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48 Cal.2d 241

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Hackley DAVIS and Billy Gene Morse, Defendants and Appellants.

Cr. 5881.

Supreme Court of California,

In Bank.

March 29, 1957.

Rehearing Denied April 25, 1957.

Defendants were convicted of murder. From judgments rendered by the Superior Court, Los Angeles County, Fred Miller, J., defendants appealed. The Supreme Court, Shenk, J., held that a defendant's counsel's conduct, after having made closing statement, in making supplemental statement repudiating defendant's theory of defense and defense witnesses and alluding to matters not in evidence, required reversal of conviction.

Reversed.

1. Criminal Law 🔑553

In murder prosecution wherein a defendant's son first testified for prosecution and later testified for defense, stating that much of his earlier testimony had been result of suggestions made by police and that his independent recollections were to contrary, since his testimony was not inherently improbable, its weight was for jury and jury could accept portion of his testimony and disbelieve remainder.

2. Criminal Law 🔑394
Searches and Seizures 🔑7(27)

Where defendant, upon arrest, freely admitted forgeries, invited arresting officers to come into trailer where he lived and offered to tell them where to find anything they wanted, and after he was in jail he told them where they could find checks in his trailer, officers properly construed his remarks as an invitation to search trailer so that their subsequent search when they found evidence linking him with murder was lawful and the evidence obtained therein admissible in the murder prosecution.

3. Criminal Law 🔑673(4)

Where two defendants who were tried together for murder had been separately questioned by police officers, it was proper for trial court to limit evidence of accusatory statements by officers and of replies thereto as to the defendant concerned.

4. Criminal Law 🔑407(2)

That defendant was in police custody when police made accusatory statements to him and he made replies thereto did not render inadmissible in evidence against him the accusatory statements and replies, but court in considering admissibility, and jury in determining weight, could consider the circumstances.

5. Criminal Law 🔑407(1)

Accusatory statements and responses thereto are admissible as an exception to the hearsay rule.

6. Criminal Law 🔑407(1)

Where accused expressly admits truth of accusatory statement, both statement and answer are admissible, but if he expressly denies the statement there is no admission.

7. Witnesses 🔑388(7)

Under statute providing that witness may be impeached on basis of prior inconsistent statements, but requiring that if statements were reduced to writing the writings be shown him before any question is put to him concerning them, statements which defense witnesses had made before police officers and which had been reduced to writing by stenographers could not be used to impeach them where writings were not presented to them at trial. West's Ann. Code Civ.Proc., § 2052.

8. Homicide ⚷308(3)

In murder prosecution, instruction that defendants were guilty of first-degree murder or were innocent was justified by the evidence.

9. Criminal Law ⚷781(2)

In murder prosecution against defendants also charged with forgery, evidence was sufficient for jury to find, with respect to one of the defendants, that on being informed of accusation tending to implicate him in murder, he became nervous and upset, and not that he was merely conscious of guilt of forgery, and justified court instructing on false or evasive replies to accusations.

10. Criminal Law ⚷673(1)

In murder prosecution, it was not error to give instruction that forgeries committed by one of the defendants after the homicide could be considered for purpose of determining flight or of bearing such flight might have on question of guilt.

11. Criminal Law ⚷351(3)

Flight may be indicative of guilt.

12. Criminal Law ⚷800(3)

In homicide prosecution on theory that killing occurred during attempt to perpetrate a robbery, where court instructed on robbery in terms of statute defining it as felonious taking of personal property in possession of another, it was not error not to further define meaning of felonious taking. West's Ann.Pen.Code, § 211.

13. Criminal Law ⚷723(1)
Homicide ⚷311

In murder prosecution, neither instruction nor argument that person sentenced to life imprisonment might be pardoned or paroled within seven years nor prosecutor's additional remark that seven years of defendants' lives was not a very good trade for decedent's life was erroneous.

14. Criminal Law ⚷622(2)

In prosecution for murder, record revealed no abuse of discretion in denying motion of one of the defendants for a separate trial.

15. Criminal Law ⚷1171(1)

In murder prosecution, a defendant's counsel's conduct, after having made closing statement, in making supplemental statements repudiating defendant's theory and defense witnesses and alluding to matters not in evidence, required a reversal of convictions of such defendant and his codefendant. West's Ann.Code Civ.Proc., § 1870, subd. 10; West's Ann.Pen.Code, §§ 1018, 1127; West's Ann.Bus. & Prof. Code, § 6068; Canons of Professional Ethics, American Bar Association, Canon 5.

16. Criminal Law ⚷699

Court has power, in exercise of discretion, to grant counsel permission to make supplemental argument after closing.

17. Criminal Law ⚷273

Whatever trial strategy or tactics attorney may employ, he may not enter plea of guilty to felony without consent of client. West's Ann.Pen.Code, § 1018.

18. Attorney and Client ⚷20

It is a violation of duty of fidelity to client to assume position adverse or antagonistic to him without his free and intelligent consent after full knowledge of facts and circumstances. West's Ann.Pen.Code, § 1018; Canons of Professional Ethics, American Bar Association, Canon 5.

19. Criminal Law ⚷1159(2)

Issues in criminal case must be decided in accordance with evidence.

20. Criminal Law ⚷706
Perjury ⚷13

Counsel may not offer testimony of witness which he knows to be untrue, and to do so may constitute subornation of perjury.

21. Criminal Law ⚷719(1)

In argument, counsel is limited to discussion of or comment on facts in evidence. West's Ann.Pen.Code, § 1127.

22. Criminal Law ⚿1189

Where rights of defendants have suffered such an interference or interruption as to fatally affect regularity of trial and conviction, a miscarriage of justice results, entitling all defendants to new trial.

◆

Harry M. Umann, Forno & Umann, Los Angeles, William Strong, Beverly Hills, Joseph A. Ball, Clarence S. Hunt, Long Beach, Grant B. Cooper and Ned R. Nelsen, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Adolph Alexander, Chief Deputy Dist. Atty., Los Angeles, Lynn D. Compton and Gordon W. Jacobson, Deputy Dist. Attys., Long Beach, for respondent.

SHENK, Justice.

The appeals in this case are from judgments imposing the death penalty and from orders denying motions for a new trial.

Lynn V. Feaster, night clerk in a Long Beach liquor store, was killed on the morning of December 23, 1953. He had been shot in the mouth, apparently about midnight. His body was lying near the open cash register drawer and his revolver, still fully loaded, was found near his head. He had a habit of reaching for his gun during a hold-up, and in prior hold-ups had killed three men and captured others. The lethal weapon was never found. No one witnessed the shooting. Nothing was found on the premises which would connect the defendants with the homicide.

Later on police officials investigated certain check forgeries in the Los Angeles area and discovered evidence to the effect that these defendants had jointly participated in forging and passing checks on the Budwalt Engineering Company on October 30, 1953; that defendant Davis had subsequently passed other Budwalt checks, including one on the night of December 22, 1953, and that shortly thereafter both men had fled the area, Davis going to the northern part of the state and Morse going to St. Louis, Missouri. Information was given to the police by Darrell Davis, the sixteen year old son of defendant Davis, that he had been out with the defendants on the night in question; that the defendants had gone into this liquor store in Long Beach about midnight, and that after he and his father returned home he overheard his father tell a Mrs. Rondon that he and defendant Morse had gone into the store for the purpose of cashing checks; that the clerk "didn't go for it" and they decided to rob him, and that Morse had then pulled a gun and shot the clerk in the mouth. Mrs. Rondon's version of Davis' statements to her that night was somewhat different, mainly to the effect that Davis had said that as he was going into a liquor store he saw a man who looked like Bill shoot the clerk in the mouth. The defendants were charged with first degree murder. Each entered a plea of not guilty. The sole defense was an alibi. A motion by the defendant Morse for a separate trial was denied. The jury returned verdicts finding the defendants guilty of murder in the first degree and the death penalty was imposed. Motions for new trial and to reduce the penalty to life imprisonment were denied. Separate appeals were taken.

The defendants urge that the evidence was insufficient to support the verdicts; that illegally obtained evidence was improperly admitted; that errors occurred in the admission of evidence and in giving certain instructions; that there was prejudicial misconduct on the part of the prosecuting attorneys; that the trial court abused its discretion in not ordering separate trials; that by reason of prejudicial misconduct of counsel for Davis at the close of the trial and in his argument to the jury both defendants were denied a fair trial, and that the court abused its discretion in denying motions for new trial based upon the grounds set forth in section 1181 of the Penal Code and upon the further ground of newly-discovered evidence as to the mental illness of counsel for Davis during and after the trial. Davis was represented by other counsel on the last two days of the trial and on his motion for a new trial.

He is also represented by other counsel on this appeal.

Throughout the six weeks of trial it was the theory of the prosecution that these defendants had engaged in a conspiracy to forge checks; that this conspiracy existed on the night of the homicide; that it was in pursuance of this conspiracy that the defendants had entered the Long Beach liquor store on the night of December 22, 1953, and that the killing which resulted was either with malice aforethought or it had occurred during an attempt to perpetrate a robbery, Pen.Code, § 211, or a burglary (entry with intent to commit a felony, forgery, Pen.Code, §§ 17, 459, 473). It was the theory of the defense that the alleged conspiracy did not exist and, as stated, that neither defendant was present at the scene of the homicide.

[1] The extra-judicial statements testified to by Darrell and Mrs. Rondon were admitted initially only as to the defendant Davis. Darrell Davis first testified as a witness for the prosecution. Later he stated that he desired to change his testimony; that much of his earlier testimony had been the result of suggestions made to him by police officers; that it was not the result of his independent recollection, and that he now desired to testify as a witness for his father. As to the conflicting testimony of Darrell Davis the jury might have accepted a portion of his testimony and disbelieved the remainder. People v. Crooker, 47 Cal.2d 348, 303 P.2d 753; People v. Hill, 126 Cal.App.2d 378, 380, 272 P.2d 113; People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P.2d 90. It cannot be said that the testimony of Darrell was inherently improbable. It was for the jury to determine its weight. However, in view of the nature and character of the testimony of this witness, and that as to other witnesses the evidence was conflicting, it should not be held that the evidence was so conclusive in favor of the prosecution as to deprive the defendants of a re-evaluation of the factual situation on a new trial. In such event there are other questions presented which should receive consideration.

[2] Both defendants urge that certain items of evidence were obtained by illegal search and seizure. The circumstances of the search were as follows. On September 3, 1955, Inspectors Bennett and Wiggins of the Long Beach Police Department went to the trailer court in Salt Lake City where the defendant Davis was then living. They were accompanied by Detective Orencole of the Salt Lake City Police Department, and he participated in the arrest of Davis. They had reason to believe that Davis had committed the felonies of forgery and murder. They met Davis near his trailer and told him he was under arrest. He readily admitted that he had forged checks in California, stated that he was willing to go back to California with the officers and answer charges in connection therewith, and that he would tell them anything they wanted to know. He was friendly and cooperative, invited them to come inside the trailer with him, and offered to tell them where to find anything they wanted. At his direction they searched the trailer for two check protectors and found them. They then took him to the Salt Lake City jail where he remained in custody until his return to California. The following day Officer Bennett visited Davis at the jail. Davis asked him: "Did you get that book of checks?" Bennett answered "No." Davis told him to look on the floor under the bottom drawer of the sink. The officers returned to the trailer. From the cooperative and friendly attitude of Davis and from his offer to get anything they wanted from the trailer or to tell them where it was, and from his remarks that he didn't want his trailer torn up, they testified that they believed Davis had given them complete permission to make an orderly search of the trailer. Under a sofa in the trailer they found a blank envelope, a letter purportedly written by defendant Morse, and a lint-covered copy of the Los Angeles Mirror of December 23, 1953, which had been folded to an inside page containing an account of the Feaster kill-

ing. The court determined that Davis had led the officers to believe that he had given permission to search the trailer and that the search was lawful. The evidence supports that conclusion. Having been made pursuant to the permission given the search was lawful and the evidence was properly admissible. People v. Burke, 47 Cal.2d 45, 301 P.2d 241; People v. Michael, 45 Cal.2d 751, 753–754, 290 P.2d 852; People v. Gorg, 45 Cal.2d 776, 783, 291 P.2d 469; People v. Stewart, 144 Cal.App.2d 555, 301 P.2d 301; People v. Lujan, 141 Cal.App.2d 143, 296 P.2d 93.

[3–6] It is contended that the court erred in admitting evidence of accusatory statements and of the conduct and replies of the defendants with reference to questions propounded to them by police officers prior to the trial. Each defendant was then separately questioned. The court properly limited the evidence as to the defendant concerned. People v. Leary, 28 Cal.2d 727, 734, 172 P.2d 34. Davis complains that this evidence as to him was inadmissible because the questioning took place while he was in police custody. Such custody does not of itself make the evidence inadmissible. People v. Simmons, 28 Cal.2d 699, 716, 172 P.2d 18; People v. Amaya, 134 Cal. 531, 536, 66 P. 794. However it is a circumstance which may be taken into consideration by the court in the first instance in determining its admissibility and by the jury in determining its weight. Accusatory statements and the responses thereto are admissible under a well-recognized exception to the hearsay rule. As stated in People v. Davis, 43 Cal.2d 661, 670, 276 P.2d 801, 805, "If the accused person expressly admits the truth of the accusatory statement, both the statement and answer may be admitted. If the accused person expressly denies the accusatory statement, there is no admission. If the accused makes an evasive or equivocal reply which is not directly responsive to the accusatory statement, or remains silent, it has been held that under certain circumstances both the accusatory statement and the response are admissible." Each case must be determined upon its own facts.

The evidence of accusatory statements offered as to Davis shows reactions coming within each of these classifications. A proper foundation was laid for the admission of this evidence.

[7] With reference to the admission of certain other evidence a proper foundation was not laid. Statements were made prior to the trial by witnesses on behalf of the defendant Morse in support of his alibi. They were made before police officers and were reduced to writing by a stenographer. The witnesses at that time signed written copies of their statements. At the trial the prosecution sought to impeach them and laid a foundation as to time, place and persons present when their prior statements were made but failed to show them the written copies which they had signed. Although these writings were not originally prepared by the witnesses they clearly come within the requirement of section 2052 of the Code of Civil Procedure.[1] This evidence was therefore improperly admitted without a proper foundation.

[8] There was no error in giving an instruction that the evidence was such that the defendants were guilty of first degree murder or were innocent. The case was tried solely on that theory. No instruction on second degree murder or on any other offense was requested or appropriate. There is no merit in the contention that instructions on conspiracy were improperly given because conspiracy had not been charged. It was one of the issues at the

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[1] Section 2052 provides that "A witness may * * * be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

trial and instructions thereon were required. CALJIC instructions were given and the correctness thereof is not complained of.

[9] The court instructed the jury on "Silence or False or Evasive Reply" as set forth in CALJIC No. 30 as follows: "If you should find from the evidence that there was an occasion when a defendant, under conditions which fairly afforded him an opportunity to reply, failed to make denial (or made false, evasive or contradictory statements), in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which he now is on trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, the circumstances of his silence (and conduct) may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that the conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

This instruction has been given and was approved in People v. Chessman, 38 Cal.2d 166, 181, 238 P.2d 1001; People v. Hays, 101 Cal.App.2d 305, 225 P.2d 600; People v. Miner, 96 Cal.App.2d 43, 54, 214 P.2d 557; People v. Wright, 94 Cal.App.2d 70, 80, 210 P.2d 263. Davis contends that this instruction was insufficient, that the jury should have been further instructed on his right to refuse to answer under the constitutional privilege against self-incrimination. No request for such further instruction was made by either defendant. As to defendant Morse there was evidence that on being informed of the accusations which tended to implicate him in the murder he "became very nervous and upset." His responses to questions put to him contain admissions and false and equivocal statements, but he urges that the only inference which could be drawn therefrom was a consciousness of guilt of forgery, not a consciousness of guilt of murder. On the record here presented the jury was entitled to draw inferences as to both.

[10, 11] It was not error to give an instruction that the forgeries committed by defendant Davis after the homicide could be considered for the purpose of determining flight or the bearing such flight might have on the question of guilt. Flight may be indicative of guilt. People v. Santo, 43 Cal.2d 319, 330, 273 P.2d 249; People v. Hoyt, 20 Cal.2d 306, 313, 125 P.2d 29.

[12] The court instructed on robbery in terms of the statute, Pen.Code, § 211. It was not error not to further define the meaning of the words "felonious taking." In defining burglary the court instructed that "any person who enters any building or store with the intent therein to commit theft or any felony is guilty of burglary." Immediately before this it had instructed the jury that the crime of forgery is a felony. No error appears by reason of the failure of the court to give more explicit instructions on "robbery" or "burglary."

[13] Complaint is made by both defendants as to the instruction given on penalty. The court gave California Jury Instructions—Criminal, Instruction No. 306, as requested by the People and by counsel for the defendant Morse, but added thereto that "under the law of the State of California when a person is sentenced to life imprisonment, it does not necessarily mean that he will remain in prison for the rest of his natural life. A person sentenced to life imprisonment may be pardoned or he may be paroled, but not until he has served at least seven years. (People v. Byrd, 42 Cal.2d 200, 266 P.2d 505.)" In anticipation of this instruction the deputy district attorney argued to the jury that "the judge will tell you that life imprisonment in this state doesn't mean life imprisonment. This may surprise you. He will tell you that a person who gets life imprisonment in this State can get paroled in seven years, seven calendar years. That is not a very good trade, seven years of their life for the rest of Mr. Feaster's life." No showing was

made that the defendant asked to be allowed to produce evidence of, or to comment on the minimum, average and maximum terms of imprisonment actually being served for first degree murder in California. Neither the argument nor the added instruction was improper.

It is charged that the deputies of the District Attorney, two of whom conducted the prosecution, were guilty of prejudicial misconduct during their argument to the jury. The instances which form the basis of the charge have been examined. Some of them were not objected to at the time and were not objectionable if they had been. Some were cited as misconduct and ruled on by the court. Some were properly found to be objectionable and the jury instructed to disregard them. It is unnecessary to discuss them in detail for the reason that on a retrial they should not recur.

[14] The court did not abuse its discretion in denying the motion of the defendant Morse for a separate trial.

[15] Finally the defendant Davis contends that during the last two days of the trial his counsel was guilty of misconduct in the presence of the jury and that this deprived him of a fair trial. The defendant Morse joins in this contention and urges that the asserted misconduct of counsel for Davis also prejudiced his cause. Both defendants seek a new trial on this ground.

Throughout the trial counsel for defendant Davis consistently followed the theory that his client was innocent and that he had an alibi defense. He offered witnesses, including the defendant Davis, in support of that theory. He introduced evidence to impeach prosecution witnesses who testified adversely to Davis' claim of alibi. And he vigorously sought to show that the testimony of Darrell Davis as a witness for the prosecution was the result of coaching and suggestions by police officers and deputy district attorneys. In his first argument to the jury, which consumed the most of two days, he adhered to the same theory. In it he vehemently accused the police officers of having "brainwashed" Darrell and compared them to the persecutors of Cardinal Mindszenty. He berated the two deputies of the district attorney, charging that they had concealed from Darrell the fact that they were going to demand the death penalty for his father and that they had improperly influenced his testimony. He concluded his argument the afternoon of January 10th. A deputy district attorney then began the closing argument for the prosecution but did not conclude on that day. The following morning counsel for Davis requested permission from the court to interrupt the deputy district attorney and make what he called some corrections in his argument of the previous day, stating that when he had denounced the attorneys for the prosecution and the police officers he had done them a great injustice, and that he wanted to review his theory of the case "to clarify what I believed to be true yesterday and today I believe to be false." The court enquired if he was referring to the testimony of witnesses. He answered that he was. The trial judge remarked that this was an unusual procedure, one that had never occurred before in his judicial experience. After cautioning the jury that attorneys were permitted to state opinions about the evidence and to state their theory of the case but that their argument was not evidence, the court permitted him to resume his argument. He then told the jury that he had "believed yesterday" that his theory of the case was correct "but now I have analyzed the case in my mind, my conscience tells me that I must do what I believe is the right thing. I believe that I have been on the wrong track. Here is what I believe to be true." He then proceeded to reconsider the evidence in the light of his "new theory." He referred to matters not in evidence as facts which were true. For example, he referred to the check-passing activities of the defendants on October 30, 1953, as being "another transaction in which Darrell was present." There was no testimony that Darrell had then been present and there was positive testimony that he had not been present. His client had testified that he had not gone to the liquor store and that he had not been with Darrell or his co-defendant Morse on the night of December 22, 1953. Counsel for Davis proclaimed to the jury, "I have reasonable grounds, after searching my mind, to believe that Davis did go to that liquor store that night and that Darrell was with him out in the car and he did see what he saw and he did run away and he did go home and he did tell * * * [Mrs.] Rondon exactly what she testified to in this case"; that he believed that his client, out of fear of the defendant Morse had "high-tailed it out of town" the day following the killing. Davis had testified that he had gone into a bar in the early morning of December 23, 1953, and had there met a person known as "Bifocal" who had told him that "his boy" had shot a liquor man, and that he, Davis, had thought that "Bifocal" referred to Morse because Morse was the only person Davis had been working with. "Bifocal" testified as a prosecution witness and denied that he had made any such statement to Davis. Davis' counsel told the jury that he believed that "Bifocal" had testified truthfully at the trial; that his client Davis had to say that "Bifocal" had told him about the murder because he was "spotted", that is, that he was actually present at the liquor store when the shooting occurred, and that Davis in his testimony "couldn't possibly put himself there because it would have been a confession." Davis' counsel then attacked the credibility of Darrell, whom he had offered as a defense witness, and called him a psychopathic liar. He apologized again and again to the deputies of the district attorney and to the police officers for having wrongfully accused them. And he professed his belief that they had not coached or misled the witness Darrell. He told the jury, "I have made one interpretation before. I have seen the light. I saw it before, and I was wrong. Today it all holds together. I believe that the witnesses in this case have been telling the truth." From the context of his argument the witnesses for whom he vouchsafed were prosecution witnesses.

At the conclusion of this affirmation of new beliefs on the part of counsel for Davis, counsel for Morse asked to approach the bench. Davis' counsel interrupted to ask if he could further clarify his remarks. Upon receiving permission he went on to state to the jury that there was one point he had failed to mention, that "if Mr. Davis did see what he saw, that the party must have been facing toward the wall and he didn't see any scar on the face[2] and that he hadn't seen Billy Morse since October 30th because there are no checks of his. That is what caused him to believe that it was Billy Morse. But the evidence in this case, in my opinion, there is no evidence that I have stated that Billy Morse was there, because the record shows that [Davis] thought 'I think it was Billy Morse.' Billy Morse has an alibi and I don't want to say in any way or innuendo by my statement that he was actually there; that Mr. Davis thought. Now that explains the knowledge, as I see it, how Mr. Davis actually was able to go through this story, as I have told it."

Counsel for Morse advised the court that he was still somewhat in a quandary. The trial judge remarked that the purpose of the remarks by counsel for Davis, as he understood them, was to correct some misstatements that he had made and to apologize to the officers he had accused, and that he had permitted counsel to do this entirely for the purpose of allowing him to correct his theories insofar as the police officers and deputy district attorneys involved were concerned. Thereafter the prosecution concluded its argument. The jury was instructed and retired to consider its verdict.

The following day, January 12th, while

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[2] Morse had 28 stitches taken in his face on November 17, 1953, in St. Louis, Missouri. The resulting scar was still quite visible at the time of the trial. The fact that he had been in St. Louis was argued as evidence in support of his alibi. The fact that Darrell did not remember noticing the scar in December 1953 was urged by the defense as evidence that Darrell had not actually seen Morse during that month.

the jury was still deliberating, counsel for Davis conducted himself in an odd, unusual and irrational manner. That evening he was picked up on the street and taken to a hospital for treatment of what was diagnosed to be an acute mental disorder. He was sobbing and hysterical with fear. He was incoherent and disorganized in his speech, was disheveled in appearance, and could not even remember his wife's name, the name of his partner, his telephone number or any of the events of the past four days. While he was under hospitalization the jury returned to the courtroom for further instructions on "penalty."

At the hearing on the motions for a new trial it was urged, as above stated, that counsel for Davis had become mentally disturbed during the trial and that as a result of his irrational conduct both the defendants had been deprived of a fair trial. Affidavits were filed by lay persons as to the appearance and deportment of Davis' counsel on January 11th and 12th. None of the affiants sought to qualify as an intimate acquaintance within the meaning of subdivision 10 of section 1870 of the Code of Civil Procedure so as to give an opinion as to his sanity. Affidavits of expert medical witnesses chosen from the court panel were presented by the defense all of which were to the effect that Davis' counsel was mentally ill on the 12th of January; that this condition had probably existed for several days prior thereto, and that this had affected his ability to act in a rational manner during the closing hours of the trial. No contradictory medical testimony was offered. The court recognized that counsel for Davis had suffered a nervous breakdown but concluded that its effect was not serious enough to justify a new trial.

[16] The request to make a supplemental argument is, as the trial court expressly stated, unusual. However there is no question of the power of the court in the exercise of a sound discretion to grant such permission, nor of the right of counsel for the defendant with such permission to supplement his argument to the jury in an appropriate way.

[17, 18] Whatever trial strategy or tactics an attorney may employ in the defense of an accused he may not enter a plea of guilty to a felony without the consent of his client. Pen.Code, § 1018. It is a violation of his duty of fidelity to his client to assume a position adverse or antagonistic to him "without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances." Anderson v Eaton, 211 Cal. 113, 116, 293 P. 788, 789. This consent was not given. Without such consent an attorney may not surrender any substantial right of the accused. Hoagland v. Chargin, 134 Cal.App.2d 466, 474, 286 P.2d 931; Redsted v. Weiss, 71 Cal.App.2d 660, 663, 163 P.2d 105, nor may he impair, compromise or destroy his client's cause of action. Zurich General Accident & Liability Ins. Co., Ltd. v. Kinsler, 12 Cal.2d 98, 105, 81 P.2d 913, citing with approval Price v. McComish, 22 Cal.App.2d 92, 70 P.2d 978; Witaschek v. Witaschek, 56 Cal. App.2d 277, 283, 132 P.2d 600.

It is the right, and sometimes the duty, of an attorney to undertake the defense of a person accused of crime. Otherwise, as stated in Canon 5 of the Canons of Professional Ethics of the American Bar Association, "innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." Under the law it is the duty of an attorney "To counsel or maintain such * * * defenses only as appear to him legal or just, except the defense of a person charged with a public offense." State Bar Act, Bus. & Prof. Code, § 6068. The concept of the exception is reflected, at least in part, in the Canon of the American Bar Association above quoted.

[19–21] The issues in a criminal case must be decided in accordance with the evidence. The jury is the exclusive judge of the questions of fact submitted to it and of the credibility of the witnesses presented.

Pen.Code, § 1127. Counsel may not offer the testimony of a witness which he knows to be untrue. To do so may constitute subornation of perjury. In arguing to the jury he is limited to a discussion of or to comment upon the facts in evidence.

From a review of the evidence presented at the trial and the statements made by counsel for Davis in his supplemental argument to the jury it is difficult to conceive a more direct and positive change of position to the prejudice of Davis, or one more injurious to his right to have the jury fairly consider his theory of defense as disclosed by the evidence. That this was not done is further evidenced by the reasonable inference that might be drawn by the jury from the supplemental argument that Davis had told his counsel that he was actually present at the scene of the murder. That this inference was obvious is indicated by the comment of the deputy district attorney in his final argument to the effect that counsel for Davis could not now say that Davis had been there unless "Davis * * * told him he was there." The fact that Davis later filed an affidavit in support of his motion for new trial in which he denied that he had ever told his counsel that he was present at the shooting and in which he averred that "any statement to the effect that he was present would be absolutely false" would not obviate the damage theretofore done to his defense in the minds of the jurors.

[22] The argument of counsel for Davis also prejudiced the rights of his co-defendant Morse to a fair trial. They were jointly charged, tried and convicted. There was evidence that both had jointly participated in the commission of the offense. When Davis' counsel placed Davis at that scene the effect on the jury could have been the same as to the defendant Morse. Where the rights of defendants have suffered such an interference or interruption as to fatally affect the regularity of the trial and conviction, a miscarriage of justice has resulted and both defendants are entitled to a new trial. People v. Crooker, supra, 47 Cal.2d 348, 303 P.2d 753. This result may rightly be said to have come about because of the temporary mental upset on the part of counsel for Davis. If the conduct here found to have been prejudicial to the rights of the defendants had been committed by an attorney in full possession of his mental faculties a serious breach of professional duty might well be disclosed. However a review of the record, including the showing as to the physical condition and appearance of counsel for Davis just before and at the time of his supplemental argument and the showing made on the proceeding for a new trial, is convincing proof that he was not guilty of any purposeful professional misconduct.

The judgments and the orders denying motions for a new trial are reversed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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48 Cal.2d 189

PEOPLE of the State of California ex rel. DEPARTMENT OF PUBLIC WORKS, Plaintiff-Appellant,

v.

Fred J. RUSSELL, Defendant-Respondent.

L. A. 24315.

Supreme Court of California,

In Bank.

March 22, 1957.

Rehearing Denied April 17, 1957.

Condemnation proceeding by the state. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., entered judgment for an abutting landowner for value of a parcel taken, and for severance damages resulting from construction of the improvement, and the state appealed. The Supreme Court, Shenk, J., held that evidence was insufficient to disclose any severance damages consisting of impairment of landowner's right of access to county road.

Judgment modified, and as modified affirmed.

Schauer, Carter, and McComb, JJ., dissented.

Opinion, 299 P.2d 920, vacated.

1. Eminent Domain 🔑221, 223, 262(4)

In an eminent domain proceeding, amount of compensation is to be determined by jury, and all other issues are to be tried by the court, and if it does not make special findings on such issues they are to be deemed implicit in verdict awarding compensation and such verdict should stand if there is substantial evidence to support implied finding. West's Ann.Const. art. 1, § 14.

2. Municipal Corporations 🔑669

An "abutter's easement of access" is a property right enjoyed by the abutter as an incident to his ownership of property, and is separate and distinct from the right of the general public in and to the street, and arises as a matter of law.

See publication Words and Phrases, for other judicial constructions and definitions of "Abutter's Easement of Access".

3. Highways 🔑85
Municipal Corporations 🔑669

A "right of access" extends to a use of a road for purposes of ingress and egress to abutting owner's property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary and reasonable, and although it is more extensive than a mere opportunity to go into the street immediately in front of one's property, it does not extend beyond access to the next intersection at either end of the street upon which the property abuts.

See publication Words and Phrases, for other judicial constructions and definitions of "Right of Access".

4. Eminent Domain 🔑106

Highway changes causing diversion of traffic or circuity of travel beyond next intersection at either end of a street beyond which an abutting owner has an easement of access are not compensable, even though the value of nonabutting property may depreciate as a consequence thereof.

5. Eminent Domain 🔑137

For the purpose of determining severance damages, it is immaterial whether defendant owns underlying fee in a road or has only an easement therein by reason of his ownership of abutting property.

6. Highways 🔑89, 165

Where an entire right-of-way had been dedicated for county road purposes, determination of particular road purposes to which parkway should be put was within the discretion of the county, and an abutting landowner who owned the underlying fee to such road could not require county to put it to any particular use, nor could he use such strip for any special purpose of his own inconsistent with full enjoyment of the right of way by the public.

7. Eminent Domain 🔑97
Highways 🔑165

With changing conditions of travel, a city or a county has the right to adapt and appropriate its highways from time to time to such uses as are within the terms of the dedication and are conducive to the enjoyment by the public of the highway, and mere possibility that a parkway might be devoted to use of vehicular traffic should a county so determine is too speculative and remote to be the basis of an award of severance damages.

8. Eminent Domain 🔑106

In the proper exercise of its police power in the regulation of traffic, a state or county may do many things which are not compensable to an abutting property owner, such as constructing a traffic island, placing permanent dividing strips which deprive an abutter of direct access to the opposite side of the highway, painting double white lines on highway, or designating the entire street as a one-way street.

9. Eminent Domain 🔑205

In condemnation proceeding by state, evidence was insufficient to disclose any severance damages consisting of impairment of abutting landowner's right of access to county road.

George C. Hadley, William E. Fisher, Jr., Los Angeles, and Robert F. Carlson, Sacramento, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Peyton H. Moore, Jr., and Weldon L. Weber, Deputy City Attys., Los Angeles, amici curiæ on behalf of appellant.

Hodge L. Dolle, Los Angeles, for respondent.

SHENK, Justice.

The plaintiff appeals from those portions of a judgment in condemnation, entered upon a verdict, awarding actual and severance damages for the taking of Parcel 1 as shown by the maps in evidence and arising out of the construction of an improvement in the county road upon which his property abuts. The property is located in Los Angeles County.

As shown by the maps, the block in which the defendant's property is located fronts on a county road known as Firestone Boulevard and is bounded by Elmcroft and Ringwood Avenues. His property, indicated as Lot 46, does not abut on those streets. A state highway, also known as Firestone Boulevard, runs parallel and contiguous to the county road in an east-west direction. Reconstruction of the state highway was undertaken in order to provide a railway overpass. This resulted in raising the grade of that highway, the taking of a portion of the county road right-of-way for the maintenance of an embankment to support the overpass, the closing of any access to the state highway at Ringwood Avenue, and providing for a new access to that highway at Elmcroft, and it required the relocation of the county road. This proceeding was commenced by the State to obtain an easement for the latter purpose across Parcels 1 and 2 of the defendant's property. It was proposed to reconstruct the county road so as to provide an identical 12-foot width of unimproved parkway adjoining his property, an identical 28-foot width of paved roadway, complete with curbs and gutters, for two-way vehicular traffic, and on the same grade as theretofore existed. The only difference in the proposed improvement was the elimination of a 12-foot unimproved parkway on the opposite side of the road from the defendant's property and the consequent diminution of the total right-of-way width of the county road from 52 feet to 40 feet. There was no impairment of access from the defendant's property via the county road to the next intersecting street in either direction.

The defendant's property was inimproved at the time of trial. It had been zoned C–1 for limited commercial use in 1950 at the time the subdivision of which it was a part had been accepted. At that time it had been contiguous to the state highway. However the subdivider had been required by the county, as a condition to its acceptance of the subdivision map, to dedicate 52 feet adjoining the state highway for the construction of the county road to be paved and improved with a roadway 28 feet in width, with curbs and gutters, and a 12-foot unimproved parkway and sidewalk area on either side. The subdivider was also required to dedicate 60-foot easements for the construction of Elmcroft Avenue and Ringwood Avenue, to pave 36 feet on Elmcroft and 40 feet on Ringwood for vehicular use, and to pave Ringwood to the state highway right-of-way line. Defendant, who was then an officer in the subdivision company and who participated in the dedication, later acquired the property in question. He owns the underlying fee in the county road.

The evidence at the trial consisted principally of the testimony of two expert witnesses Ross and Little for the defendant and two expert witnesses Elliott and Smith for the plaintiff, and a view by the jury and the court of the premises after the construction of the improvements.

Witness Little testified that the taking of Parcel 1, which constituted only about 5% of the larger parcel owned by the defendant, did not, in his opinion, reduce the value of the highest and best use to which the remainder of the defendant's property could be put. There was some variance in the opinions of the four witnesses as to the fair market value of this parcel but the parties do not now dispute the amount of the award made by the jury and the judgment, namely, $3,848.64. This leaves for consideration on this appeal the question as to the award of severance damages resulting from the construction of the improvement.

It was the theory of the plaintiff that the proposed improvement did not impair any legally compensable right of the defendant; that all of the rights enjoyed by him in connection with the ownership of his property were appurtenant to the county road and not to the state highway; that there had been no impairment of his rights as an abutter on the county road to air, light, view, or access; that the diminution in total right-of-way width by the elimination of the unimproved parkway across the road did not constitute a substantial impairment of his right of access to and from that road, and that before the question of the damages to which the defendant might be entitled for impairment of access to the county road could be submitted to the jury, the court was required to determine as a matter of law that there had been a substantial impairment. It was the theory of the defendant, at the outset of the trial, that he was entitled to compensation for the loss of access to the state highway at Ringwood Avenue and because of the raising of the grade of that highway. Pending the ruling of the court evidence was offered to show that his remaining property had been depreciated in value by the construction of improvements in the state highway. After deliberation and near to the close of the trial the court ruled that these were not compensable items of damage and instructed the jury not to consider them in reaching its verdict. No claim was asserted as to any loss of impairment of the defendant's right to air, light or view by the improvement in the county road.

Each of the defendant's witnesses testified that in their opinion the highest and best use of the remainder of his property had been changed from a retail commercial development to a residential development. Witness Ross estimated the severance damages caused by the reconstruction of the county road at $69,373, using as the basis for this estimate the fact that the road in front of the defendant's property was too narrow for servicing commercial property and that by the reduction of the total right-of-way width to 40 feet the road no longer had the potential of an additional paved width, and he considered 40 feet too narrow for the use of vehicles of the type used to serve commercial property. Witness Little estimated the severance damages at $68,034, using as the basis for his estimate the erection of the state highway ramp, the closing of the Ringwood Avenue access, and the inadequacy of a 40-foot street to service commercial property. He made no breakdown of these factors in his computation. Two of these were later held by the court to be non-compensable. When he was asked to consider only the diminution in right-of-way width in estimating the severance damages, he did not change the amount of his estimate. Yet when asked if he thought that the closing of Ringwood Avenue was an additional reason to persuade a present buyer that the property was no longer commercial property but residential property, he replied "I don't think any buyer would buy property for commercial property if Ringwood Avenue was closed off."

It was the contention of the defendant throughout the trial that the loss sustained by him was not a question of access but of changing the highest and best use of his property by the narrowing of the right-of-way, the original width of which had been established by the local authorities as being necessary for serving this commercially-zoned property and in which original width he owned the underlying fee. The trial court properly treated this as a question of access to the county road. However it refused to determine as a matter of law that there had been no substantial impairment of this right, leaving this determination to the jury as a question of fact. The jury was instructed that the defendant had a private right in the county road of reasonable access by such modes of conveyance and travel as are appropriate to the highway, and to a road of a width which was adequate to serve his property, considering the uses to which it was adapted and available. If the jury should find in accordance with this definition that the defendant's right of access had not been substantially impaired, it was instructed to find that the defendant had suffered no compensable damage by reason thereof. One of the jurors asked whether the landowner has the right to say what can be done with that right-of-way for the use of his own property, whether he could have paved those 12 feet on the opposite side of the road, or did that strip of land belong to the county and had to be reserved for curbs or sidewalks. After a colloquy between court and counsel, he was informed that "the area dedicated to the County of Los Angeles for road purposes may be improved and used for general road and street purposes which includes pavement, sidewalk area, curbs, parkway, which ultimate improvement is determined by the County of Los Angeles according to need of the surrounding area." The jury returned a verdict of $33,499.83 for the severance damages for impairment of the defendant's right of access in and to this county road.

The plaintiff urges that the trial court should have determined as a matter of law from the facts presented that there had been no substantial impairment of defendant's right of access to this road; and that the evidence does not disclose any legally compensable injury suffered by the defendant from the county road improvement. The defendant urges that by its judgment on the verdict the court determined that there was substantial impairment as a matter of law, and that substantial evidence supports the judgment.

[1] In an eminent domain proceeding the amount of compensation is to be determined by the jury. Const. Art. I, § 14. All other issues are to be tried by the court, and if it does not make special findings on those issues they are implicit in the verdict awarding compensation. People v. Ricciardi, 23 Cal.2d 390, 402, 144 P.2d 799 and cases cited. The verdict should stand if there is substantial evidence to support the implied finding.

[2-4] An abutter's easement of access arises as a matter of law, Rose v. State, 19 Cal.2d 713, 123 P.2d 505. It is a property right enjoyed by the abutter as an incident of his ownership of property, and is separate and distinct from the right of the general public in and to the street. While certain general rules have been set forth in the various decisions which have considered the nature and scope of this right, each case must be considered upon its own facts. The right of access has been defined as extending to a use of the road for purposes of ingress and egress to his property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary or reasonable. Rose v. State, supra, 19 Cal.2d 713, 728, 123 P.2d 505. It is more extensive than a mere opportunity to go into the street immediately in front of one's property. Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818. However it does not extend beyond access to the next intersection at either end of the street upon which the property abuts. Beckham v. City of Stockton, 64 Cal.App.2d 487, 149 P.2d 296. Any inconveniences which may be suffered after such intersection is reached do not impair the easement but are inconveniences suffered by him as a member of the public. Highway changes causing diversion of traffic or circuity of travel beyond an intersecting street are not compensable, People v. Ricciardi, supra, 23 Cal.2d 390, 401-402, 144 P.2d 799, even though the value of non-abutting property may depreciate as a consequence thereof.

In those cases in which substantial impairment has been found as a matter of law from a reduction in width of a paved street or sidewalk area different factual situations were presented. In Rose v. State, supra, 19 Cal.2d 713, 123 P.2d 505, the elimination of a grade crossing and the construction of a subway left a 14-foot lane for 2-way vehicular traffic and a 3-foot sidewalk in front of industrial property. In Eachus v. Los Angeles, etc., Ry. Co., 130 Cal. 492, 62 P. 829, the construction of a street improvement left a 10-foot strip for vehicular use in front of the plaintiff's property. In Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 280 P. 109, an improvement was constructed so close to the plaintiff's premises that a vehicle could not be parked in front of it while a streetcar passed by. In McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139, an improvement was constructed seven feet from the plaintiff's property line. These may be readily distinguished from the present case where the parkway adjoining the defendant's property and the paved street area for vehicular traffic were of exactly the same width and grade and bore the same relationship to the defendant's property as theretofore. Any inconvenience to the use of this property for commercial purpose because of these widths was no greater as a result of the improvement. Much of the defendant's argument is devoted to a discussion of results stemming from the improvements in the state highway. His property does not abut thereon and the court properly ruled that these matters are not compensable.

[5–7] For the purpose of determining severance damages it is immaterial whether the defendant owns the underlying fee in the county road or has only an easement therein by reason of his ownership of abutting property. Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 618, 37 P. 750. The entire right-of-way had been dedicated for county road purposes. The determination of the particular road purposes to which the opposite parkway should be put was within the discretion of the county. The defendant could not have required the county to put it to any particular road use nor could he have used that strip for any special purpose of his own inconsistent with the full enjoyment of the right of way by the public. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 705, 117 P. 906, 36 L.R.A.,N.S., 185; Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 429–430, 90 P. 1053, 13 L.R.A.,N.S., 904; Hayes v. Handley, 182 Cal. 273, 282, 187 P. 952; Airways Water Co. v. County of Los Angeles, 106 Cal.App.2d 787, 790, 236 P.2d 199; People v. Henderson, 85 Cal.App.2d 653, 657, 194 P.2d 91. With changing conditions of travel, a city or a county has the right to adapt and appropriate its highways from time to time to such uses as are within the terms of the dedication and are conducive to the enjoyment by the public of the highway. Wattson v. Eldridge, 207 Cal. 314, 278 P. 236; Airways Water Co. v. County of Los Angeles, supra, 106 Cal.App.2d 787, 790, 236 P.2d 199. The mere possibility that the opposite parkway might have been devoted to the use of vehicular traffic, should the county so determine, was too speculative and remote to be the basis of an award of damages. Cf. City of Los Angeles v. Geiger, 94 Cal.App.2d 180, 192, 210 P.2d 717.

[8] In the proper exercise of its police power in the regulation of traffic, a state or county may do many things which are not compensable to an abutting property owner, such as constructing a traffic island, placing permanent dividing strips which deprive an abutter of direct access to the opposite side of the highway, painting double white lines on the highway, or designating the entire street as a one-way street. McDonald v. State, 130 Cal.App.2d 793, 799, 279 P.2d 777; People v. Sayig, 101 Cal.App.2d 890, 226 P.2d 702; Holman v. State, 97 Cal.App.2d 237, 217 P.2d 448; Beckham v. City of Stockton, 64 Cal.App.2d 487, 149 P.2d 296. Amicus curiae urge that the use of the parkway as a traffic separation strip between the state highway and the county road is proper in the control of traffic, and as such presents no valid claim for damages. Under the factual situation here presented this contention is sustained.

[9] No substantial impairment of the defendant's right of access to the county road is disclosed by the evidence and the

court should have instructed the jury to that effect. Any finding of the court to the contrary implied from the fact that the question of severance damages was submitted to the jury is not supported by the evidence.

In view of what has been said other contentions raised on appeal need not be discussed.

The judgment awarding damages for the taking of Parcel 1 is affirmed. The judgment is modified by striking therefrom the award for severance damages for the taking of Parcel 1. As so modified the judgment is affirmed; the defendant to recover costs on appeal.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the opinion prepared for the District Court of Appeal by Justice Fourt and concurred in by Presiding Justice White and Justice Doran (reported in (Cal. App.) 299 P.2d 920) adequately discusses and correctly resolves the questions presented on this appeal. For the reasons therein stated I would affirm the judgment of the trial court.

McCOMB, J., concurs.

CARTER, Justice.

I dissent.

When this case was before the District Court of Appeal, Second Appellate District, Division One, an opinion was prepared by Mr. Justice Fourt affirming the judgment of the trial court. This opinion was concurred in by Mr. Presiding Justice White and by Mr. Justice Doran. The views expressed in said opinion are in accord with my concept of the law on this subject and I adopt said opinion as my dissenting opinion from the majority opinion herein.

"This is an appeal by the plaintiff from a judgment in a condemnation action wherein the defendant was awarded severance damages in the sum of $33,499.83.

"The action was brought to acquire an easement for public road and highway purposes over property described in the complaint. The complaint alleges that the parcel to be taken is a part of a larger parcel and the prayer asks that damages incidental to the taking be ascertained and assessed. The answer admits that the parcel to be taken is only a part of a larger parcel and alleges that the taking and the construction of the improvement cause a damage. The issue of damages is therefore joined by the pleadings of the parties.

"The parcel to be taken was unimproved, about 287 feet in length and varied in width from 6 feet to 28 feet and was about 5,064 square feet in area. That parcel was a part of a larger parcel all owned by the defendant. The larger parcel was generally rectangular in shape with an area of about 105,000 square feet. The entire property in question was zoned for commercial usage, fronting and abutting upon the north side of a county road called Firestone Boulevard, hereinafter referred to as the County road. The County road consisted of a dedicated right of way 52 feet in width, of which the center 28 feet had been paved allowing for vehicular and other travel in both directions and complete with curbs and gutters on each side. The County road ran parallel to, and adjoined on the south side, State Highway Route Number 174, also known as Firestone Boulevard, hereinafter referred to as the State highway. There was no connection or paved crossover between the State highway and the County road along their common boundary. Figure 1 illustrates the 'before' position and measurements of the defendant's property and its relationship to the roadways. Figure 2 illustrates the 'after' position and measurements of the defendant's property and its relationship to the roadways.

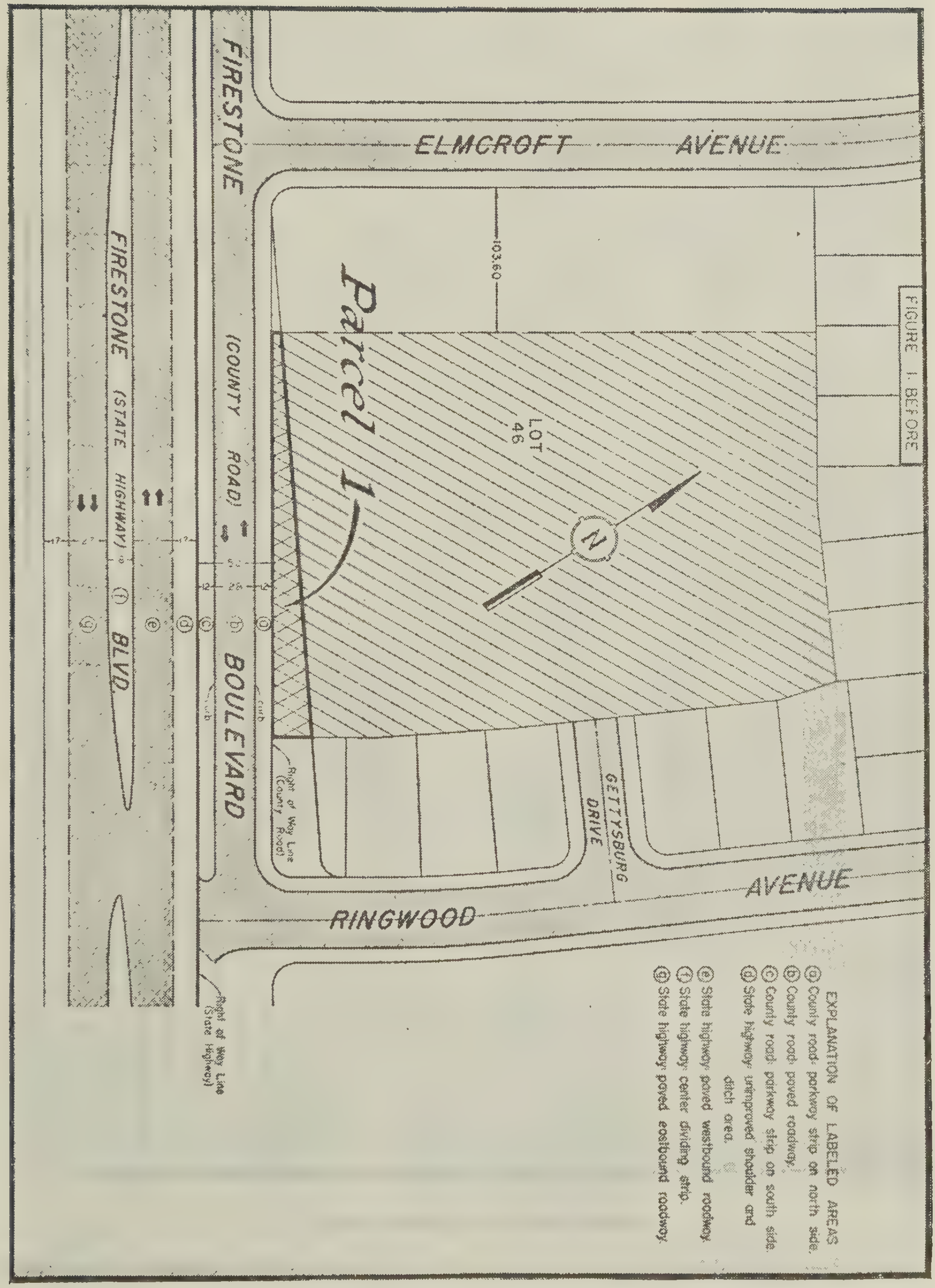
FIGURE 1. BEFORE
FIRESTONE (COUNTY ROAD) BOULEVARD
FIRESTONE (STATE HIGHWAY) BLVD.
ELMCROFT AVENUE
RINGWOOD AVENUE
GETTYSBURG DRIVE
Parcel 1
LOT 46
103.60
N
Right of Way Line (County Road)
Right of Way Line (State Highway)
curb
curb
ⓐ ⓑ ⓒ ⓓ ⓔ ⓕ ⓖ
EXPLANATION OF LABELED AREAS
ⓐ County road parkway strip on north side.
ⓑ County road paved roadway.
ⓒ County road parkway strip on south side.
ⓓ State highway unimproved shoulder and ditch area.
ⓔ State highway paved westbound roadway.
ⓕ State highway center dividing strip.
ⓖ State highway paved eastbound roadway.

Figure 1—Before Construction.

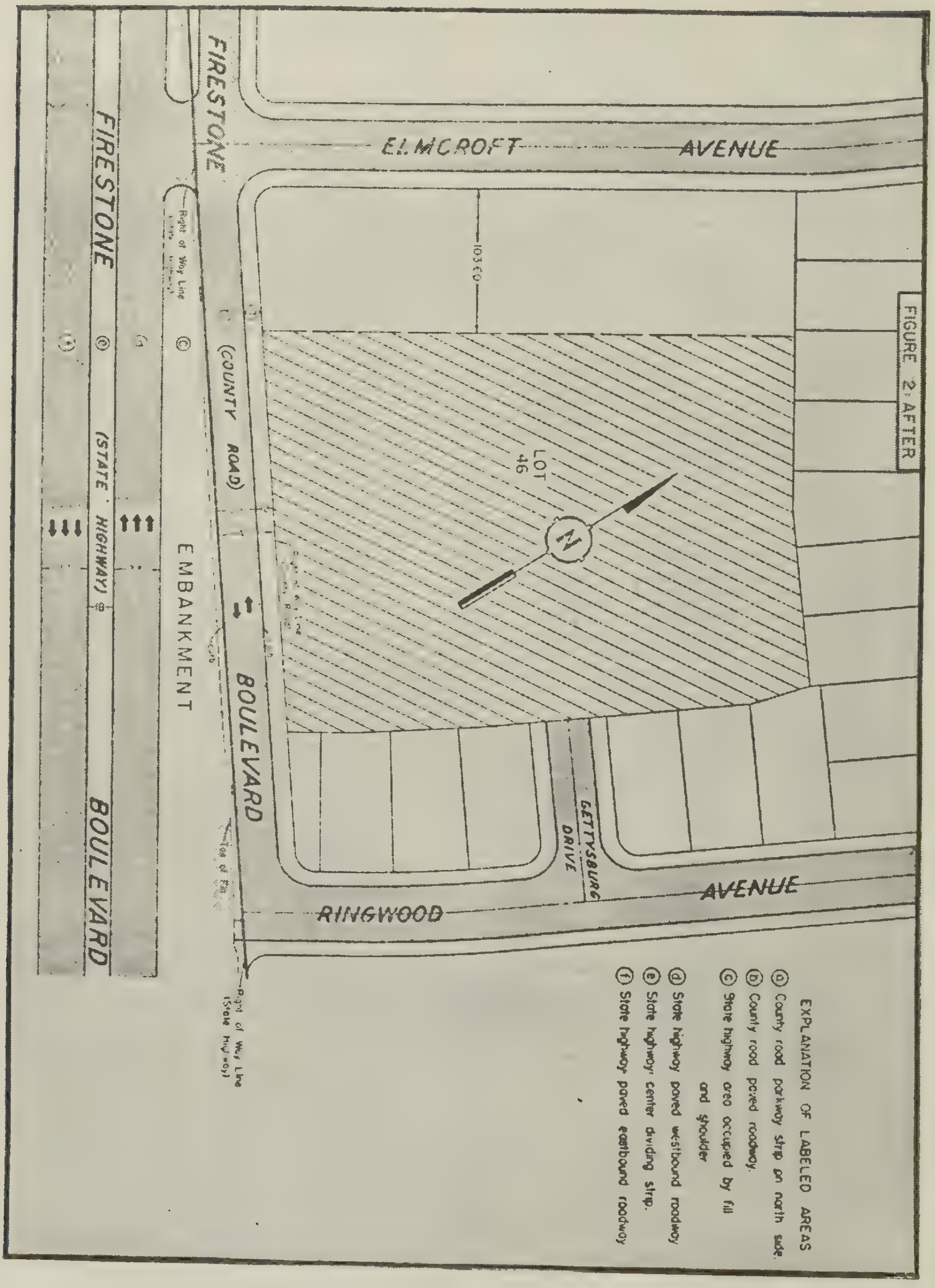
FIGURE 2: AFTER
FIRESTONE
FIRESTONE
ELMCROFT AVENUE
(COUNTY ROAD)
BOULEVARD
EMBANKMENT
(STATE HIGHWAY)
BOULEVARD
LOT 46
N
RINGWOOD
AVENUE
GETTYSBURG DRIVE
Right of Way Line
Right of Way Line (State Highway)
EXPLANATION OF LABELED AREAS
ⓐ County road parkway strip on north side.
ⓑ County road paved roadway.
ⓒ State highway area occupied by fill and shoulder
ⓓ State highway paved westbound roadway
ⓔ State highway center dividing strip.
ⓕ State highway paved eastbound roadway

Figure 2—After Construction.

"The relocation of the County road was necessitated by the widening of the State highway for the construction of a railroad overpass. The reconstruction of the County road resulted in the elimination of a 12-foot strip on the south side of the County road. In other words, the County road was reduced from 52 feet to 40 feet in width, or a reduction of about 23 per cent, although the paved portion of the road remained the same. In addition, a paved connection between the County road and the State Highway was constructed where Elmcroft Avenue and the State highway connect.

"The evidence indicated that respondent's damages were not based upon any loss of light, air or view with respect to the County road, thereby resolving the matter to the question of loss or impairment of access.

"Appellant asserts that the sole question presented by this appeal is whether the trial court erred in not ruling as a matter of law that respondent's easement of access in and to the abutting County road had not been substantially impaired. It is appellant's contention that since the uncontradicted evidence showed that the road had been reconstructed in exactly the same relationship to the land as to the grade, width of roadway, and intervening parkway strip, the only difference being the elimination of an unimproved 12-foot wide strip on the other side of the County road separating and dividing that road from a heavily traveled State highway, there was no substantial loss or impairment of respondent's right of access.

"The property in question was a part of a subdivision known as Tract Number 16767, apparently developed in about 1950. The political subdivision having control of subdivisions at that time imposed certain conditions and requirements on the subdividers, among such conditions and requirements being that a road (the County road here) 52 feet in width be dedicated to the county; that, at the property owners' expense, it be paved with a roadway 28 feet in width; that it be provided with curbs and gutters and that a 12-foot parkway and sidewalk area be provided on each side of the paved and curbed roadway. The subdivision map was recorded on October 31, 1950. Apparently, the subdividers complied substantially with all of the conditions and requirements made by the political subdivisions concerned with the property.

"As stated in Bacich v. Board of Control, 23 Cal.2d 343, at pages 349–350 [144 P.2d 818, 823]: 'It has long been recognized in this state and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment thereof.'

"Also, in People v. Ricciardi, 23 Cal.2d 390, the court stated, at page 397 [144 P.2d 799, 803]: 'The courts of this state, from time immemorial and in cases too numerous to mention, have declared and enforced the abutting property owner's right to a free and convenient use of and access to the highway on which his property abuts. (Citing cases.) It was declared in the case of Eachus v. Los Angeles etc. Ry. Co., supra, 103 Cal. 614, at page 617 [37 P. 570, 42 Am.St.Rep. 149], that this right of ingress and egress attaches to the lot and is a right of property as fully as is the lot itself and any act by which that easement is destroyed or substantially impaired for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision under which the owner is entitled to compensation.

"'It is also the settled law that "An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; * * * An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation. [Citing cases.]" (Lane v. San

Diego Elec. Ry. Co., 208 Cal. 29, 33 [280 P. 109].)'

"In Rose v. State, 19 Cal.2d 713, at pages 727–728 [123 P.2d 505], the court said: 'The abutting owner's easement of access arises as a matter of law * * * and its nature and extent have been set forth in the numerous decisions which have considered the question. Thus, it is established that the easement of access is a matter of law peculiar to the individual owner, and an unreasonable interference with such an easement is an injury necessarily different from the injury suffered by the general public. * * * It is an easement in the public highway upon which his land fronts. (Citing cases.) The right extends to a use of the highway for purposes of ingress and egress to his property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary or reasonable. (See Lewis, Eminent Domain (3d ed.), p. 190.)'

"The appellant here contends that the right of access does not extend to the full width of the dedicated right-of-way, but only to the paved portion thereof and that therefore there was no substantial loss or impairment of respondent's right of access since a duplicate paved portion of equal size has been provided.

"In support of its contentions appellant cites Rose v. State, supra; Beckham v. City of Stockton, 64 Cal.App.2d 487 [149 P.2d 296]; McDonald v. State, 130 Cal.App.2d 793 [279 P.2d 777]; Brown v. Board of Supervisors, 124 Cal. 274 [57 P. 82], and Bigley v. Nunan, 53 Cal. 403.

"All of the cited cases are distinguishable from the case now before us. In the Beckham case the complainant owned property, no part of which was taken for construction, and which was beyond the intersection and within the first block from the street in question. In the construction an underpass was made and as a result thereof claimants could no longer go directly from their property across the next intersecting street and to the downtown area. The court held that mere inconvenience and circuity of travel beyond an intersecting street resulting from the construction of an improvement therein do not furnish a basis for recovery of damages by landowners whose properties abut on a street which intersects the street on which the improvement is constructed; that in order for the landowner to recover there must be an infringement of some right which he possesses in connection with his property; and such property right is that of reasonable use of the street fronting the property in either direction to the next intersection. Such right the plaintiffs still had.

"In the McDonald case, plaintiffs claimed damages because they formerly passed directly across the county road, upon which their property fronted, to and into a state highway which lay next to and parallel with the county road. The state had constructed a wall 11 feet inside of the county road thus making direct passage to the state highway impossible, and necessitating travel on the county road to the next intersecting street before the state highway could be entered. A demurrer to the second amended complaint was sustained because of the pleadings showed that appellants did not own property abutting on the state highway and did not have direct access thereto. The appellate court stated, 130 Cal.App.2d at page 797, 279 P.2d at page 780: 'However, appellants do not complain of the fact that the wall was placed within the original surface area of the county road rather than upon its common boundary with the state highway. They claim only that their abutters' rights in the state highway have been damaged. * * * Thus, the real issue presented is whether or not the appellants, upon the construction of the state highway, *ipso facto* acquired a right to have no barrier erected between said state highway and that portion of Plumas Street (county road) upon which their properties abutted.'

"Brown v. Board of Supervisors, supra, 124 Cal. 274, 57 P. 82, merely holds that the narrowing of a street is not *ipso facto* an impairment of the right of access. The board of supervisors of the city and county of San Francisco passed an order declaring the northerly 31 feet of Turk Street to be closed and vacated. The owners of the lands abutting upon the southerly side of the street instituted proceedings for a review of the action of the board and a judgment annulling the order upon the ground that in adopting it the board acted in excess of its jurisdiction. The court held that the act of the board was a legislative act performed in the exercise of a discretionary power intrusted to them as a legislative body and that it was not the exercise of any judicial function which may be reviewed upon certiorari. In answer to the contention that the board had no jurisdiction to adopt the order without at the same time providing for an assessment of damage that would be sustained thereby and providing for its payment, the court stated, 124 Cal. at pages 280–281, 57 P. at page 83, 'The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. * * * The appellants herein do not, however, claim that the reduction in the width of the street will in any respect interfere with their enjoyment of light and air, or that access to their lots is in any degree impaired. * * The damage which the appellants may sustain by reason of a diminution in value of their lands is not damage for which they are entitled to compensation. (Citing cases.)'

"Bigley v. Nunan, supra, 53 Cal. 403, was not a condemnation proceeding but was an action to abate a nuisance caused by the erection of a fence in the highway in front of plaintiff's property, and for damages. The access from the plaintiff's lot to the street had not been cut off or impeded. The court held that if plaintiff and his immediate neighbors had more occasion to pass through the street than the public at large, this was an inconvenience in degree only and was not an injury in kind different from that sustained by the public; that the nuisance may be abated or removed, and to give damages on account of the decreased value of the land would be to give damages for all the injury the premises would ever sustain, which would be clearly wrong.

"In a majority of the cases in other jurisdictions the right of an owner of property to compensation for damages suffered by the narrowing of a street in front of his premises has been sustained, even where the portion vacated is on the opposite side of the street. (18 Am.Jur. 860; 49 A.L.R. 1255.) In City of Tulsa v. Hindman, 128 Okl. 169 [261 P. 910, 55 A.L.R. 891], it was held that where a city widens or opens a street for automobile and motor-truck traffic to its entire width, thereby consuming all space theretofore assigned and set apart for sidewalks or foot roads, it is liable to abutting property owners for any consequential damages resulting to such property.

"In Fry v. O'Leary, 141 Wash. 465 [252 P. 111, 49 A.L.R. 1249], the south 13 feet of a street were vacated over the protests of the landowners whose property abutted the opposite side. The court in holding that the resulting damage was compensable, stated, 252 P. at page 113: 'We think it also clear under the uniform weight of authority that one who is an abutting property owner upon a street or alley, any portion or the whole of which is sought to be vacated, has a special right and a vested interest in the right to use the whole of the street for ingress and egress, light, view, and air, and, if any damages are suffered by such an owner, compensation is recoverable therefor. It follows therefore, that if appellants' light, air, view, or access is materially diminished, as alleged in the complaint, they are entitled to have the same passed upon by a jury regularly impaneled to determine the amount thereof. Ridgway v. City of Osceola, 139 Iowa 590 [117 N.W. 974].

" 'Respondents contend that the vested interest of an abutting property owner in a street extends only to the middle of the street, and that therefore appellants are not abutting property owners as to the 13 feet vacated, which is across the street. But this position is untenable. Carried to its logical conclusion, the council could vacate all the street opposite appellants' property, leaving but a 30-foot street, and still appellants have no cause for complaint because not abutting owners. Yet there can be no doubt that, under most circumstances, property on a street only 30 feet in width would not be as valuable as on one twice as wide, for there would be only half as much space for light, air, view, and means of access. An abutting property owner's vested interest is to the full width of the street in front of his land, and he is entitled to use the whole thereof for egress and ingress, light, air, and view, and for any substantial or material diminution of any of these rights he is entitled to recover in damages.'

"Appellant further contends that the trial court, as a matter of law, must make a finding as to whether the abutter's rights of access have been substantially impaired, prior to submitting the matter to the jury. It is true that it is within the province of the trial court, and not the jury, to pass upon the question whether under the facts presented the abutting landowner's right of access will be substantially impaired. However, this the trial court did when it ruled on the admission of evidence and in its instructions to the jury. Also, if the court does not make special findings on the issue its findings thereon are implicit in the verdict awarding compensation. (People v. Ricciardi, supra, 23 Cal.2d 390, 144 P.2d 799.)

"Two witnesses testified for respondent and each stated that it was his opinion that there was a damage to the remaining parcel. One witness stated that it was his opinion that such damage was $69,373, and the other testified that it was his opinion the damage was $68,034. Each testified that by reason of the relocation and construction of the country road the highest and best use of respondent's property had changed from a retail commercial development to a residential development. The court and jury viewed the property, the area and the constructed improvement. The trial judge was in a position to and, in our opinion, he did fairly exercise his discretionary power. His view of the property and of the construction by the state is independent evidence to support the determination or finding implicit in the verdict that an impairment of access existed. (Neel v. Mannings, Inc., 19 Cal.2d 647, 654 [122 P.2d 576]; Wheeler v. Gregg, 90 Cal.App.2d 348, 366 [203 P.2d 37]; City of Oakland v. Adams, 37 Cal.App. 614, 617 [174 P. 947]; Hatton v. Gregg, 4 Cal.App. 537, 540–541 [88 P. 592].) In the case of County of San Diego v. Bank of America, 135 Cal.App.2d 143, at page 149 [286 P.2d 880], the court stated as follows: 'It is the rule in California that in a condemnation action, in absence of a showing of passion or prejudice, the finding of a jury when supported by substantial evidence will not be set aside on appeal. (Citing cases.)'

"Also, in Rose v. State, supra, 19 Cal.2d 713, at pages 728–729 [123 P.2d 505, 512,] the court said: 'It is well settled that where there is evidence to support a finding that substantial and unreasonable interference with the land-owner's easement of access or right of ingress and egress has been caused as the result of an obstruction in the street or highway on which his property abuts, an appellate court will not say as a matter of law that such finding is erroneous. (O'Connor v. Southern Pac. Co., 122 Cal. 681 [55 P. 688]; Smith v. Southern Pac. Co., 146 Cal. 164 [79 P. 868, 106 Am.St.Rep. 17]; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629 [169 P. 388].)

" 'The issues before the trial court in the case at bar were, whether plaintiffs' right of access to Jackson Street was substantially and unreasonably impaired by the construction of the subway, and if so, the amount of damage suffered as the result of such interference. These matters are for the trier of the facts and only where the evidence does not support a finding of substantial and unreasonable interference should the court decide the issue as a matter of law.'

"The case of Anderson v. State, 61 Cal. App.2d 140 [142 P.2d 88], holds that the view alone will support a verdict if it is within the range of testimony. The trial court heard the testimony of all witnesses, received and examined all exhibits, viewed the property, and reweighed the evidence before denying appellant's motion for new trial. (See People v. Adamson, 118 Cal. App.2d 714, 725 [258 P.2d 1020].)

"Appellant further contends that there were errors of law committed which were prejudicial to it. It is claimed that the testimony of the witness Little for the respondent should have been stricken. The substance of the testimony of the witness was that before the construction the remaining property was adapted to commercial activities and that after the reduction of the street the remaining property was no longer commercial; that the county road is now too narrow to service a commercial development and that the remaining property cannot now be utilized for commercial activities and is therefore less valuable. The testimony was proper and the motion to strike it was properly denied. Substantially the same situation prevailed as to the testimony of respondent's witness Ross.

"It is our conclusion that there was ample evidence to support the judgment and there was no prejudicial error to appellant."

Rehearing denied: CARTER, SCHAUER and McCOMB, JJ., dissent.

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48 Cal.2d 283

Albert Walter GARIBALDI, a minor, by his guardian ad litem, Albert F. Garibaldi, and Albert F. Garibaldi, Plaintiffs and Appellants,

v.

BORCHERS BROS., a corporation, and Edward Walter Silva, Defendants and Respondents.

S. F. 19326.

Supreme Court of California,
In Bank.
April 9, 1957.

Personal injury action. The Superior Court, Santa Clara County, John D. Foley, J., rendered judgment for defendants, and plaintiffs appealed. The Supreme Court, Spence, J., held that plaintiffs could not successfully complain of giving of BAJI instruction on last clear chance, even though Supreme Court had, in another case, condemned such instruction, since plaintiffs had proposed such instruction and their suggested modification thereof, which trial court rejected, would only have increased the already existing confusion in the BAJI instruction.

Affirmed.

Carter, J., dissented.

Opinion, 300 P.2d 300, vacated.

1. Appeal and Error ⟹882(12)

Plaintiffs could not successfully complain of giving of BAJI instruction on last clear chance, even though Supreme Court had, in another case, condemned such instruction, where plaintiffs had proposed such instruction and their suggested modification thereof, which trial court rejected, would only have increased the already existing confusion in the BAJI instruction.

2. Negligence ⟹83.10

Even if plaintiff's contributory negligence continued up to very moment of injury, he can recover from defendant who failed to exercise last clear chance to avert accident, if contributory negligence was not proximate cause of accident.

3. Trial ⚷296(4)

In action for injuries sustained by pedestrian who came into contact with truck, continuing negligence instruction might have been confusing, standing alone, but in view of other instructions given, jury could not have been misled thereby to believe that continuing contributory negligence would bar recovery even if it were not proximate cause of accident and defendant had failed to exercise last clear chance to avert accident.

4. Negligence ⚷83.8

When all of essential elements for application of last clear chance doctrine are present, negligence of defendant, who failed to exercise last clear chance to avoid accident, is deemed in law to be sole proximate cause of accident, and defendant may be held responsible to plaintiff for resulting damage, despite contributory negligence of plaintiff.

5. Trial ⚷296(3)

In action for injuries sustained by boy when he came into contact with defendants' truck on city street, instruction, with regard to right to assume that others will perform their duty under law, would have to be considered with instructions which preceded it and, so considered, could not have misled jury to believe that truck driver had been entitled to assume, without regard to boy's tender age, that boy would obey law.

6. Automobiles ⚷217(3)
Trial ⚷194(16)

Pedestrian crossing roadway in residential area as point other than within cross walk at intersection has duty to yield right of way to vehicular traffic, but such duty is not absolute; and instructions given, in action for injuries sustained by pedestrian, were not subject to claimed infirmity of telling jury that pedestrian had been required to yield right of way.

7. Trial ⚷206

Where truck driver admitted, at trial, having made certain prior statements which were inconsistent with account of accident as given at trial of action for injuries sustained by pedestrian who came in contact with truck, such admissions became part of driver's own testimony, and did not come within the "viewing with caution" rule; but it was not error to give instruction with regard to that rule where there were other prior statements of driver in evidence which he did not, at trial, admit having made.

8. Trial ⚷252(8)

In personal injury action, arising out of accident occurring prior to 1953 amendment of Vehicle Code section, absence of evidence, to show that speed limit signs had been in place at entrance to alleged residential district or at entrance to contiguous residential district, justified trial court's refusal to give requested instruction on existence of prima facie speed limit of twenty-five miles per hour. West's Ann. Vehicle Code, §§ 90, 510, 511, and (b)(1).

◆

Bruce F. Allen and Douglas, Zingheim & Allen, San Jose, for appellants.

William J. Connolly and Donald F. Farbstein, San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs, father and minor son, appeal from a judgment in favor of defendants in an action for damages for personal injuries sustained by the son when he came in contact with defendants' truck. They maintain that the court committed prejudicial error in instructing the jury. Viewing the evidence in the light most favorable to their contentions, the record does not support their position.

The accident occurred approximately midway between intersections on Sunol Street in San Jose on August 19, 1952, about 10:30 a. m. Sunol Street runs north and south, and is thirty feet wide. There are residences on both sides of the street in this area. At the time of the accident, cars were parked solidly along the west side of Sunol Street, leaving two lanes of traffic open. No parking was permitted on the east side. A dirt strip four feet wide extended between the sidewalk and the curb on this east side.

Plaintiff minor, then eight-and-one-half years old, and his seven-year-old sister were walking north on the sidewalk on the east side of the street. Defendants' concrete mixer truck was also proceeding north on the east side of the street. The driver saw the children as he approached them and he kept them under observation until his truck reached a point about fifteen feet south of where they then were, when he looked straight ahead. After he had passed the children he heard a scream and the sound of something hitting the side of the truck. The boy was found lying in the street near the east curb. A mark on the truck indicated that the point of contact was on the right rear mudguard, twelve feet from the front of the truck.

Defendant driver testified that he first observed the children when he was two hundred to two hundred and fifty feet from them; that his view of them was unobstructed; that his speed then was about twenty miles per hour; that there was traffic approaching from the opposite direction; that his truck was proceeding about three feet from the east curb; that when about one hundred feet from the place of the accident, he reduced his speed to fifteen miles per hour; that the children's backs were toward him and they did not look at him at any time; that they were "on a hop and a skip down the sidewalk"; and that they "kind of jacked toward the west of the sidewalk." He further testified that he did not see the children leave the sidewalk or make any movement indicating that they were going on the street, but he admitted having told the police officer at the scene of the accident that he saw the boy step to the curb. The driver also testified that he did not sound his horn as he approached the children and only "lightly applied" the brakes; that it was only after he heard the scream, that he really applied the brakes and stopped "as quickly as [he] could" next to the curb.

The boy could not remember the accident. His sister, nine years old at the time of the trial, testified that she and her brother went from the sidewalk onto the dirt strip, where they waited for one northbound truck to pass, and then "when the second one (defendants') was coming, my brother started to go out by the curb, and I don't think he saw the truck, he was looking at me, and he told me to get back on the sidewalk, and so I was in the dirt strip and the truck came along and hit him." A neighbor testified that while she did not see the boy hit, she had noticed defendants' truck as it passed her house, which was just before the place of the accident; that it swerved toward the east curb because of an oncoming southbound truck; and that she estimated defendants' truck was then going about thirty miles per hour. Defendants' truck, with its load of concrete, weighed about fifteen tons.

At plaintiffs' request, the jury was instructed on the last clear chance doctrine. The formula prescribing the essential conditions for application of that doctrine has been recently restated. Brandelius v. City & County of San Francisco, 47 Cal.2d 729, 306 P.2d 432. Such restatement was based upon the formula appearing in other decisions of this court. Daniels v. City & County of San Francisco, 40 Cal.2d 614, 619, 255 P.2d 785; Peterson v. Burkhalter, 38 Cal.2d 107, 109–110, 237 P.2d 977; Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915.

[1] The parties first are in dispute as to whether the last clear chance doctrine was applicable at all here. Defendants claim that the evidence only shows that the boy stepped from his "place of safety" on the sidewalk or curb and into the roadway *after* he had left the truck driver's view as the truck proceeded past him; that until the boy entered the roadway he was not in a "position of danger" cf. Dalley v. Williams, 73 Cal.App.2d 427, 435, 166 P.2d 595, at which time he apparently ran into the rear side of the truck; and the truck driver therefore had no chance

of avoiding the impact. It seems difficult to find a basis for application of the doctrine in view of the evidence presented and more particularly, in view of the account of the only eyewitness to the actual happening of the accident, the boy's sister. Her testimony indicated that as the boy walked toward the curb, he realized the danger of venturing into the roadway while trucks were passing and, in fact, told her to get back on the sidewalk as they waited. But assuming for the purpose of discussion that under any possible view of the evidence the last clear chance doctrine could be deemed applicable, the jury was instructed with respect to that doctrine and apparently did not find all the necessary conditions for its application to exist. Plaintiffs do not challenge the sufficiency of the evidence to sustain the adverse verdict, but they do contend that the court erred in its omission of their proposed modification of BAJI 205.

The instruction given by the court followed the exact language of BAJI 205. Plaintiffs proposed this BAJI instruction but had added to paragraph "Third" thereof the following clause, which is italicized: "Third: That the (truck driver) had actual knowledge of (the boy's) perilous situation, *or that (the driver) knew facts from which a reasonable person would have believed that (the boy) was in peril.*" This italicized portion was not given. The BAJI instruction on last clear chance, in unmodified form, was analyzed recently in Brandelius v. City & County of San Francisco, supra, 47 Cal.2d 729, 306 P.2d 432. It was there held to be erroneous as it was found to be "misleading" and "confusing" in its amplification of the prescribed elements for application of the doctrine. Plaintiffs' proposed modification of the third paragraph of the BAJI instruction would obviously have increased the already existing confusion in the BAJI instruction. We therefore conclude that plaintiffs may not successfully complain of the failure of the trial court to include plaintiffs' proposed modification in the BAJI instruction, which instruction was given at plaintiffs' request.

[2, 3] Plaintiffs argue that the force of the stated last clear chance doctrine was nullified by the giving of the following instruction on continuing negligence. (BAJI 205–A, Third Paragraph): "The Doctrine of Last Clear Chance is invoked to defeat the defense of contributory negligence only in a case when, after plaintiff's negligence has put him into a position of danger, its work as an efficient agent of causation ceases, and it does not play a part in proximately causing the accident. When, on the other hand, a person's negligence not only places him in a position of danger, but thereafter it or its effect continues, and as a proximately causing factor, brings about, or helps to bring about, the accident, then the law of contributory negligence applies, and such person may not recover." Plaintiffs object to this instruction, claiming that it declares that if plaintiff continues to be negligent up to the moment of the impact, he cannot recover from the defendant who failed to exercise the last clear chance to avert the accident, even though plaintiff's negligence was not a proximate cause thereof. Such proposition, of course, is not the law, Doran v. City & County of San Francisco, 44 Cal.2d 477, 486–487, 283 P.2d 1; Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 639, 255 P.2d 795, and the instruction does not so state. The first sentence states in effect that the doctrine does not apply unless the plaintiff's negligence has become "remote in causation." Center v. Yellow Cab Co., 216 Cal. 205, 207–208, 13 P.2d 918. The second sentence states that if the plaintiff's negligence or its effect continues so as to be a "proximate cause" of the accident, then such negligence will bar a recovery. Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 440, 136 P.2d 611. Thus, the instruction is in line with the authorities dealing with the last clear chance doctrine which have rationalized that doctrine, in its relation to the doctrine of contributory negligence, on the basis of proximate cause.

Sparks v. Redinger, 44 Cal.2d 121, 124–125, 279 P.2d 971; Girdner v. Union Oil Co., supra, 216 Cal. 197, 203–204, 13 P.2d 915; see annos.: 92 A.L.R. 47; 119 A.L.R. 1041; 171 A.L.R. 365.

However, while this instruction may be technically correct, it might be argued that it could be confusing to a lay jury were it not for other considerations. The instruction was immediately preceded by the general last clear chance instruction (BAJI 205), reciting the elements of the doctrine, including the circumstance of the negligent plaintiff totally unaware of his impending peril, and concluding with the statement that if *all* the prescribed "conditions [were] found" to exist "with respect to the accident in question," then the jury "*must find against the defense of contributory negligence* * * * because under such conditions the law holds the defendant liable for any injury suffered by [the] plaintiff and proximately resulting from the accident *despite the negligence of [the] plaintiff*." (Emphasis added.) With these instructions so submitting plaintiffs' right to recovery in terms of proximate cause, it seems reasonable to assume that the jury realized that in this as "in every case of negligent unawareness plaintiff's negligence continues to the very time of the injury, but if the elements of the last clear chance doctrine are present that rule nonetheless applies." Overacker v. Key System, 99 Cal.App.2d 281, 284, 221 P.2d 754. Accordingly, plaintiffs' objection to the instruction on continuing negligence may not prevail. See Clark v. Vieroth, 141 Cal. App.2d 462, 465–466, 296 P.2d 823.

[4] Before concluding this phase of the discussion we should state that it appears that any instruction such as BAJI 205–A, Third Paragraph, is technical in nature and is of little, if any, assistance to the average jury in applying the last clear chance doctrine. It would be more helpful, in our opinion, if the courts would frankly recognize that the last clear chance doctrine is in reality an exception to, or modification of, the ordinary rules making plaintiff's contributory negligence a bar to plaintiff's recovery. (See Prosser on Torts, Second Ed., 1955, p. 290.) In other words, when all the essential elements for the application of the last clear chance are present, then the negligence of the defendant, who failed to exercise the last clear chance to avoid the accident, is deemed in law to be the sole proximate cause of the accident; and under these circumstances, the defendant may be held responsible to plaintiff for the resulting damage despite the contributory negligence of plaintiff. An instruction to that effect, coupled with proper instructions on the essential elements of the last clear chance doctrine, would give the jury a clearer understanding of the real issues for its determination and would avoid complicating the jury's deliberations by instructions which place upon the jurors the burden of rationalizing their findings and conclusions with the ordinary concepts of proximate cause.

[5] Plaintiffs next contend that the jury was erroneously instructed that the truck driver was entitled to assume that the injured boy would obey the law without regard for his tender age. The challenged instruction reads as follows: "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate an accident which can be occasioned only by a violation of law or duty by another. *However, an exception should be noted*: the rights just defined *do not exist when* it is reasonably apparent to one, or *in the exercise of ordinary care* would be *apparent to him*, that another is not going to perform his duty." (Emphasis added.) This instruction must be considered with the instructions, requested by plaintiffs, which preceded it: "Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult who possesses normal physical and mental faculties. *A person operating a*

motor vehicle must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on a person operating a motor vehicle, and from whose conduct injury to a child may result. (Emphasis added.)

"The presence of children is in itself a warning requiring exercise of care for their safety. The conduct of children is unpredictable and a person operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. A greater degree of care is required of a driver of a vehicle when he knows a small child is at play than in a case where a person of mature discretion is involved."

Considering these last mentioned instructions together, it is clear that the jury was properly told that a child is only held to a standard of care in accordance with his age and the existing conditions, Galbraith v. Thompson, 108 Cal.App.2d 617, 621, 239 P.2d 468, and that here the driver was only entitled to assume that the children would act as other children of like age would ordinarily act under similar circumstances. Hilyar v. Union Ice Co., 45 Cal.2d 30, 36–37, 286 P.2d 21.

Plaintiffs next contend that the jury was instructed according to the rules required of an adult pedestrian. Such is not the case. At plaintiffs' request, the accepted instruction on the standard of care required of a minor was given (BAJI 147), the first sentence of which reads: "A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience." Then followed the general instruction, of which plaintiffs complain, as to the duty owed by a pedestrian while crossing a street. (BAJI 201–C.) This latter instruction, given at defendants' request but with certain modifications in recognition of the minor plaintiff's status, reads: "Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect; it does place upon him the continuing duty to exercise ordinary care to avoid an accident, *the degree of ordinary care in the case of a minor is that ordinarily exercised by a child of like age, mental capacity and experience, under the same or similar circumstances.*" (Emphasis added.) Thus it is clear that the instructions emphasized the determinative consideration to be not whether the minor plaintiff acted as an adult should, but whether he used the care ordinarily exercised by like children in similar circumstances. Accordingly, the matter of whether or not the boy was chargeable with contributory negligence in the happening of the accident was a question of fact properly left to the jury. Raggio v. Mallory, 10 Cal.2d 723, 727, 76 P.2d 660; Richardson v. Ribosso, 120 Cal.App. 641, 643, 8 P.2d 226; DeNardi v. Palanca, 120 Cal.App. 371, 376, 8 P.2d 220.

[6] Nor is there merit to plaintiffs' further claim that the trial court erroneously instructed the jury that the minor plaintiff was *required* to yield the right of way to defendants' truck. The criticized instruction reads as follows: "While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: If he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of

way to all vehicles on the roadway so near as to constitute an immediate hazard. Second: The amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation.

"This duty to yield the right of way is *not an absolute one,* and it is for you to determine from the facts, whether the minor plaintiff, Albert Garibaldi, exercised reasonable care under the circumstances, that is, the degree of care ordinarily exercised *by a child of like age, mental capacity and experience.*" (Emphasis added.) This instruction supplied the precise language that was found wanting in the cases to which plaintiffs refer. Cole v. Ridings, 95 Cal.App.2d 136, 141, 212 P.2d 597; Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60. The second paragraph clearly and correctly informed the jury that the boy's duty to yield the right of way was not absolute, and that the basic test was whether he as a minor exercised reasonable care under all the existing circumstances. See Gavin v. Watt, 144 Cal.App.2d 238, 300 P.2d 842.

[7] Plaintiffs next contend that the trial court erred in instructing the jury, at defendants' request, that "Evidence of the oral admission of a party, other than his own testimony in this trial ought to be viewed by you with caution." Plaintiffs claim that it was not proper to give this instruction because the truck driver at the trial admitted having made certain prior statements which were inconsistent with the account of the accident as given at the trial. These admissions then became a part of the driver's own testimony and so did not come within the "viewing with caution" rule. But in addition to these admissions, there were other prior statements of the driver in evidence which at the trial he did not admit having made, and which warranted the giving of this cautionary instruction. See Crawford v. Alioto, 105 Cal.App.2d 45, 50–51, 233 P.2d 148; Freeman v. Nickerson, 77 Cal.App.2d 40, 62, 174 P.2d 688.

[8] Plaintiffs finally object to the trial court's refusal to give their requested instruction on the existence of a prima facie speed limit of twenty-five miles per hour in effect at the time and place of the accident. It will be recalled that the accident happened in 1952 and prior to the 1953 amendment of section 511 of the Vehicle Code. They claim that Sunol Street was in a residence district, Vehicle Code, § 90, where the prima facie speed limit was twenty-five miles per hour. Ibid, § 511, subd. (b) (1). Assuming that the accident happened in an area which might have qualified as a residence district, if properly signposted, the requested instruction was not proper unless there was evidence to show that speed limit signs were then in place at the entrance to the alleged residential district or to a contiguous residential district. Daniels v. City & County of San Francisco, supra, 40 Cal.2d 614, 624, 255 P.2d 785; Guerra v. Brooks, 38 Cal.2d 16, 19–20, 236 P.2d 807; Reynolds v. Filomeo, 38 Cal.2d 5, 11–13, 236 P.2d 801. There was no evidence of such signposting other than the mention of a single sign at some indefinite location. Such vague and indefinite evidence was insufficient. Furthermore, the fastest that any witness stated that the truck was traveling at any time was about thirty miles per hour. The jury was fully and correctly instructed on the basic speed law, Veh.Code, § 510, and after an examination of the record, it reasonably appears that the jury found that the speed of the truck was not a vital factor in the happening of the accident.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The majority opinion holds that various instructions given to the jury were not prejudicially erroneous. I cannot agree.

The same instruction on last clear chance that was given in Brandelius v. City & County of S. F., 47 Cal.2d 729, 306 P.2d 432, was given in this case at plaintiff's request but an addition thereto [1] was stricken by the court. The majority opinion now says as it did in the Brandelius case that the instruction without the addition was incorrect and confusing; that therefore plaintiff cannot complain of it because it was given at his request and the addition thereto (not given) would have added to the confusion. I reiterate the comments in my dissent in the Brandelius case, 47 Cal.2d 729, 306 P.2d 432, to the effect that the instruction without the addition was not erroneous nor confusing; that the addition was proper and should have been given. Even if the unmodified instruction was confusing the addition should have been given. It in effect told the jury that it could find actual knowledge by defendant of the boy's perilous position if a reasonable person would have believed he was in a perilous position, that is, if the facts would justify an inference that defendant knew of the boy's perilous position despite his protests to the contrary. In Selinsky v. Olsen, 38 Cal.2d 102, 105, 237 P.2d 645, 647, this court pointed out that even though the defendant says he did not have such knowledge the facts may reasonably show that he did. We there stated: "The second factor is lacking, urges defendant, because there is no showing that defendant was aware of plaintiff's perilous position or knew he could not escape therefrom. That depends upon the view one takes of the evidence. It is true that *defendant testified that he did not see plaintiff's car* until he was directly behind it, when plaintiff drove his car into the line of traffic in front of him, and that plaintiff's car was in motion at the time of the impact. Other evidence shows, however, that defendant was looking straight ahead as he approached plaintiff's car and his view was unobstructed. It may be inferred therefrom that he saw plaintiff's motionless car extending into the line of traffic. * * * Under the evidence most favorable to plaintiff, defendant could have seen plaintiff's car standing in the road ahead of him for a minute before the impact and thus could, by the exercise of ordinary care, have avoided the accident." (Emphasis added.) Plaintiff was entitled to have the jury advised on this issue especially in this case where, as in the Selinsky case, defendant said he was watching the boy and his view was unobstructed. In Peterson v. Burkhalter, 38 Cal.2d 107, 111, 237 P.2d 977, 979, we said: "Also relied upon for reversal of the judgment is the testimony of Burkhalter that when he first saw Peterson he was not aware of a possible collision. *But the application of the doctrine of last clear chance is not dependent upon an admission by the defendant that he expected that there might be a collision.* As stated in Cady v. Sanford, 57 Cal.App. 218, 226, 207 P. 45, 48, *'It was not necessary that appellant should actually know that an accident was inevitable if he failed to exercise care. It is enough if the circumstances of which he had knowledge were such as to convey to the mind of a reasonably prudent man a question as to whether respondent would be able to escape a collision.'*

"Burkhalter compares his situation to that of the defendant in Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 107 P.2d 417. There the rule of last clear chance was held to be inapplicable because there was no evidence showing knowledge by the defendant of the plaintiff's danger. Johnson had fallen asleep while driving his automobile, and there was no evidence that the driver of the other car was aware of this fact. For that reason, it was held, the defendant did not know that Johnson was in a position of danger, and did not have the last clear chance to avoid the collision.

"Burkhalter knew that Peterson was

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[1] The addition was: "That the (truck driver) had actual knowledge of (the boy's) perilous situation, *or that (the driver) knew facts from which a reasonable person would have believed that (the boy) was in peril.*"

oblivious to the impending collision, and he excuses his failure to do anything to avert the accident upon the ground that he had no reason to expect continuing negligence on the part of Peterson. However, there is ample evidence from which the jury could determine that a reasonably prudent man, knowing the facts of which Burkhalter was aware, should have foreseen that Peterson might not turn or stop his motor scooter. Under such circumstances, it was negligent for Burkhalter to proceed toward the intersection acting upon a contrary assumption." (Emphasis added.) Similarly, in the instant case, defendant could be said to have known of the presence of a very young child on the curb especially in view of the rule that: "A greater degree of care is required of a driver towards children than towards adults. The care required is greater still when the driver knows that small children are at play in the immediate vicinity. This is so because their conduct is unpredictable. The driver must anticipate their thoughtlessness and impulsiveness. Their very presence is a warning requiring the exercise of care. While a driver in approaching a child upon a street or highway is not bound to guard against every possible contingency, yet where he sees a child in a place of danger, or might reasonably apprehend that if approached without warning the child would through fright or bewilderment place itself in danger, it is his duty to keep his car under such control as is reasonably necessary to avoid a collision. If he has knowledge of the presence of children in the immediate vicinity, he may be charged with negligence in injuring one of them, even though he did not see the injured child, particularly where the injury occurs near the child's home or a school. A fortiori, the driver may be held responsible where he sees the child approaching the path of his vehicle.

"The driver may be liable under the doctrine of last clear chance for an injury to a child, even under the assumption that the child's conduct amounted to contributory negligence, where he sees the child in the path of his vehicle in danger of being run over and realizes that the child is unaware of the approach of the vehicle." 7 Cal.Jur. 2d, Automobiles, § 271; see, also, 30 A.L.R. 2d 5. In Scandalis v. Jenny, 132 Cal.App. 307, 310, 22 P.2d 545, 547, it was held that defendant was negligent as a matter of law where a child ran into the side of his car, and on the issue of contributory negligence the court said: "The next question is, Was the plaintiff guilty of contributory negligence? To this question there can be but one answer, and that is in the negative. Even if it were negligence for a child of three years of age to stand in or near the center of a city street and look down, apparently unaware of the approach of an automobile, we are unable to see that such negligence contributed proximately to the injury that came to him by reason of the negligence of the defendant in the manner hereinbefore stated. By the exercise of ordinary care defendant should have seen and realized that plaintiff was unaware of the approach of the automobile, and his failure so to do placed upon him the whole blame for the accident." In Hilyar v. Union Ice Co., 45 Cal.2d 30, 36, 286 P.2d 21, 24 quoting from Conroy v. Perez, 64 Cal.App.2d 217, 224, 148 P.2d 680: "'The presence of children is in itself a warning requiring the exercise of care for their safety. * * * Moreover if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury. * * *' * * * In Freeland v. Jewel Tea Co., 118 Cal. App.2d 764, 769, 258 P.2d 1032, it was held that it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties, Conroy v. Perez, supra, 64 Cal.App.2d 217, 224, 148 P.2d 680; that their conduct is unpredictable and one operating a motor vehicle *should anticipate their thoughtlessness and impulsiveness*, Shannon v. Central-Gaither Union School Dist., supra, 133 Cal. App. 124, 23 P.2d 769. It was also held that the presence of children is in itself a warning requiring the exercise of care for their safety." (Emphasis added.)

Hence in the instant case defendant was bound to anticipate unpredictable action by the child who was playing along the curb. Knowing the child was there, and the likelihood of his going into the street, defendant had the duty to take precautions, but he took none. The added portion of the instruction requested by plaintiff should therefore have been given because it took into consideration the factors involved in a child's presence on the street and what defendant was required to anticipate in regard thereto.

The next instruction given is also clearly erroneous.[2] Contrary to the statement in the majority opinion, this instruction advised the jury that the last clear chance doctrine was not applicable if plaintiff's negligence continued up to the time of the impact. So interpreted it is conceded to be wrong; indeed the majority opinion says such instruction should not be given. The instruction states that the doctrine may apply "only" when plaintiff's negligence has ceased; and where plaintiff's negligence *"continues"* up to the time of the accident, he *cannot* recover because of his contributory negligence. The majority seeks to escape this interpretation on the assumption that the continuance of plaintiff's negligence is said to cease if it is no longer the proximate cause of the accident. The proximate cause feature would only confuse the jury because, as pointed out in the majority opinion, it is fictional reasoning to say that the last clear chance is based on the theory that where applicable, the plaintiff's negligence has ceased to be the proximate cause of the accident. Here the jury was told that if plaintiff's negligence ceased before the impact the doctrine applied as it was not then the proximate cause of the accident. No one should expect the jury to follow such intricate and finespun reasoning. To the jury the plaintiff is still negligent, he continues to be so and the jury would naturally so assume; his negligence would still be a cause of the accident to them even though the defendant could have avoided it by the exercise of ordinary care. But they are told that they may not mitigate such an anomalous situation by the application of the last clear chance doctrine. This is especially true in this case where we have a child involved and consideration must be given to defendant's duty in respect to a child on the curb in close proximity to his moving truck. The jury would normally assume that the child's actions would be negligent if he were an adult and his negligence continued up to the time of the accident and were one of the causes of the accident. Moreover, the instruction defining proximate cause informed the jury that a cause which produces injury, is proximate.[3] The jury was further instructed that "* * * if you further find that the negligence of both proximately caused the accident, then if you so find, your verdict must be for the defendants." It is reasonable to suppose that the jury would conclude that conduct of the child helped produce the injury—was a proximate cause and the jury would not therefore apply the last clear chance doctrine under the instruction now discussed.

Likewise the instruction told the jury that defendant had a right to assume that the child would perform his duty and obey the law, and hence, if he did not anticipate such conduct by the child, there was no negligence. It is true, as stated by the majority, that thereafter the jury was instructed as to what conduct to expect from a child, but that instruction did not cure the one plaintiff attacks. The instructions are conflicting, as the jury was told in one breath that defendant need not anticipate that a child might act as an adult—reasonably and according to law—and in the next, that a child's actions are not measured the same way as an adult's. In the instructions with reference to the conduct of children the jury was not informed that defendant should "anticipate" unpredictable action by a child. The jury would be confused because, it would not know whether to apply the adult standard or child standard in evaluating defendant's conduct, and this was the very essence of plaintiff's case, that is, whether knowing that the child was playing at the curb, defendant took proper precautions, or could proceed with the assumption that the child would not run out into the street.

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[2] "The Doctrine of Last Clear Chance is invoked to defeat the defense of contributory negligence only in a case when, after plaintiff's negligence has put him into a position of danger, its work as an efficient agent of causation ceases, and it does not play a part in proximately causing the accident. When, on the other hand, a person's negligence not only places him in a position of danger, but thereafter it or its effect continues, and as a proximately causing factor, brings about, or helps to bring about, the accident, then the law of contributory negligence applies, and such person may not recover."

[3] "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies."

The error in the instruction now discussed was further emphasized by the giving of instructions on the duty of a pedestrian in crossing a street phrased in the terms of an adult pedestrian—that he must yield the right of way when not crossing in a crosswalk. This is also in conflict with the duty imposed upon the defendant to anticipate the conduct of a small child, and, in effect, negatives it.

Considering all of the foregoing instructions, it is evident that the jury was placed in a position where it could not apply the appropriate duty of defendant toward a child playing near the curb of a street nor measure the child's duty under the circumstances. The instructions were irreconcilable. Defendant, knowing of the child's presence, playing near the street, oblivious to defendant's truck, also knew, or was bound to know, that the child was likely to enter the street, yet he did nothing to cope with such a contingency. He did not slow down his truck, come to a stop or sound his horn. Under these circumstances, the jury could have found, if properly instructed, that he had a last clear chance to avoid the accident but failed to avail himself of it.

The last clear chance doctrine like res ipsa loquitur was evolved by great liberal minded judges to ameliorate the rigor of the common law in its application to the law of negligence. (See, excellent article by Myron L. Garon, member of the Los Angeles Bar, entitled "Recent Developments in California's Last Clear Chance Doctrine," 40 Cal.L.Rev. 404.) It is my view that these doctrines should be applied liberally to the end that relief may be granted to those who suffer injuries as the result of the negligent conduct of others. The application of these doctrines has been greatly restricted by recent decisions of this court which indicate a marked conservative trend, Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Doran v. City & County of San Francisco, 44 Cal.2d 477, 283 P.2d 1; Brandelius v. City & County of S. F., 47 Cal.2d 729, 306 P.2d 432; Leonard v. Watsonville Community Hospital, 47 Cal.2d 36, 305 P.2d 36; Danner v. Atkins, 47 Cal.2d 327, 303 P.2d 724; Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724. Whether this conservative trend is in accord with public interest may be open to serious question. In my opinion it is more in keeping with the public interest that these doctrines be liberally applied by our courts.

I would therefore reverse the judgment.

149 Cal.App.2d 674

In the Matter of the ESTATE of Elizabeth B. ROUSE, Deceased.

Lewis E. ROUSE, Individually as surviving spouse, and as Administrator with the Will annexed of the Estate of said deceased, Appellants,

v.

Norvell B. UNDERWOOD and Elizabeth Jane White, Legatees and Respondents,

Baker, Palmer & Wall et al., Respondents.

Civ. 5373.

District Court of Appeal, Fourth District, California.

April 2, 1957.

Proceedings on motion by decedent's husband to set aside final account and decree of distribution in decedent's estate upon ground that decree had been taken against husband through mistake, inadvertence, surprise, excusable neglect and extrinsic fraud. The Superior Court, Kern County, Gordon L. Howden, J., entered order denying motion to vacate final account and husband appealed. The District Court of Appeal, Barnard, P. J., held although decedent's sister and niece had been devised all of decedent's personal property and were also named as sole beneficiaries of life policy and retirement fund, where, after dispute arose between husband and sister and niece, parties had entered into an agreement concerning division of insurance and retirement proceeds and property, final account had been entered according to agreement in probate and no appeal had been taken from that decree, order denying husband's motion was not an appealable order.

Appeal dismissed.

1. Executors and Administrators 🔑314(12)

Where decedent had devised alleged personal property to her sister and niece and had also made sister and niece beneficiaries of life policy and retirement fund, and where, after decedent's husband and sister and niece had entered into an agreement concerning division of the property, final decree had been entered according to agreement and no appeal had been taken from decree, order denying husband's motion to vacate decree upon ground that decree had been taken against husband through mistake, inadvertence, surprise, excusable neglect and extrinsic fraud and that decedent's gifts of community property were a nullity was not appealable. West's Ann.Code Civ. Proc., § 473; West's Ann.Prob.Code, § 1240.

2. Courts 🔑202(5)

In probate matters an order denying a motion to vacate a prior order or decree is not an appealable order.

3. Appeal and Error 🔑982(1)
Judgment 🔑363, 375

A motion to set aside decree on ground of mistake, inadvertence, surprise, excusable neglect and extrinsic fraud is addressed to sound discretion of trial court and order will not be disturbed unless it clearly appears that court has abused its discretion. West's Ann.Code Civ.Proc., § 473.

4. Appeal and Error 🔑1024(4)
Judgment 🔑393

On motions to vacate decrees for mistake, inadvertence, surprise, excusable neglect and extrinsic fraud, trial court must determine credibility of witnesses and resolve conflicts in evidence and trial court's determination with respect to conflicting evidence is conclusive upon appeal. West's Ann.Code Civ.Proc., § 473.

5. Husband and Wife 🔑273(1)

Where wife's sister and niece had been named sole beneficiaries of proceeds of life policy and retirement fund, property represented by policy and fund acquired through use of community funds could be voided by husband, after wife's death, as to one-half only.

6. Executors and Administrators 🔑314(12)

Where final decree of distribution of decedent wife's property had been entered on agreement, which had been entered into after litigation in Superior Court, between husband and decedent's sister and niece, allegation, not presented to or passed upon by probate court in connection with final decree, that contract providing for contingent attorney's fees in Superior Court action was void on ground contract had not been approved by probate court, did not justify reversal of order denying husband's motion to vacate final decree, especially in view of conflicting evidence. West's Ann. Code Civ.Proc., § 473.

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William H. Haupt, Inglewood, for appellants.

Conron, Heard & James, Wayne M. Hamilton, Bakersfield, for respondents Norvell B. Underwood and Elizabeth Jane White.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents Baker, Palmer & Wall.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion to vacate and set aside an order settling a final account and a decree of distribution.

Elizabeth B. Rouse and Lewis E. Rouse were married in 1918 and lived together until Mrs. Rouse died, on April 25, 1954. They had no children, and Mrs. Rouse was a schoolteacher. She left a holographic will in which, after stating that "I desire to make a statement about all of my wordly possessions", she gave all of her furniture and personal belongings to her sister Norvell B. Underwood and her niece Elizabeth Jane White. She then stated that her husband had purchased "the stove & radio", and that he might have "my engagement diamond". The husband was appointed administrator with the will annexed on May 24, 1954.

The home of the parties was held in joint tenancy, and that property is not here involved. Aside from a long itemized list of household furniture, dishes, silverware, bedding, pictures and the like, the property involved consists largely of a building and its furnishings situated on a leased lot in a church conference grounds; the proceeds from certain life insurance policies; and the proceeds of a death fund under the Teachers' Retirement System. The deceased had taken out certain life insurance policies totaling about $7,500, in which the sister and niece were named as sole beneficiaries. The amount due from the death fund in the Teachers' Retirement System, amounting to $6,500, was payable in its entirety to the sister and niece, who had been designated as beneficiaries thereunder.

The sister and niece filed a request for notice of all proceedings in the estate, and a dispute arose between them and Mr. Rouse over what each was entitled to. The insurance companies would not pay on the policies until it was determined who was entitled to receive the money. Mr. Rouse employed the same attorneys who represented him as administrator, for a contingent fee, to obtain for him his community interest in the proceeds of the insurance policies and from the retirement system funds. He then brought an action in the superior court naming the sister and niece, the insurance companies, and the State Teachers' Retirement System as defendants. The complaint alleged that all payments of premiums and all contributions of salary to the teachers' fund were community property, and that one-half of the sums payable from these sources belonged to him. Negotiations for a settlement of the controversy continued for several months, a number of conferences being held between the parties and their attorneys. A written agreement signed by Mr. Rouse as first party and the sister and niece as second party, and also by their attorneys, was executed under date of November 2, 1954. This agreement stated that Mr. Rouse claimed a community interest in the property left by Mrs. Rouse, including that mentioned in the will and the proceeds of the insurance policies and the retirement fund, and that the parties desired to amicably settle their respective rights with respect to all of said property. This agreement provided that one-half of the proceeds of the insurance policies and the retirement fund should be paid to Mr. Rouse, and the other half to the sister and niece; that the proceeds of the building and furnishings on the conference grounds should be divided between them in the same manner; that certain other items should be similarly divided between the parties; and that certain articles of furniture and the like should go to each party, respectively, with an allowance to the other party for one-half of the value thereof in accordance with a list which was attached thereto. It was also agreed that each party would pay one-half of the costs of administration of the estate, that each party would sign any instrument and perform any acts necessary to carry out the agreement, and that a petition would be filed in the probate court for an order distributing the property in accordance with this agreement.

The parties and their attorneys also signed a stipulation dated November 25, 1954, entitled in the action which had been brought by the husband in the superior court. It was thereby stipulated that the proceeds of one life insurance policy should be paid one-half to the appellant and the remaining one-half to the sister; that the proceeds from the other life insurance policies and the Teachers' Retirement System should be paid one-half to the appellant and the other half to the sister and the niece; that the checks for these payments should be delivered to the attorneys for the parties, respectively; that upon such payment the action in the superior court should be dismissed as to all defendants with prejudice; that the payments so made should be deposited in a bank, to be withdrawn only on the orders of the attorneys for both parties; and that upon such withdrawal the proceeds should be distributed by those attorneys in accordance with the written agreement entered into by the parties under date of November 2, 1954. The monies were paid by the insurance companies and the Teachers' Retirement System, but Mr. Rouse did not file this stipulation in the action pending in the superior court and did not dismiss that action. Insofar as this agreement of November 2, 1954, called for the delivery of articles in kind that agreement was fully executed on or before December 10, 1954.

On September 7, 1955, Mr. Rouse, as administrator of this estate, filed his first and final account and petition for distribution. In addition to the usual things it was therein alleged that a dispute had arisen between the surviving husband and the sister and niece, because of the fact that the furniture and certain personal belongings were community property of the decedent and the surviving husband; that the premiums on the life insurance policies, and the amounts paid into the Teachers' Retirement System fund, were paid with community funds, but the decedent had named her sister and niece as beneficiaries of said policies and of said retirement fund; that a suit had been filed in the superior court by the surviving husband to recover for himself his community one-half interest in said policies and said fund; that said suit was compromised by a stipulation between the parties under which the surviving husband is to receive his community half interest in said policies and fund; and that an agreement had been made between the parties with respect to the division of property belonging to the decedent and compromising the surviving husband's claim to a community one-half interest therein, and providing that the expenses of administration should be shared equally. The agreement between the parties dated November 2, 1954, was attached to the petition for distribution, and it was prayed that the first and final account be settled and allowed and that the property be distributed as set forth in that agreement and in the petition for distribution.

The matter came on regularly for hearing and a decree was entered on October 6, 1955, settling and allowing the account and ordering all of the property of the estate, including the proceeds of the life insurance policies and the retirement fund, distributed in accordance with the agreement of the parties and the petition for distribution. The effect of the decree was to give one-half of everything to the surviving husband and the other half to the sister and niece, except as this was varied by the agreement providing that each party should take certain articles of furniture and pay one-half of the value thereof to the other. The decree further found that all of the property of the decedent was community property; that a dispute had arisen between the surviving husband and the sister and niece; and that they had entered into an agreement under which the property ought to be distributed in a certain manner. The property was distributed in that manner, and as prayed for in the petition. The decree further provided that all other property of every kind and nature and wherever situated, and not described or not now known or discovered, was thereby distributed to the surviving husband. No appeal was taken from that order and decree and it became final.

[1, 2] Four and a half months later, on February 20, 1956, Mr. Rouse, as surviving husband and as administrator of this estate, made a motion in the probate proceeding for an order vacating and setting aside the order settling the final account and the decree of distribution, upon the grounds that this order and decree had been taken against him through mistake, inadvertence, surprise, excusable neglect and extrinsic fraud. He filed two affidavits by himself and the affidavits of two other persons in support of the motion to vacate, and the respondents filed seven affidavits in opposition thereto. The affidavits are very lengthy, covering the claims and answers of the parties, respectively, and it is unnecessary to summarize their contents here. After a hearing the matter was submitted. The court later filed a written opinion, and an order was entered denying the motion to set aside the decree of distribution.

Mr. Rouse, as administrator of this estate and as surviving husband of the deceased, has appealed from this order. The appeal is presented on a settled statement and upon the original records of the probate court insofar as they are involved in this appeal. The appellants contend that the decedent's gifts of community property were a nullity and created no rights in the donees, and that he has the right to avoid any such gift made without his knowledge and consent; that the naming of beneficiaries of insurance or retirement death benefits is not the making of a testamentary disposition but constitute attempted gifts to take effect at the death of the donor, and are utterly void; that the decree of distribution entered on October 6, 1955, was void since it was based upon a void contract by which the surviving husband sought to take property away from the estate without any authority from the probate court; and that the contingent contract for attorney's fees was void since it was not approved by the probate court.

Aside from any other consideration, it clearly appears that the motion to vacate and set aside the decree of distribution was based upon section 473 of the Code of Civil Procedure. This appears from the language used in making the motion, and from the fact that no other authorization for such a motion exists. The order appealed from is not one mentioned in section 1240 of the Probate Code, and in probate matters an order denying a motion to vacate a prior order or decree is not an appealable order. In re Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368; In re Estate of Glassgold, 97 Cal.App.2d 859, 218 P.2d 1016. It follows that the purported appeal must be dismissed.

[3–5] If this were an appealable order and if the agreements of the parties were not to be considered, the result would be the same insofar as the appellants are concerned. It is well settled that such a motion is addressed to the sound discretion of the trial court, and the order will not be disturbed unless it clearly appears that the court has abused its discretion; that it is for the trial court to determine the credibility of witnesses and to resolve conflicts in the evidence; and that its determination with respect to conflicting evidence is conclusive on appeal. In re Estate of Ryker, 95 Cal.App.2d 507, 213 P.2d 420; In re Estate of Brady, 95 Cal.App.2d 511, 213 P.2d 125; Baratti v. Baratti, 109 Cal.

App.2d 917, 242 P.2d 22; Reid v. Koeslag, 106 Cal.App.2d 729, 236 P.2d 192. The evidence here, presented in the form of affidavits, was conflicting as to every material point and for that reason alone the order would have to be affirmed if the matter was properly before his court. Moreover, the parties who are solely interested executed an agreement and stipulation which was used to secure the main property in question, they fully carried out the provisions of that agreement and it was submitted for the approval of the court, and the decree of distribution was entered in the exact manner provided for in the agreement and requested of the court. In any event, the property represented by the insurance policy and the retirement fund having been acquired through the use of community funds could be voided by the husband, after the wife's death, as to a one-half only. Odone v. Marzocchi, 34 Cal.2d 431, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109; Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 244 P.2d 742. By the decree of distribution the husband got exactly what he was entitled to and it would not appear that the estate, of which he was administrator, was in any way injured. Assuming that the matter could well have been handled in a different manner it would be an idle act to set aside the decree of distribution, on technical grounds, in order to have a similar one again entered.

It was alleged in the affidavits filed in support of the motion to vacate the decree of distribution that these appellants believed that the deceased had, during her lifetime, given other amounts to the sister and niece which were in fact community property, and that they desired time in which to investigate and ascertain the facts with respect to such matters. It is here argued that such transfers had been made without the knowledge or consent of the husband. Not only were these allegations denied in the opposing affidavits but a long period of time had elapsed after the making of the agreement, including several months after the decree of distribution was entered, and no definite facts were presented to the court. Moreover, in accordance with the agreement of the parties the decree of distribution contained a clause giving to the surviving husband, in its entirety, any later discovered property. Such property was not otherwise disposed of by the decree of distribution and that decree could in no way interfere with the subsequent discovery of such property, if any such property can still be found.

[6] The matter of contingent attorney's fees involved services other than services in the probate proceeding, was not presented to or passed upon by the court in connection with the petition for distribution, and was not involved in the decree of distribution. It was provided in the agreement for such contingent fees that any amount allowed as attorney's fees in the estate should be deducted from the contingent fee otherwise payable, and this was done. If, as appellants contend, they were in any way misled or taken advantage of by their attorneys the surviving husband may have a right of action against them, but nothing here appears which would have justified a reversal of the order denying the motion to vacate and set aside the decree of distribution, especially in view of the conflicting evidence presented.

While the order should be affirmed if the proper jurisdiction existed, the appeal must be dismissed and it is so ordered.

GRIFFIN and MUSSELL, JJ., concu-

In the Matter of the ESTATE of Ellen M. HILL, Deceased.

Jessie E. HILL, Executrix, Petitioner and Appellant,

v.

C. Walter HALL, Successor Trustee, Gladys Hill Adams, Contestants and Respondents,

Methodist Hospital of Southern California, Methodist Episcopal Church, University of Southern California, Legatees and Respondents.

Civ. 21978.

District Court of Appeal, Second District,

Division 2, California.

April 4, 1957.

Rehearing Denied April 26, 1957.

Hearing Denied May 29, 1957.

Proceeding on annual trust account. The Superior Court, Los Angeles County, Roy L. Herndon, J., entered an order disallowing an allocation of probate income accruing during probate of estate of testatrix to income account of trust, and executrix of deceased trustee appealed. The District Court of Appeal, Moore, P. J., held that probate income accruing during probate of the estate of testatrix was allocable to income account of the trust, rather than to the corpus account of such trust.

Reversed and remanded for further proceedings.

1. Executors and Administrators 🔑315(1)
Trusts 🔑280

Allocation of income accruing during probate of estate of a testatrix to either income account or corpus of testamentary trust should not be made by a decree of distribution, but by the trustee, and not the executor, even though they be the same person.

2. Judgment 🔑948

A plea of res judicata does not raise a jurisdictional problem.

3. Trusts 🔑280

Where a decree of distribution did not make an allocation of income which accrued during probate of an estate between the corpus and the income of a testamentary trust, but merely distributed probate income and other property to the trustee as an aggregate, trustee was obligated to make appropriate allocation.

4. Trusts 🔑331

Orders settling a trustee's annual accounts were not res judicata insofar as precluding income beneficiaries from raising issue as to proper allocation of income accruing during probate of testatrix' estate to income account of trust, rather than to corpus of the trust.

5. Trusts 🔑280

When a trustee has paid to one beneficiary what should have been held for or paid to other beneficiaries, the latter should receive the amount of the overpayment, and this can be accomplished by compelling him who has been overpaid either personally to repay the amount of the overpayment or by requiring the trustee to withhold the amount from the share of the beneficiary who has been overpaid unless the beneficiary has so changed his position that it would be inequitable to compel him thus to make restitution.

6. Courts 🔑117

Trial court minutes import absolute verity.

7. Trusts 🔑327, 331

Where, at time a trustee's sixth annual account was presented, trustee requested instructions concerning proper allocation of probate income, and following objection court refused to pass on such issue, its order approving such account was not res judicata on issue of such instructions, and court erred in entering an order nunc pro tunc amending order settling such account to state that a decree of distribution entered in estate from which trust was derived was res judicata as to such issue.

8. Wills 🔑684(7)

Probate income accruing during probate of the estate of testatrix was allocable to income account of the trust, rather than to the corpus account of such trust.

9. Trusts ⚿329

Findings of fact, conclusions of law, petitions for fees, petition for distribution of income and objections, arising out of order for approval of a trustee's current account were not appealable, and appeal therefrom would be dismissed.

10. Trusts ⚿329

An order settling a current account of a trustee 's appealable.

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Snow & Snow, Beverly Hills, by Hugh John Snow, Beverly Hills, for appellant.

Birger Tinglof, Los Angeles, for respondent Gladys Hill Adams.

MOORE, Presiding Justice.

John G. Hill was executor and trustee under the will of Ellen M. Hill. He died and appellant herein became executrix of his estate. As such executrix, she filed the 14th account current and report on behalf of the deceased trustee, covering the period between the 13th annual account filed by him and the date of his death. In it, for the first time since the establishment of the trust, she allocated probate income accruing during the probate of the estate of Ellen M. Hill, to the income account of the trust. She appeals from orders disallowing such allocation.

Ellen M. Hill died in 1939 leaving a will in which she named her husband executor and trustee of a testamentary trust in which he was the principal income beneficiary during his lifetime.

August 8, 1941, John G. Hill as Executor filed his first and final account, report and petition for distribution. That document made no reference to the allocation or distribution of the probate income to the income beneficiaries designated by the will. As Trustee he made an annual report for each of the following years, a total of 13 annual accounts and reports. During his lifetime, although he was entitled to receive 90 per cent of the income of the trust, he made no claim for the probate income except in his sixth annual account, and did not ask the court to distribute any part of it to the income beneficiaries. The court made the distribution without allocation.

With that history in mind, it now devolves upon the court to attempt to correct the evils resulting from the unselfish neglect of Mr. Hill as trustee.

On August 26, 1941, he filed his supplementary account as executor. His final and supplemental accounts and petition for distribution made no specific reference to probate income, nor did the decree. The decree of distribution dated August 27, 1941, distributed all the assets of the estate to John G. Hill, trustee, "in pursuance of and according to the provisions of the last will of said deceased." While, by the terms of the will, John G. Hill was life beneficiary to the extent of 90 per cent of the trust income, the balance thereof belonged to certain charities and should have been paid to them regularly by the trustee as provided by the will, including their shares of the income accrued during the period of probate.

When Mr. Hill as trustee filed his sixth account current and report, May 21, 1947, it contained the first request for instructions as to how the probate income should be allocated for accounting purposes. It recited that Hill had learned during the accounting period that in his first and final account in the probate estate he had erroneously charged certain items of expense to probate income which should have been charged to principal, namely: federal estate tax, state inheritance tax, attorney's and executor's fees. The document states: "Due to the erroneous method of rendering the two accounts there should have been income distributable to the trustee, herein, of $17,041.27, as detailed above. Instead, your petitioner as Executor, distributed no income to your petitioner as Trustee, but made the payments listed above out of the income account." This statement was followed by a request for instructions as to proper disposition to be made of the probate income. This was a beginning to undo the wrongs that had accumulated since the first account was filed. But it met with opposition. As remainderman under the trust, Mrs. Adams, a respondent herein, filed an answer in which she argued that the court was without jurisdiction to hear the petition and requested its dismissal. Thereafter on January 8, 1948, according to the minutes, the petition was denied "for lack of jurisdiction." Despite the denial for lack of jurisdiction, when the formal order was filed it contained no mention of the petition for instruction or of the probate income, but settled the report and account as rendered.

John G. Hill departed this life November 19, 1954. He was succeeded in office as Trustee by respondent C. Walter Hall. His second wife, Jessie Elder Hill, as his executrix, promptly filed her 14th account current and report on behalf of the deceased trustee to the date of his death. In that report, the probate income was allocated to the income beneficiaries. The two objectors, respondents Hall and Adams, took deadly aim at the 14th account current and effectively crippled the trust.

It is well to remember that by the Trust, at the death of John G. Hill, the major income of the trust estate goes to respondent, Gladys Hill Adams, until the trust terminates in 1960 when the corpus is to be distributed to Adams and her issue and to the charities named in the will. Pursuant to such provision, Mrs. Adams is now the principal income beneficiary. That lady, as remainderman of the trust, and C. Walter Hall, as successor trustee, both filed separate objections. Their chief criticism of the 14th account current was directed to the fact that the executrix had allocated the probate income to the income beneficiaries while Mr. Hall, as successor trustee, filed his 14th account current covering the same period as that covered by Jessie's account in which there was no allocation of probate income. Jessie, in turn, filed objections to Hall's account for failure to allocate probate income to income beneficiaries.

Upon such accounts and objections the matter came on for trial. The court found (1) that "by the order settling the final account and decree of distribution under will, signed and filed in this proceeding, August 27, 1941, the court intended to allocate to principal, capital, or corpus and not to income, the entire property distributed to the trustee"; (2) that Hill never appealed from this order and never claimed any allocation of the probate income to an income account until the filing of the trustee's sixth account current; and that in the order settling the sixth account current Hill "was not granted any relief on said request and prayer for allocation and no appeal was ever taken."

The court thereupon concluded, omitting irrevelant portions as follows:

"12. That the Order Settling Final Account and Decree of Distribution Under Will signed and filed in this proceeding on August 27, 1941, became final and is res adjudicata as to the rights of all beneficiaries under said Order and Trust.

"13. That the relief sought by * * * Hill in said Sixth Account Current with reference to the allocation of the probate income * * * is substantially the same relief as is sought by the Executrix of his estate in the present proceeding; that the Order * * * denied relief * * * that said Order is now final and is res adjudicata" as to Hill and his estate; that Hill acquiesced in the ruling on said order and his estate "is now precluded from claiming a distribution of probate income to an income account and charging same to capital or corpus.

"14. That in hearing said Sixth Account * * * the Court intended to and did pass upon the petition" for instructions and considered that the matter had been adjudicated in the Decree of Distribution and was therefore res adjudicata and that it lacked jurisdiction to again determine the question. The trial court further concluded that the order settling the sixth account should be amended *nunc pro tunc* specifically to state that the decree of distribution was res adjudicata.

This appeal is from the *nunc pro tunc* order and all other orders in connection with the 14th account current which hold there has been an adjudication of the question and which deny the allocation of the probate income to the income account of the trust.

Appellant contends that there has been no adjudication of the question of allocation of the probate income; that the court erred in making the *nunc pro tunc* order and that unless the will declares to the contrary, income goes to the income beneficiaries from the date of death and not from the date of distribution to the trustee, citing In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825. On the other hand, respondents assert that the matter is completely res judicata and that the estate of Hill is precluded from enforcing any right to probate income because of acquiescence, laches and estoppel.

[1–3] The decree of distribution did not determine the issue. The decree should not do so, for the allocation is to be made by the trustee, not the executor, even though they be the same person. In re Estate of Dare, 196 Cal. 29, 35, 235 P. 725. The order settling the sixth account current did not determine the question. There is nothing in the record to justify the *nunc pro tunc* order. It amounts to pure speculation as to what the judge who presided at the hearing intended to do. See Mather v. Mather, 22 Cal.2d 713, 719, 140 P.2d 808. Moreover, a good plea of res judicata does not raise a jurisdictional problem. Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640; 29 Cal.Jur.2d § 275, p. 256. Even if there had been acquiescence on the part of Hill, the original trustee, it would not be binding on the subsequent income beneficiaries or the charities or on the remaindermen. Inasmuch as the will does not provide to the contrary, the rule in Re Estate of Platt must be followed and the instant order must be corrected so that the income beneficiaries may be awarded the income derived during the period of probate. The decree of distribution did not make an allocation between the corpus and the income. It merely distributed the probate income and other property to the trustee as an aggregate. Thereupon the trustee became obligated to make the appropriate allocation. In re Estate of Dare, supra, 196 Cal. 29, 36, 235 P. 725; In re Estate of Marre, 18 Cal.2d 184, 190, 114 P.2d 586.

[4, 5] All the accounts of the trustee, except the sixth, treated the probate income as corpus and made no distribution to anyone. The contention that the orders settling those accounts are res judicata finds no support in law. So to contend raises an issue between the income beneficiaries on the one hand and the remaindermen on the other which is not present upon a trustee's accounting. In re Estate of Charters, 46 Cal.2d 227, 236, 293 P.2d 778; In re Estate of Roberts, 27 Cal.2d 70, 79, 162 P.2d 461; Church v. Security-First National Bank, 40 Cal.App.2d 529, 538, 105 P.2d 148; Landis v. Grimes, 38 Cal.App.2d 324, 327, 100 P.2d 1089; In re Estate of Blake, 157 Cal. 448, 456, 108 P. 287. "The whole purpose of the proceeding is to fix the amount for which the trustee, or personal representative of a decedent, is individually liable. If the trustee, or personal representative, has acted in an unauthorized manner and by reason thereof is liable in a greater sum than that for which he charges himself, his account will be surcharged." Willson v. Security-First National Bank, 21 Cal.2d 705, 713, 134 P.2d 800, 805. In re Estate of Eilert, 131 Cal. App. 409, 21 P.2d 630, is apposite. Four annual accounts of a testamentary trustee had been settled, thus approving payment to the income beneficiary of certain dividends upon corporate stocks in the mistaken belief that they constituted trust income in their entirety. After discovery of the fact that the dividends should have been apportioned because they partially represented capital, the trustee, upon its fifth accounting averred its mistake and sought instructions; the court found a bona fide mistake on the part of the trustee; held that $16,820.70 had been improperly paid to the life tenant but approved by the prior orders settling accounts; directed the trustee to commence proceedings to recover such sum and to hold it as corpus

when received. At the same time the court ordered the trustee to retain all trust income received and apply it toward repayment of the amounts mistakenly disbursed to the life tenant until the entire excess should be recouped. In affirming the order which thus settled the fifth account, the court said, 131 Cal.App. at page 414, 21 P.2d at page 632: "Appellant argues that, the order settling the four former accounts having become final, the court was without power to reopen the matters contained therein on the hearing of a subsequent account, and that the effect of the order here made is to set aside the former orders and reopen the matters therein adjudicated, which may not be done." And at page 416 of 131 Cal.App., at page 633 of 21 P.2d: "Having charge of this trust estate, it was the duty of the trial court, so far as it could, to see that the *corpus* or principal thereof was kept intact for the remaindermen. A complete administration of the trust estate involved this duty as well as seeing that income payments were made to the life tenant as he became entitled to them. The superior court not only had both probate and equity jurisdiction, but it had the undoubted right to exercise its equity powers in connection with, and as incidental to, its powers as a probate court. Having determined that this life tenant had received moneys to which he was not entitled and which belonged ultimately to the remaindermen, and having under its control at the same time other moneys to which the life tenant was entitled and also other property which could be expected to make further moneys available to him while the matter was still in charge of the court, all of which was a part of the same matter then pending before the court, it would be contrary to all principles of equity to hold that the court must first order the income in the hands of the trustee paid to the life tenant and that a separate action must then be brought to compel him to repay this money on account of sums theretofore mistakenly paid to him from the same fund and which the court had already found he was not entitled to retain. In re Estate of Whitney, 124 Cal. App. 109, 11 P.2d 1107. The entire matter being before the court, and all of the parties having been heard, the court had full power to complete the same and to render its order in accordance with the facts and the principles of equity involved."

In principle, the In re Estate of Eilert controls here. The power of the probate court to correct the mistake regardless of the settlement of the prior accounts was upheld to the fullest extent possible under the existing circumstances. The trustee was additionally authorized to pursue the recipient in a court of law for recovery of the funds mistakenly paid to him though the payment had been approved by court order. That such is the correct rule is emphasized by Scott on Trusts wherein it is declared that when a trustee has paid to one beneficiary what should have been held for or paid to other beneficiaries, the latter should receive the amount of the overpayment. This can be accomplished by compelling him who has been overpaid either personally to repay the amount of the overpayment or by requiring the trustee to withhold the amount from the share of the beneficiary who was overpaid unless the beneficiary has so changed his position that it would be inequitable to compel him thus to make restitution. (2 Scott on Trusts, § 254.2, p. 1443.) If such were not the practice, a beneficiary who has been overpaid would be unjustly enriched at the expense of those who have not been overpaid and who were not in any way responsible for the overpayment. In the instant case, there has been no payment and the problem is merely one of adjusting the trustee's accounts and then making appropriate disbursement of the accumulated fund.

[6, 7] At the time the sixth account was presented, the trustee requested instructions concerning proper allocation of the probate income. Following objections, counsel agreed upon the names of two cotrustees and the petition for instructions

was denied, as recorded in the minutes, for want of jurisdiction. The same minute order says, "Account Settled as Prayed." This was a clear segregation of issues, removing that of apportionment of probate income from the proceeding. There was no express or implied direction for an attorney order. The fact that the later written order of the judge made no mention of the petition for instructions on the matter of apportionment is not controlling. The minutes import absolute verity. Shellhaas v. Petrolane, Ltd., 98 Cal.App.2d 171, 174, 219 P.2d 797; People v. Fude, 117 Cal.App.2d 186, 189, 255 P.2d 23. This amounted to a withdrawal of the issue or a refusal of the court to pass upon it. In either event, the order is not res judicata on that issue. Cason v. Glass Bottle Blowers Association, 37 Cal.2d 134, 141, 231 P.2d 6, 21 A.L.R.2d 1387; 29 Cal.Jur.2d § 245, p. 207.

[8] From what we have said, it follows that the trial court erred in finding that the decree of distribution was res judicata as to allocation of probate income; that such court erred in finding it had no jurisdiction to consider the petition for instructions in connection with the trustee's sixth account current; that the trial court compounded this error in the order *nunc pro tunc*; and that the trial court erred in disallowing appellant's attempt to correct these previous errors by allocating the probate income to the income account of the trust in her 14th current account of the deceased trustee.

[9, 10] "The Findings of Fact, Conclusions of Law * * * Petitions For Fees, Petition for Distribution of Income, Objections, etc." are not appealable; hence the appeals therefrom are dismissed. The order settling fourteenth account is appealable. That portion of said order which purports to amend *nunc pro tunc* the order settling sixth account current of the trustee is reversed. Those portions of the order settling fourteenth account current which allocate the probate income to the corpus account of the trust are reversed, i.e.: paragraphs IX, X, XI, XII and XV, and the cause remanded to the lower court for further proceedings consistent with the views herein expressed.

FOX and ASHBURN, JJ., concur.

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150 Cal.App.2d 34

Vira J. HILL, Plaintiff, Cross-Defendant and Respondent,

v.

Thomas Price HILL, Defendant, Cross-Complainant and Appellant.

Civ. 8951.

District Court of Appeal, Third District, California.

April 9, 1957.

As Modified May 9, 1957.

Hearing Denied June 4, 1957.

Divorce proceeding by wife on ground of extreme cruelty. The Superior Court, Lake County, Lilburn Gibson, J., entered interlocutory decree of divorce, and husband appealed on ground that the apportionment of community property was unjust. The District Court of Appeal, Van Dyke, P. J., held that the award to wife of community property was improper and would be modified by awarding to husband realty on which office building was located, with rentals after date of decree, and by charging income tax debts against personalty awarded wife and making provisions for discharge of such debts from such source.

Interlocutory decree modified and, as modified, affirmed, and cause remanded with instructions.

1. Divorce 🔑286

In divorce proceeding, district court of appeal, as a reviewing court, has power and is charged with duty of changing of trial court's disposition of community property if, from review of the record, district court of appeal feels that the apportionment was unjust. West's Ann.Civ.Code, § 148.

2. Divorce ⚷286

Reviewing court, in exercising jurisdiction of changing trial court's disposition of community property in divorce proceeding, does not approach the task from standpoint of whether trial court has been guilty of an abuse of discretion. West's Ann.Civ. Code, § 148.

3. Divorce ⚷253

In divorce action by wife on ground of extreme cruelty, evidence was sufficient to afford good reason for awarding wife greater part of the community property.

4. Divorce ⚷252

Where divorce has been granted, and community property is to be apportioned, amount thereof, parties' ages, physical and mental condition, and ability to support themselves, and needs of minors, if any, are all higher in scale of importance than mere infliction of punishment for wrongdoing.

5. Divorce ⚷252

Where wife had been awarded $3,750 alimony pendente lite in divorce proceeding, award to wife of community property worth over $100,000, including two homes, office building, loans receivable, two automobiles, six insurance policies, and stocks and bonds was improper, in view of award to husband of community property consisting of $12,000 in accounts receivable, automobile worth $1,550, office equipment worth $1,500, and apartment furniture worth $2,897, even though husband's conduct afforded good reason for awarding wife greater part of the community.

◆

Paul Friedman, San Francisco, for appellant.

Lovett K. Fraser, Bruce B. Bruchler, Lakeport, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an interlocutory decree of divorce granted for extreme cruelty. Appellant herein contends the apportionment of community property made by the trial court is unjust and asks this court to modify the judgment in that respect, and to instruct the trial court to enter judgment as so modified.

[1, 2] There can be no doubt that this court, as a reviewing court, is by statute given the power on appeal, and is charged with the duty on appeal, of changing the trial court's disposition of community property if, from a review of the record, this court feels that the apportionment made is unjust. It is equally well settled that in exercising this jurisdiction on appeal, reviewing courts do not approach the task from the standpoint of whether or not the trial court has been guilty of an abuse of discretion. Section 148 of the Civil Code provides:

> "The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the Court."

The section has been in the code since 1872 and is in substantially the same language as a preceding section of the Practice Act enacted in 1857. The power has been exercised even on appeals based upon judgment rolls, as in Strozynski v. Strozynski, 97 Cal. 189, 31 P. 1130. There, the findings upon the subject of cruelty were that "the defendant has treated her with extreme cruelty, has been guilty of extreme cruelty to her, has beaten her and called her vile names within the year past." Said the court, 97 Cal. at page 191, 31 P. at page 1130:

> "By this section the legislature must have intended to subject the exercise of the discretion of the trial court, in dividing the community property, to revision on appeal for any apparent degree of error, though not amounting to

an abuse of discretion; otherwise, the section effected no change in, nor added anything to, the theretofore well-settled rule that the appellate court will not undertake to revise the exercise of discretionary power, except it appear that such power has been abused. And this construction of the section has been practically, if not expressly, adopted by this court." Citing Eslinger v. Eslinger, 47 Cal. 62, Brown v. Brown, 60 Cal. 579, and other cases.

In Nelson v. Nelson, 100 Cal.App.2d 348, 351, 223 P.2d 636, 638, the court said:

> "We grant appellant's contention that in a proper case, under Cal.Civ.Code sec. 148, this court has the power to revise the trial court's disposition of community property upon the granting of a divorce, even in cases where the trial court's action does not amount to an abuse of discretion."

In Falk v. Falk, 48 Cal.App.2d 762, 770–771, 120 P.2d 714, 719, this court said:

> "* * * This section confers upon the court a discretion in determining the amount of community property to be awarded to the respective parties when a divorce is granted on the ground of either adultery or extreme cruelty. That discretion must accord with justice in the light of the facts of the particular case and the condition or circumstances of the parties as provided by that section of the code. From the language of the second paragraph of that section [sec. 146], standing alone, it would seem that a division of the community property, under the circumstances contemplated therein, should not be disturbed on appeal except for an abuse of discretion. Section 148 of the Civil Code, however, confers authority on a court of review to revise the award of distribution of community property, regardless of the discretion vested in the trial court, so as to render justice pursuant to the provisions of section 146, as it appears to exist according to the judgment of the members of the reviewing court. In other words, the appellate courts have a discretion in dividing the community property pursuant to the mandate of section 146 which is paramount and superior to the discretion vested in the trial court under such circumstances."

[3] After a review of the entire record we have concluded that the apportionment of community property made under the decree appealed from ought to be modified.

Appellant and respondent herein were married September 22, 1922, and respondent began this action approximately 30 years later. There was one child of the marriage, a son, who, though a minor when the action was begun, had attained his majority during the pendency of the action. The marriage had been inharmonious during most of its existence, and appellant had from time to time and over varying periods of time been guilty of marital infidelity, much of which was known to respondent. For a considerable time appellant had also used intoxicating liquors, sometimes to excess, but had ceased to do so some six or seven years before the divorce action was begun. For some time before the action was begun, he had been guilty of violating his marriage vows by a continuing affair with a married woman, which infidelity did not cease with the filing of the action nor during the pendency thereof so far as the record discloses. Respondent testified, and appellant denied, that throughout the marriage relation there had been occasions when appellant would strike respondent, the number she testified to roughly approximating once a year during the existence of the marriage. We accept the fact of brutality as testified to by respondent and presumably found by the court. There was little if any conflict as to marital infidelity. Appellant's conduct cannot be condoned and affords good reason for awarding to the wife the greater part of the community property.

[4] Apparently the decisions have embraced the concept that it is proper in

such cases to visit punishment upon the erring spouse in the apportionment of community property. Nevertheless, divorce having been granted and the time having arrived for apportioning the community property, the amount thereof, the age of the parties, their physical and mental condition, their ability to support themselves, and the needs of minors, if such there be, are all matters ranking higher in the scale of importance than the mere infliction of punishment for wrongdoing.

[5] Alimony pendente lite was awarded to respondent, amounting to the sum of $3,750. The community owned a residence worth approximately $27,500; it was awarded to the wife. To her was also awarded a remainder interest in another home and an office building valued at about $20,000. She was given loans receivable in excess of $11,000, two automobiles, six insurance policies with the cash surrender value in excess of $12,000, stocks and bonds valued at $20,000 or more. Altogether there was given to the wife property well over $100,000 in value. Appellant was awarded something over $12,000 in accounts receivable, concerning which, however, it is probable, as remarked by the trial court, that only a small part would prove collectible. He was awarded one automobile with a blue book value of $1,550, office equipment worth $1,500, apartment furniture valued at $2,897. Upon motion for new trial, the trial court changed its award so as to give him the right of possession and use of the office building for so long as it was used by him in his profession as a doctor and surgeon, but in no event longer than January 1, 1965, conditioned, however, upon appellant's paying all taxes levied and assessed against the property, and keeping the building in good repair and properly insured. The order further provided, however, that two rooms then rented to a dentist continued to be rental units with the rent going to respondent. For almost the whole of the marriage respondent has pursued gainful employment and at the time of the entry of the interlocutory decree she was engaged as a government employee at $300 a month and in the possession of accrued and accruing retirement rights. She was in good health and expected to continue her employment. Both parties were 52 years of age. On the other hand, it appears to us to have been credibly shown, and there is no specific finding to the contrary, that appellant's health had materially deteriorated; that he had suffered a heart attack with the result that, under physician's orders, he had been compelled to curtail his practice as a doctor and surgeon to not exceeding four afternoons a week. There was non-professional testimony that for a number of years his vigor had diminished until the strain of taking care of a full practice was proving a heavy burden. One further fact is to be noted. There was owed by the community to the federal and state governments for unpaid income taxes more than $10,000. The court made no provision for discharge of these obligations from the community property, which in reality consists of the net after payment of community debts. McKannay v. McKannay, 68 Cal.App. 701, 707, 230 P. 214.

It is hereby ordered that the interlocutory decree be modified by awarding to appellant the real property on which is located the office building, with rentals accrued after the date of the decree appealed from, and by charging the tax debts above mentioned against the personal property awarded to the wife and making appropriate provisions for discharge of those debts from that source. Accomplishing this, unless the parties can agree upon a method, may require the court to take further evidence and make orders appropriate to that end. The cause is, therefore, remanded to the trial court with instructions to take necessary steps to secure the apportionment herein ordered. In all other respects the decree appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

149 Cal.App.2d 822

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eugene A. TALIAFERRO, Defendant and Appellant.

Civ. 9015.

District Court of Appeal, Third District, California.

April 5, 1957.

Rehearing Denied April 30, 1957.

Hearing Denied May 29, 1957.

Action by State for accounting as to rents received by defendant from certain parcels of real property during period between date of recording of deeds to State for nonpayment of taxes and time of redemption. The Superior Court, Sacramento County, Malcolm Glenn & Gordon A. Fluery, JJ., entered default judgment and defendant appealed. The District Court of Appeal, Peek, J., held, inter alia, that complaint was sufficient to state a cause of action and question of sufficiency of evidence could not be raised on appeal from a default judgment.

Affirmed.

1. Taxation ⚷739

In State's action to recover rents allegedly received by defendant from certain parcels of real property conveyed to State for nonpayment of tax, between date of recording deeds to State and time of redemption of property, complaint following the applicable code provisions was sufficient to state a cause of action. West's Ann.Rev. & Tax.Code, § 3651 et seq.

2. Pleading ⚷207

A special demurrer for uncertainty is not intended to reach failure to incorporate sufficient facts in the pleading but is directed at uncertainty existing in the allegations already made.

3. Pleading ⚷207

Where complaint was sufficient to state a cause of action and to apprise defendant of issues he was to meet, it was not subject to a special demurrer for uncertainty. West's Ann.Code Civ.Proc., § 427.

4. Limitation of Actions ⚷39(1)

State's action to recover rents allegedly received by defendant from certain parcels of realty conveyed to State for nonpayment of taxes during period between date of recording of deeds to State and time of redemption of property and asking for an accounting thereof, was an action for accounting and came within the four year limitations prescribed by statute. West's Ann.Code Civ.Proc., §§ 339, 340, 343.

5. Appeal and Error ⚷865

Where on appeal from order denying motion for change of venue and to dismiss complaint it was determined that certain county was the proper county for hearing of action, on appeal from default judgment taken in same cause of action, defendant could not challenge jurisdiction of the court. West's Ann.Const. art. 6, § 5.

6. Judgment ⚷106(1)

In State's action to recover rents that defendant allegedly received from real property conveyed to state for nonpayment of taxes where State after dismissal of defendant's appeal from order overruling motion for change of venue and motion to dismiss complaint, entered a default judgment, defendant failed to show that default judgment was obtained as a result of extrinsic fraud.

7. Judgment ⚷443(1)

If default judgment were obtained against defendant by means of extrinsic fraud, he could maintain an independent action in equity to secure relief.

8. Appeal and Error ⚷865

Upon an appeal by the defaulting party from a default judgment, question of sufficiency of evidence to support implied findings may not be raised since court may consider only the judgment roll and the question of jurisdiction.

9. Appeal and Error ⚷865, 907(3)

Where appeal is from a default judgment, the case is before reviewing court wholly upon the judgment roll and it must be assumed that the trial court's findings are supported by sufficient evidence.

◆

Eugene A. Taliaferro, San Pablo, in pro. per.

Edmund G. Brown, Atty. Gen., by Lucian B. Vandegrift, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a default judgment arising out of an action instituted by the State pursuant to the provisions of section 3651 et seq., of the Revenue and Taxation Code, relating to the rents which the State alleges were received by defendant from certain parcels of real property in Contra Costa County during the period between the date of recording of the deeds to the State and the time of redemption of the property.

The complaint alleges that on June 30, 1949, certain parcels of real property were conveyed to the State for nonpayment of taxes; that the deeds were thereafter recorded; that the State was the owner of and entitled to the rents, issues and profits from said parcels between the date of recordation and the date of redemption; that the defendant took the rents, issues and profits from said parcels during such periods and at all times retained the same, the exact amount and value of which were unknown to the State; and that plaintiff demanded of defendant an accounting, but defendant refused and paid plaintiff no part thereof. The prayer was for an accounting of said rents so received by defendant and for the sum then found to be due.

The defendant's motion for a change of venue and his motion to dismiss the complaint were denied. His demurrer was overruled and he was given 15 days in which to answer. His purported appeal from said orders was dismissed as not having been filed within the period prescribed by rule 2(b) of Rules on Appeal. People v. Taliaferro, 127 Cal.App.2d 462, 273 P.2d 920. On the day following the filing of our order of dismissal, defendant's default was entered by the clerk of the Superior Court of Sacramento County. Shortly thereafter that court, after hearing and considering the evidence introduced, entered its judgment in favor of the State, and this appeal by defendant followed.

Although much of what is now argued by defendant was previously decided against him, 127 Cal.App.2d 462, 273 P.2d 920, and although much of what is set forth in his briefs is completely outside of the record, this being an appeal on the judgment roll from a default judgment, nevertheless we have attempted to note and discuss the numerous contentions he has made as though they were properly before us.

Defendant's first contention appears to be four-fold: (1) That the complaint does not state facts sufficient to constitute a cause of action and is ambiguous, uncertain and unintelligible; (2) that several causes of action are not separately stated; (3) that the cause of action is barred by the provisions of sections 339 and 340 of the Code of Civil Procedure; and (4) that the court lacks jurisdiction of the subject matter of the complaint.

[1] The first portion of defendant's contention is wholly without merit. The allegations of the State's complaint follow the applicable code provisions and are substantially the same as those which the court held to be sufficient in People v. Maxfield, 30 Cal.2d 485, 183 P.2d 897.

[2, 3] The second item of defendant's first contention is likewise without merit. "A special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading, but is directed at the uncertainty existing in the allegations actually made." People v. Lim, 18 Cal.2d 872, 883, 118 P.2d 472, 478. Here the allegations are amply sufficient to apprise the defendant of the issues which he was to meet. Under such circumstances

we cannot say that the complaint is either ambiguous, uncertain or unintelligible. Nor can it be said that there was a misjoinder of the causes of action. Section 427, Code of Civil Procedure. Defendant's contention in this regard is merely a lengthy argument based upon suppositive circumstances.

[4] The action is not, as defendant next contends, one which comes within the limitations expressed in sections 339 and 340 of the Code of Civil Procedure. It is an action for an accounting and hence comes within the four-year limitation contained in section 343 of that code. Austin v. Harry E. Jones, Inc., 30 Cal.App.2d 364, 368, 86 P.2d 379.

[5] Defendant next has challenged the jurisdiction of the superior court to entertain this proceeding by reason of Article VI, section 5, of the California Constitution. However no jurisdictional question as contemplated by that constitutional provision is here presented. Even if we were to assume the validity of defendant's contention as to the question of venue, it would be meaningless since the prior judgment holding that the County of Sacramento was a proper county for the hearing of the action has long since become final. (People v. Taliaferro, supra.)

[6, 7] Defendant's next contention, that the default judgment was secured as a result of plaintiff's extrinsic fraud, is equally without foundation. In support he points to the fact that on March 3, 1954, and again on March 8, 1954, a deputy attorney general sent him a notice of the order of the court entered on February 16, 1954, denying his motions and overruling his demurrer. The notices were the same, except that the one of March 8 included the allowance to defendant of 15 days for his answer. It is his contention that in reliance upon the notice that his motion for a change of venue was denied on February 16, he did not file his notice of appeal until April 16. The record fails to support defendant in this regard. It shows that he did not rely upon such representation to such an extent that he was induced not to appear, and therefore did not have a full opportunity to litigate his defenses. It was not until September 16, 1954, when this court granted plaintiff's motion to dismiss defendant's appeal from the order denying his motion for a change of venue, that his default was entered; and, secondly, the default judgment was not entered against him until September 27, 1955. Furthermore, if the circumstances were as related by him, and if he had been prevented from presenting his case by reason of the extrinsic fraud of plaintiff, he still could have maintained an independent action in equity to secure relief, Olivera v. Grace, 19 Cal.2d 570, 576, 122 P.2d 564, 140 A.L.R. 1328; however he did not choose to do so.

[8, 9] His final contention is that there is nothing in the record to support the default judgment in the sum of $2,134.88, or in any sum, and that the relief granted to plaintiff was outside the scope of the prayer of the complaint. It is too well established to warrant citation of authority that "upon an appeal by the defaulting party from a default judgment the question of the sufficiency of the evidence to support the implied findings may not be raised. The court may consider only the judgment roll and the question of jurisdiction." Price v. Price, 140 Cal.App.2d 816, 817, 295 P.2d 489. It is the further rule that since the case is before us wholly upon the judgment roll, it must be assumed that the trial court's findings are supported by sufficient evidence. Willys of Marin Company v. Pierce, 140 Cal.App.2d 826, 296 P.2d 25.

Defendant has cited no cases in support of his final contention; that his rights under the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution were violated, his comment being that his argument in this regard "* * * would constitute more or less a summary of the material which has been set forth in the three preceding titles." Assuming such statement to include the contentions made by defendant and the arguments advanced in support thereof, then it would appear equally unnecessary for us to reiterate what has heretofore been said in regard thereto. Nevertheless we note that from our examination of the record, we find no support for this final contention by the defendant.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

* * *

149 Cal.App.2d 612

SEALITE, Incorporated, Plaintiff and Appellant,

v.

George FINSTER, Defendant and Respondent.

Civ. 17108.

District Court of Appeal, First District, Division 2, California.

April 1, 1957.

Action to recover certain equipment and materials and damages for defendant receiver's allegedly illegal taking thereof from plaintiff corporation. From a judgment of the Superior Court, County of Alameda, Richard H. Chamberlain, J., for defendant, plaintiff appealed. The District Court of Appeal, by the Court, held that corporation's sole reliance on use of seized chattels by its president-general manager on job which he contracted for corporation to do was insufficient to overcome trial court's findings, supported by evidence, that corporation was not owner of or in possession of chattels.

Judgment affirmed.

1. Appeal and Error 🔑676

On appeal from judgment for defendant receiver in action to recover certain equipment and materials and damages for defendant's allegedly illegal taking thereof from plaintiff corporation, trial court's denial of plaintiff's petition to intervene in action wherein defendant was appointed receiver cannot be reviewed by District Court of appeal, where neither petition, order denying it, nor any appeal therefrom is contained in clerk's transcript.

2. Pleading 🔑46

Where one sues or is sued in representative capacity, such fact must be averred, and mere statement of his representative character after his name will be treated as only descriptio personae.

3. Receivers 🔑168

A receiver is liable to persons not beneficially interested in receivership in his official capacity only.

4. Parties 🔑94(1)

The objection that one sued individually should have been sued in representative capacity or also in such capacity can be waived.

5. Parties 🔑95(6)

Where true liability, if any, of defendant, sued in individual capacity, is in representative capacity, amendment of complaint to that effect may be permitted.

6. Appeal and Error 🔑882(6)

Where parties to action and court proceed throughout trial on theory that certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy, though it was not actually raised by pleadings.

7. Appeal and Error 🔑889(2)

Where action against a receiver as individual to recover equipment and materials and damages for his allegedly illegal taking thereof from plaintiff corporation was tried on theory that lawfulness of defendant's action as receiver was before court, which found that all action of defendant in matter was in his capacity as receiver and made further findings as to legality of his action as such and conclusion of law that he was entitled to judgment as individual and in his official capacity, plaintiff's failure to amend complaint so as to support action against defendant as receiver did not prevent District Court of appeal from reviewing plaintiff's right as against receiver as such on appeal from judgment for defendant.

8. Appeal and Error ⚷901

An appellant contending that trial court's fact findings are not supported by evidence must point out evidence involved and show wherein it does not support findings.

9. Property ⚷10

The fact that person in possession of chattels is agent of corporation is inconclusive as to corporate or individual character of such possession.

10. Appeal and Error ⚷843(2), 1010(1)

On corporation's appeal from judgment for defendant receiver individually in its action to recover equipment and materials and damages for allegedly illegal taking thereof by defendant, corporation's sole reliance on its president-general manager's use of seized chattels on job which he contracted for corporation to do was insufficient to overcome trial court's findings, supported by evidence, that corporation was not owner of or in possession of chattels, so as to require affirmance of judgment on such ground and render finding that corporation was alter ego of such officer, against whom judgment was rendered in action wherein receiver was appointed, surplusage, evidentiary support of which need not be reviewed.

11. Judgment ⚷728

Where a trial court's finding is surplusage, unnecessary and immaterial, it is not conclusive in subsequent action and cannot operate as collateral estoppel.

12. Receivers ⚷168

A receiver, legally taking equipment or materials being used by judgment debtor on job of sealing leaky sewer lines under corporation's contract signed by such debtor as its president-general manager, was not liable to corporation for loss of slurry solution not taken by receiver, but coagulated in such lines, in absence of showing that receiver knew of presence thereof in lines or that his cooperation to save it was asked at any time when it could still be saved; such loss not being caused by any tort of receiver.

◆

Gordon K. Williams, Oakland, for appellant.

Alden Ames, Redwood City, for respondent.

PER CURIAM.

This is an action for the recovery of certain equipment and materials allegedly taken without right by defendant and damages for the illegal taking. Judgment was for defendant. Plaintiff appeals from said judgment and from an order denying its motion for a new trial. Said order being nonappealable, the appeal from it will be dismissed.

Defendant and respondent George Finster was duly appointed by the Alameda Superior Court a receiver in the matter of Gardner, cross-plaintiff, v. E. K. Ferguson; E. K. Ferguson, Jr., Gordon A. Ferguson and Reed C. Ferguson, co-partners doing business as Ferguson Bros., a co-partnership, cross-defendants, and a writ of possession issued from that court directing the sheriffs to render him assistance in reducing to possession all property belonging to the above cross-defendants including a large number of specifically listed items. The Fergusons were contractors. E. K. Ferguson, deceased, was the father of the other three cross-defendants. The four Fergusons and after the father's death the three sons had been in the contracting business together under different names among which E. K. Ferguson and Sons, and Ferguson Bros. Respondent tried with the help of detectives to find the large quantities of equipment belonging to the judgment debtors in different counties. Having been informed that Reed C. Ferguson was working with equipment at Milpitas in Santa Clara County, respondent went there accompanied by an officer of the Sheriff of said county. He found Reed C. Ferguson with equipment, among which was a tractor and trailer. Respondent told him: "We have come to take your equipment" and asked him to drive the tractor and trailer up the road. Reed answered: "Well, if you are going to take it, you drive it up." He did not protest or contend that any of the equipment belonged to others. The truck was registered in the name of Ferguson Bros. as registered owner and the tractor to E. K. Ferguson and Sons Company as registered owner and both were listed specifically in the writ of possession. There was bolted on the trailer, so as to form one unit with it, a large tank, which, invisible from the ground, proved to be partly filled with a milky fluid. There was another smaller tank on the ground. To the two tanks three pumps were firmly attached by pipe fittings. One of these pumps was mentioned in a chattel mortgage granted by Ferguson Bros. in 1953 and specifically mentioned in the writ of possession. Respondent found out later from the seller of the other two pumps that they also had been billed to Ferguson Bros. Also a pick-up truck registered in the name of Ferguson Bros. and some hose were taken then and there. When respondent saw Reed Ferguson in Milpitas and wished to ask him about the fluid in the tank, Reed evaded him.

At the time of the taking Reed Ferguson was president, acting as general manager of Sealite, Incorporated, the plaintiff, herein further called Sealite. Its business was the manufacture of special yarns and plugs for sewer construction and the sealing of sewer lines which do not meet specifications. The job Reed was working on was the sealing of leaky sewer lines which Sealite had contracted to perform. The fluid in the tank and, probably unknown to defendant, also partly in the sewer lines being treated, was a Slurry Solution used to seal the sewers which solidifies within two or three days. Sealite first filed a petition to intervene in the action of Gardner v. Ferguson, in which defendant was appointed as receiver, to have him ordered to restore the equipment and materials taken, which petition was denied, but thereafter Sealite was granted permission to file a separate action against George Finster as receiver on July 30, 1954.

The complaint in this action, filed September 2, 1954, mentions in its caption George Finster as defendant, without stating his capacity of receiver. It states in the complaint itself that George Finster is the duly appointed receiver in the matter of Gardner v. Ferguson, supra, but otherwise describes his acts as acts of defendant without stating that he acted in the capacity of receiver. The granting of the permission to sue the receiver is not alleged. The facts alleged are in substance that plaintiff on July 8, 1954 was the owner of certain enumerated chattels among which the two tanks and 2,550 gallons of sealing solution in them and nearly 10,000 gallons of sealing solution not in the tanks, that defendant wrongfully took possession of them without consent, their alleged value and alleged damage suffered by the necessity of renting other equipment and of doing of extra work because of the taking of the equipment. No right to the tractor and trailer and pick-up truck was claimed. Defendant denied the allegations of the complaint except that in his capacity as receiver in accordance with instruction of the court he seized part of the property mentioned in the complaint which was in the possession of Reed C. Ferguson, which was the possession of Ferguson Bros. whose property it was. As separate defenses it was alleged that Sealite was an alter ego of Ferguson Bros. and that defendant had offered to surrender possession of any property seized in which Ferguson Bros. had no interest.

In his opening statement counsel for defendant pointed out that on the face of the complaint George Finster was sued as an individual, and that under the case of Chiesur v. Superior Court, 76 Cal.App.2d 198, 172 P.2d 763, there is no personal liability of the receiver for his acts in his official capacity. Therefore, there would only be reason to proceed if the complaint was considered as directed against Mr. Finster in his official capacity, amendments to the complaint, which should be supplied in writing, taken for granted. Counsel for plaintiff, although leaving the decision as to personal liability of Mr. Finster to the court, had also given as his personal opinion that there was no such liability. The trial then proceeded as to all the issues made by the pleadings.

The court found in substance that whatever action defendant took in this matter was done as receiver in obedience to the directions of the court; that plaintiff is a corporation duly formed and existing and doing business under the laws of the State of California; that it is not true that plaintiff was the owner of the personal property claimed by it; that certain of said personal property was in the possession of Reed C. Ferguson, a member of the co-partnership known as Ferguson Bros. and that said possession in truth and in fact was the possession of said Ferguson Bros.; that George Finster in his capacity as receiver took possession of such personal property but that he did not do so wrongfully; that said property taken is the property of Ferguson Bros.; that plaintiff is the alter ego of Ferguson Bros. and that defendant had declared his willingness to surrender any property seized by him in which Ferguson Bros. had no interest. The conclusions of law were that defendant "George Finster both as an individual and in his official capacity as Receiver" is entitled to judgment and defendant to his costs of suit. The judgment is "that plaintiff take nothing by its complaint and the defendant, George Finster, have judgment * * * for his costs of suit".

Appellant's contentions on appeal are that it was error to deny its petition to intervene in the case of Gardner v. Ferguson; that it was unjust to attach significance to the fact that defendant in the caption of the complaint and in the prayer was not identified as receiver; that the finding that plaintiff was the alter ego of Ferguson Bros. was contrary to the evidence which did not show facts which permit the disregarding of the corporate entity; that it was error to find that the seizure was in accordance with the instructions of the court when the property seized was in the possession of a third person; that the offer to return property in which Ferguson Bros. had no interest was of no effect because it incorrectly put on appellant the burden of proving title although it was in possession at the time of the seizure.

Respondent takes the position primarily that the fact alone that the action was against George Finster as an individual who is not personally liable for acts done in his capacity as receiver is decisive of the case; further, that the fact that the property seized was found to belong to the judgment debtors was sufficient independent from the correctness of the finding regarding plaintiff's status as alter ego of Ferguson Bros. and finally that the latter finding is supported by the evidence.

[1] The denial of the petition in intervention in Gardner v. Ferguson is wholly outside the field of this appeal. Neither the petition nor the order denying it, which is not made in the same cause, nor any appeal from said order, is contained in the Clerk's transcript. Hence, this matter cannot be reviewed by us.

[2–7] The complaint in this case, designating George Finster as the defendant, sues George Finster individually, not in his capacity as receiver. Neither is it alleged anywhere in the body of the complaint that defendant acted in his capacity as receiver, only that he was appointed as such. Where one sues or is sued in a representative capacity, it must be averred that it is as such representative and even a mere statement of the representative character, following the name of the party, will be treated as only descriptio personae. Ferry v. North Pacific Stages, 112 Cal. App. 348, 352, 296 P. 679; 67 C.J.S., Parties, § 100, p. 1097; cf. Bank of America National Trust & Savings Ass'n v. Carr, 138 Cal.App.2d 727, 736, 292 P.2d 587, as to service on a defendant in a representative capacity. The point is important because a receiver is liable to persons not beneficially interested in his receivership, in his official capacity only. Chiesur v. Superior Court, supra, 76 Cal.App.2d 198, 201, 172 P.2d 763; McNulta v. Lochridge, 141 U.S. 327, 12 S.Ct. 11, 35 L.Ed. 796. However, it has been held that the objection of one sued individually that he should have been sued in a representative capacity or also in a representative capacity can be waived, 67 C.J.S., Parties, § 149, p. 1152, and, further, that if one has been sued in individual capacity whereas his true liability, if any, is in representative capacity, amendment of the complaint to that effect may be permitted. 67 C.J.S., Parties, § 85, p. 1080. In this case the trial undoubtedly took place on the theory that the lawfulness of the action of defendant as receiver was before the court. The court accordingly made a finding that all action of the defendant in this matter was in his capacity as receiver and further findings relating to the legality of his action as such and a conclusion of law that defendant as an individual and in his official capacity was entitled to judgment. "It is settled law that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by the pleadings". Miller v. Peters, 37 Cal.2d 89, 93, 230 P.2d 803, 806; 3 Cal.Jur.2d 608. The fact that the complaint was not amended so as to support an action against the defendant in his capacity as a receiver does not under the above circumstances prevent us from reviewing appellant's right as against the receiver as such. Cf. Rench v. Watsonville Meat Co., 138 Cal.App.2d 482, 487, 292 P.2d 85.

However, the court expressly found that appellant's crucial allegation that it was the owner of the personal property taken by the receiver was not true and appellant fails expressly to attack said findings as unsupported by the evidence and to sustain the burden incumbent on an appellant who attacks a finding on that ground. It must be pointed out from the outset that this issue is independent of and logically has priority over the issue whether plaintiff is the alter ego of Ferguson Bros. or not. It is found and undisputed that plaintiff is a corporation duly formed and existing and doing business under the laws of the State of California. Such a corporation can own property as alleged, whether or not for the purpose of its relation with Ferguson Bros. its corporate entity may be disregarded and its ownership be considered to be identical with the ownership of Ferguson Bros. If the plaintiff corporation is not the owner of the personal property claimed, it becomes irrelevant whether it is the alter ego of Ferguson Bros. or not.

[8–11] "It has been repeatedly held that an appellant who contends that findings of fact are not supported by the evidence, must point out the evidence involved and show wherein it does not support said findings". Industrial Indem. Co. v. Golden State Co., 117 Cal.App.2d 519, 538, 256 P.2d 677, 689. Appellant wholly failed to point out any evidence proving that it was the owner of the several chattels claimed by it. Appellant takes the position that it is under no duty to do so, contending that a receiver even after having obtained a writ of possession is not entitled to take property from the possession of a third party. Whatever there be of the soundness of said contention, appellant's complaint is expressly based on ownership, not on possession, which is not alleged. But even if the possession of the chattels when seized should be considered, appellant does not point out evidence in the record sufficient to show that at that time they were in its possession. The only showing in this respect in appellant's brief is the contention that its possession must be inferred from the fact that the equipment and material were then being used by Reed C. Ferguson on a job for which he had signed a contract as president-manager of appellant, and on which he was present as such. It does not follow that everything he had in his possession or was using then and there was in the possession of appellant. It could hardly be said that Ferguson's watch was in the possession of appellant even if he was using it in timing the operations on the job. One who is present in a special capacity is necessarily also present individually and can also have possession in his individual capacity. He can be working on a job which he attends in his special capacity also with equipment which he owns and possesses individually. If he has still another capacity he may also have ownership and possession in said other capacity. The fact that the person in possession is an agent of a corporation is inconclusive as to the corporate or individual character of the possession. However, the fact that Ferguson, although he was president-manager of appellant and the person who best knew in which capacity he possessed the chattels, did not protest when they were seized for his partnership debt and abandoned them to respondent receiver without asserting any right of appellant in them, when appellant had great need of them to continue the job without harmful interruption, tends to show that his possession was not the possession of appellant but that of him individually or of his partnership. The court so found. The findings of the court as to ownership and possession are further supported by the undisputed fact that the locomotive equipment used on the job was registered in names used by the Ferguson partnership and that on one of the pumps there used the partnership had granted a chattel mortgage (the complaint does not mention their taking or base any claim on it) and that the other two pumps were also billed by the seller to the judgment debtor. In view of the above, appellant's sole reliance on the use of the seized chattels by Reed C. Ferguson on appellant's job is wholly insufficient to overcome the findings of the trial court as to ownership and possession. The judgment must be affirmed on that ground. Because of the holding that appellant was not the owner and not in possession of the chattels, the finding that it was the alter ego of the judgment debtor is surplusage, the evidentiary support of which need not be reviewed. Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782; Shasta Water Co. v. Croke, 128 Cal.App.2d 760, 765, 276 P.2d 88. It may be noted that where a finding is surplusage, unnecessary and immaterial, such finding is not conclusive in a subsequent action, cannot operate as a collateral estoppel. 29 Cal.Jur.2d 208; Natural Soda Products Co. v. City of Los Angeles, 109 Cal.App.2d 440, 446, 240 P.2d 993.

[12] Appellant's contention that defendant is at any rate liable for the loss of some 10,000 gallons of Slurry Solution which allegedly was in the sewer lines at the time of the taking of the chattels, and which was not taken by the receiver but coagulated in said sewer lines, is wholly without merit. Respondent could only be responsible for said loss if it was caused by his tort. As we upheld the legality of the taking of the chattels there is no tort and no tort liability of defendant. We note that it does not appear that respondent knew of the presence of the fluid in the lines or that his cooperation to save it was asked at any time at which the fluid still could be saved.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

Catherine AITKENHEAD, Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Defendant and Respondent.

Civ. 17138.

District Court of Appeal, First District, Division 2, California.

April 10, 1957.

Rehearing Denied May 10, 1957.

Hearing Denied June 4, 1957.

Action for injuries suffered by pedestrian when she stumbled and fell at juncture of sidewalk and curb. The Superior Court, City & County of San Francisco, Albert C. Wollenberg, J., granted city's motion for judgment notwithstanding the verdict, and pedestrian appealed. The District Court of Appeal, Stone, J. pro tem., held that where city repaired sidewalk and curb on corner and failed to level them with adjoining sidewalk and curb, so that there were four levels of sidewalk and curbing, and failed to repair gap two inches wide and six inches deep between two sections of curbing immediately adjacent to sidewalk defect, and pedestrian allegedly was injured when her toe and then her heel were caught in depression, although one-half to five-eighths inch rise from sidewalk to curb level might be considered minor defect, when combined with contiguous curbing defect condition was formed which could not be held as matter of law to be trivial.

Judgment notwithstanding verdict reversed.

1. Municipal Corporations ⟾768(1)

Whether defect in sidewalk is trivial depends upon all circumstances surrounding existence of conditions in particular case. West's Ann.Gov.Code, § 53050 et seq.

2. Appeal and Error ⟾989

Appellate court in each case arising from alleged defect in city sidewalk must review evidence adduced in trial court and determine whether, in light of all surrounding circumstances, defect was minor or trivial as matter of law. West's Ann. Gov.Code, § 53050 et seq.

3. Municipal Corporations ⟾821(11)

Where city repaired sidewalk and curb but failed to level it with adjoining sidewalk and curb, so that there were four levels of sidewalk and curbing, and failed to repair gap two inches wide and six inches deep between two sections of curbing immediately adjacent to sidewalk defect and pedestrian allegedly was injured when her toe and then her heel were caught in depressions, although one-half to five-eighths inch rise from sidewalk level to curb level might be considered minor defect, combined with contiguous curbing defect condition was formed which could not be held to be trivial as matter of law. West's Ann.Gov.Code, § 53050 et seq.

4. Municipal Corporations ⟾768(1)

The rule that minor defects in city sidewalks due to continuous use, or action of elements, or other cause, will not necessarily make city liable for injuries caused thereby, does not contemplate city's being negligent in manner of repairing defects or failing to repair a patent defect because sidewalk or curbing happens to abut or traverse privately owned property. West's Ann.Gov.Code, § 53050 et seq.

5. Municipal Corporations ⟾821(6)

In action by pedestrian for injuries suffered when she stumbled and fell at juncture of sidewalk and curb, question whether defect in sidewalk and curb was dangerous defect was for jury. West's Ann.Gov.Code, § 53050 et seq.

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Lewis, Field & DeGoff, San Francisco, for appellant.

Dion R. Holm, City Atty. of City and County of San Francisco, Lawrence S. Mana, Deputy City Atty., San Francisco, for respondents.

STONE, Justice pro tem.

Appellant commenced this action seeking damages for injuries suffered by her when she stumbled and fell at the juncture of the sidewalk and curb at 28th Avenue and Quintara Street in San Francisco. Appellant charged respondent with liability under Government Code, § 53050 et seq., the statutory exception to the common law making a municipality liable for injuries resulting from a dangerous or defective condition of the public streets. Liability is contingent upon the injured party proving that the defect created a dangerous condition and that the city had notice or knowledge of the condition and failed to remedy it within a reasonable time.

Appellant was a housewife, 72 years of age at the time the accident occurred. Her husband's car was parked on 28th Avenue near the corner of Quintara. Appellant and her husband had been visiting in the home of appellant's niece. She had visited the home three or four times before the accident, the last visit being two weeks before the accident occurred. Appellant and her husband left the house between 8:30 and 8:45 p. m., February 6, 1954, to enter the automobile parked at the side of the curbing. As appellant placed her right foot near the place where the sidewalk and the curbing meet, her right toe went into a depression and as she stepped forward her heel caught in either the depression between the sidewalk and the curb or a gap between two sections of curbing which was immediately adjacent thereto. At the spot where the appellant caught her toe, the angular return of the corner sidewalk meets the 28th Avenue sidewalk and the angular return of the corner curbing meets the 28th Avenue curbing. There are four different levels, one between the contiguous sections of sidewalk, one between the contiguous sections of curbing, one between the 28th Avenue sidewalk elevation and curb elevation and a difference in elevations between the angular curb and the 28th Avenue curb.

Respondent admitted ownership of the street denied negligence and alleged contributory negligence. The jury brought in a verdict in favor of the plaintiff and defendant city moved for judgment notwithstanding the verdict which the court granted. From the judgment and order this appeal is taken.

No question is raised on this appeal as to notice. The minute order granting the order for judgment notwithstanding the verdict recites "The evidence shows conclusively that the defendant had notice of the defect". The only issue before this court on appeal is whether it can be said the defect in the sidewalk and curbing was minor or trivial as a matter of law. If the condition was minor, the city is not liable under the rule expressed by the Supreme Court in the case of Barrett v. City of Claremont, 41 Cal.2d 70, at page 73, 256 P.2d 977, at page 980, where the court said:

> "The plaintiff contends that, in any event, the question of whether the defect was trivial or substantial is one of fact, which the jury has resolved in her favor. But, as was said in Whiting v. City of National City, supra [9 Cal.2d 163, 69 P.2d 990], '[i]t is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continue use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect.'"

[1, 2] No rule is laid down in the Barrett case nor have we found any rule in the many cases cited defining the test to be applied by a reviewing court in deter-

mining whether a defect in a sidewalk is trivial as a matter of law, or whether the nature of the condition presents a question of fact for the trier of facts. Obviously, no fixed measurement in inches of height, depth, or width of an obstruction or depression can be adopted or established as a standard because a determination of whether a condition is trivial or not depends upon all of the circumstances surrounding the existence of the conditions in the particular case. Therefore, it is incumbent upon the appellate court in each case to review the evidence adduced in the trial court and determine whether in the light of all of the surrounding circumstances the defect was minor or trivial as a matter of law.

There were two defects in this case, one in the sidewalk and one in the curbing adjacent to the sidewalk. There was a variance between the level of the sidewalk and the level of the curbing. In addition, there was a variance between the level of the two curbs. Added to this, there was a gap between the two sections of the curb immediately adjoining the sidewalk defect which aperture was between one and two inches wide and roughly six inches deep. The plaintiff testified that as she was about to step off the sidewalk her toe caught as if it had sunk into a hole or depression and then her heel caught causing her to fall forward into the street.

[3] The condition of the sidewalk and curb sections can best be understood by looking at plaintiff's Exhibit I. In the light of the many cases cited by respondent, the one-half to five-eighths inch rise from the sidewalk level to the curb level might well be considered a minor defect, but the additional curbing defects must also be considered. The defects in the sidewalk and in the curbing are contiguous, and combined they form a condition which can hardly be said to be trivial as a matter of law.

An additional factor, aside from the physical condition of the area, must be considered. The city repaired the angular return and terminated the repair work at the point where the condition involved in this case existed. The city failed to level off the area where the two sections of sidewalk and two sections of curbing came together when repairing the angular return.

The record in this case discloses that the city did not repair the sidewalk or curbing beyond the angular return because of the mistaken belief of the Superintendent of Street Repair for the City and County of San Francisco that the city was not liable for a defective condition in a sidewalk or curbing in front of private property.

[4] The reasoning upon which the trivial or minor defect rule is based is expressed at page 73 of the Barrett case in the following language: "Minor defects due to continued use, or action of the elements, or other cause will not necessarily make the city liable for injuries caused thereby." [41 Cal.2d 73, 256 P.2d 980.] This does not contemplate the city being negligent in the manner of repairing defects or failing to repair a patent defect because the sidewalk or curbing happens to abut or traverse privately owned property.

Thus, the city by its manner of repairing the defective condition of the angular return contributed to the creation of the condition of which appellant complains. The city did not fill the gap in the curbing at the time the sidewalk was repaired, although the aperture adjoined the section of sidewalk which was repaired.

[5] Considering all of the facts surrounding the conditions at the time of the happening of the accident, we do not believe it can be said that the defect was minor or trivial as a matter of law. The question of whether it was a dangerous defect was a question of fact to be determined by the trier of facts. This question having been presented to the jury and the jury having found in favor of the plaintiff, it is ordered that the judgment notwithstanding the verdict be reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

149 Cal.App.2d 691

Helen L. O'FARRELL, as Administratrix of the Estate of Frances Rader Craig, a/k/a Frances Craig, Mrs. W. M. Craig and Frankie Craig, Deceased; Helen L. O'Farrell, Individually, Mary Alice Webber and Jean Watkins Rader, Plaintiffs, Cross-Defendants, Respondents and Appellants,

v.

AMERICAN TRUST COMPANY, a California corporation, Defendant, Cross-Complainant, Appellant and Respondent,

Robert Walker Craig et al., Cross-Defendants and Respondents,

Maud Agnew et al., Cross-Defendants, Appellants and Respondents.

Civ. 17120.

District Court of Appeal, First District, Division 2, California.

April 3, 1957.

Rehearing Denied May 3, 1957.

Action by heirs of trustor's wife against trustee to compel distribution to them of corpus of trust after death of wife, wherein trustee cross-complained by naming heirs of trustor, and devisees and legatees of trustor's will as defendants. The Superior Court, City and County of San Francisco, Preston Devine, J., entered judgment awarding corpus to devisees and legatees, and heirs of wife and heirs of trustor appealed. The District Court of Appeal, Brazil, J. pro tem., held that under trust agreement, providing that upon death of trustor's wife corpus and income should be subject to disposition according to probate law in force at that time, trustor intended probate law to mean law relating to wills if he died testate and law of succession as of death of life tenant if he died intestate, and where trustor had made will, his devisees and legatees were entitled to corpus.

Affirmed.

1. Trusts ⟾343

Where trust agreement provided that on death of trustor's wife trust corpus and income should be subject to disposition according to probate law in force at that time, upon death of wife, trustor's heirs and wife's heirs were not estopped to assert their claims to remainder because when order for payment of inheritance tax in trustor's estate was made, and when remainder was taxed to trustor's legatees, they made no protest. West's Ann.Prob.Code, §§ 101, 105.

2. Trusts ⟾119

In action to compel distribution of corpus of trust, which had been established in 1934 under agreement providing that on death of trustor's wife corpus and income should be subject to disposition according to probate law in force at that time, trustor's will made in 1939 and resultant decree of distribution were admissible to indicate proper distribution to be made of property in trust, if phrase "probate law" included disposition by will, and were generally admissible as they were pleaded in trustee's cross-complaint to which all parties answered. West's Ann.Civ.Code, § 1638; West's Ann.Prob.Code, §§ 101, 105; West's Ann.Code Civ.Proc., § 1860.

3. Appeal and Error ⟾1050(1)
Trusts ⟾119

In action to compel distribution of corpus of trust, which had been established in 1934, admission of trustor's 1939 will and resultant decree of distribution for the purpose of showing what trustor meant by what he said in 1934, was error, but not reversible error, where there was little, if anything, in will which could be of assistance in interpreting the trust agreement. West's Ann.Civ.Code, § 1638; West's Ann. Prob.Code, §§ 101, 105; West's Ann.Code Civ.Proc., § 1860.

4. Wills ⟾629

A remainder is deemed vested rather than contingent, if question be doubtful, and every testamentary interest will be presumed to be vested unless a contrary intention is clearly manifest.

5. Trusts ⟾124

Where trust agreement provided that upon death of trustor's wife corpus and income should be subject to disposition according to probate law in force at that time, trustor intended "probate law" to mean law relating to wills if he died testate, and law of succession as of death of life tenant if he died intestate, and therefore devisees and legatees of trustor's will, rather than heirs of trustor's wife or trustor's heirs, were entitled to corpus and income of trust after wife's death. West's Ann.Civ.Code, §§ 866, 1638; West's Ann.Prob.Code, §§ 101, 105; West's Ann.Code Civ.Proc., § 1860.

See publication Words and Phrases, for other judicial constructions and definitions of "Probate Law".

6. Appeal and Error ⚷877(2)

In action by heirs of trustor's wife to compel distribution to them of corpus of trust, which was established by agreement providing that upon death of wife corpus should be subject to disposition according to probate law in force at that time, fact that four of twenty-four of trustor's legatees to whom judgment awarded corpus were dead could not be complained by heirs of trustor's wife or trustor's heirs. West's Ann.Civ.Code, §§ 866, 1638; West's Ann. Prob.Code, §§ 101, 105; West's Ann.Code Civ.Proc., § 1860.

◆

Barrett & Harkleroad, San Francisco, for appellants Helen L. O'Farrell, as Administratrix of Estate of Frances Rader Craig, also known as Frances Craig, Mrs. W. M. Craig and Frankie Craig, Deceased; Helen L. O'Farrell, individually, Mary Alice Webber and Jean Watkins Rader.

Brobeck, Phleger & Harrison, San Francisco, for appellant American Trust Co.

Alden Ames, Redwood City, guardian ad litem for appellant George William Higginson.

Pillsbury, Madison & Sutro, Maurice D. L. Fuller, Francis N. Marshall, Frank M. Bowen, Jr., San Francisco, for appellants James Agnew, Maurice Cecil Higginson, Beatrice Mabel Higginson Naylor, Sarah Sophia Higginson and Ida Higginson Latimer.

Morrison, Foerster, Holloway, Shuman & Clark, W. T. Fitzgerald, Robert S. Beach, San Francisco, for appellant Florence McKenna.

J. Thaddeus Cline, San Francisco, for appellants Maud Agnew and John Agnew.

John B. Ehlen, San Francisco, for respondents Margaret Wallace Hunter, Annie Campbell Bullick, Edna Mary Baxter, Helen Morton Mee, James Morton, Wallace Bruce Morton, Estate of Wallace Morton and Estate of Jane Morton Barry.

Warren H. Atherton, Jack C. Dozier, Stockton, Leonard Ratner, Los Angeles, of counsel, for respondents Robert Walker Craig, Winifred J. McCarthy, Dorothy Louise Milligan, Herbert Walker Craig, Jr., Margaret Craig Shurtz, Bernice Annette Craig, as Executrix of Estate of Harold Carter Craig, Sr., Deceased, and Mildred A. Craig, sole distributee of Estate of Howard Wilson Craig, Deceased.

BRAZIL, Justice pro tem.

The several appeals are taken from a judgment based on an interpretation of an inter vivos trust agreement. A complaint was filed by plaintiff against the American Trust Company, as trustee, to compel distribution directly to her of the corpus of the trust on the death of the last beneficiary. The trustee cross-complained by naming the heirs of the original trustor, and the devisees and legatees of said trustor's will, as parties defendants; and asked the court to determine the several claims by a court ruling on the original trust agreement. The appeal of the American Trust Company, as trustee, is of a technical nature; and, having nothing to do with the respective rights of the plaintiffs and the two groups of defendants, will be disposed of at the conclusion of this opinion.

William Martin Craig made an agreement on July 17, 1934, with the American Trust Company to convey valuable real property to it, in trust for certain expressed purposes. The conveyance was actually made on June 23, 1938; and on November 6, 1939, he made his will. The corpus of the trust was the trustor's separate property, he having married Frances Craig shortly before the date of the original trust agreement. No changes were made in that agreement from the time it was signed until Mr. Craig died, childless, on October 13, 1942. The wife survived him; and she died intestate on January 26, 1954, leaving as her sole heirs three children by a former marriage. Helen O'Farrell appears here as the original plaintiff in her capacity as administratrix of her mother's estate.

The respondents are the persons who claim the remainder as a class of devisees and legatees of the trustor. They are 24 in number, representing 20 living people and estates of four persons named in the will who died after the trustor and before the beneficiary, Mrs Craig. One group of appellants consists of nine first cousins of Mr. Craig who claim the property as members of a class who otherwise would get the property as heirs under the laws of succession if there had been no will; and the other appellant is the administratrix of the estate of Mrs. Craig representing herself and two others as natural children of Mrs. Craig in whom they claim the property is vested before her death. For the sake of brevity only, and not by way of accurate description, the respondents will be called legatees, the nine appellants, heirs, and the other appellant, the widow.

The dispute arises from an interpretation of paragraph 11 of the trust agreement, by the provisions of which each of these parties claims to be entitled to the corpus of the trust.

> "Eleventh: Upon the death of said Frances Rader Craig, unless said trust is sooner terminated as herein provided, said trust shall terminate and all property then in said trust, both corpus and income, after the payment of all expenses of said trust shall be freed therefrom and if said trustor shall then be dead, shall be subject to disposition according to the probate law of the State of California in force at that time."

Over objection of both appellants, the trial judge admitted in evidence as an aid in construing the foregoing paragraph, as indicated in his written opinion, the 1939 will of Mr. Craig, and the report of the inheritance tax appraiser in his estate. Respondent claims the result should be the same whether or not the court was correct in its ruling on the admissibility of such evidence. Each appellant takes a position that there is no ambiguity in paragraph 11, that "according to the probate law" means according to the laws of succession. The widow says the remainder was vested upon trustor's death in her as being trustor's sole heir and so her estate gets the property. The heirs maintain the remainder was vested in them when Mrs. Craig died and, therefore, being members of the class described as next of kin or heirs, the property is lawfully theirs.

The only issue before this court is the interpretation of the quoted dispositive clause of the inter vivos trust agreement, other than issues pertaining to the admission of evidence. Actually, the parties have narrowed the first issue even further to an interpretation of the expression "according to the probate law of the State of California in force at that time". As will be explained later, neither appellant can afford to take the position that the clause in question is so ambiguous as to defy reasonable construction for in such case neither could ultimately prevail.

[1] Despite the express statement of the trial judge appearing in his written opinion that he did not consider the payment of the inheritance tax on the whole estate of the testator-trustor, including the trust fund, as any aid to construction; and that the elements of estoppel were lacking, the respondent persists that both such special defenses are justified by the record. "The order fixing inheritance taxes, which may incidentally determine questions in regard to succession and beneficial ownership, is not binding except for tax purposes as between those who claim the estate, whether as heirs, legatees, or beneficiaries of a trust extrinsic to the will." In re Estate of Rath, 10 Cal.2d 399, 406, 75 P.2d 509, 512, 115 A.L.R. 836. The appellants are not estopped

to assert their claims, simply because when the order for payment of inheritance tax in Mr. Craig's estate was made, and when the remainder was taxed to the legatees, they made no protest. As the trial court stated—The required elements of estoppel are lacking.

We think it clear that the court was called upon, in construing the meaning of paragraph 11 of the trust agreement, to find out what the trustor meant by what he said at the time he said it on July 17, 1934. It was not called upon to find out what he could or should have done. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity", Civil Code, § 1638. "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret". Code of Civil Procedure, § 1860.

Both appellants assert it was error to use the will of 1939 or the circumstances surrounding its execution, as an aid in the construction of paragraph 11, claiming that trustor's state of mind or his conduct in 1939 has no bearing whatever on what he intended in 1934 by what he actually said in the trust agreement. In justifying use of the latter will to assist in the interpretation of the trust agreement, the court said "In any event, assuming that section 101 of the Probate Code is not applicable, surely the will may be looked to as extrinsic evidence tending to explain ambiguity in the trust. Security [First Nat. Bank of Los Angeles] v. Ogilvie, 47 Cal.App.2d 787 [119 P.2d 25]." That case does not support the court's observation for there the court was dealing with a contemporaneous property settlement agreement; not an unconnected instrument of a much later date. Respondent cites many other cases for the same purposes, but none of them goes so far as to say that a later executed unconnected document may be received in evidence to construe an earlier ambiguous statement. Limitation of space precludes a discussion of each case so cited and yet differentiation is apparent as is shown in the appendix to appellant-heirs' brief. One of the cases cited by respondent in support of the court's ruling is In re Estate of Sargavak, 35 Cal. 2d 93, 216 P.2d 850, 21 A.L.R.2d 307, which, however, actually points out the distinction which the trial court and respondent have failed to make. We quote from page 96 of 35 Cal.2d, page 852 of 216 P.2d thereof:

> "The extrinsic evidence in this case consists for the most part of the oral declarations of the testatrix before and after the execution of the instrument in question. Such declarations, whether made at, before, or after the execution of the instrument are admissible, if offered for the purpose of ascertaining the intent with which the instrument was executed [citations], and not for the purpose of proving the meaning the testator attributed to specific provisions of an admitted will [citations]. 'Such * * * declarations of intent to make a will are admissible when the attempt is not to explain an ambiguity but to show the testamentary character of a letter.' "

Oral declarations of a decedent, whether made before, at the time, or after, are excluded in connection with a matter of construction of a document unless they be instructions to the scrivener. Probate Code, § 105. "An exception to the exclusion of oral declarations of the testator is his instructions to a scrivener when offered to resolve an ambiguity in a will concerning the amount of a bequest." In re Estate of Resler, 43 Cal.2d 726, 734, 278 P.2d 1, 6.

[2, 3] The will of 1939 and the resultant decree of distribution were admissible to indicate the proper disposition to be made of the property in the inter vivos trust if the phrase "probate law" included disposition by will. They were also generally admissible, as they were pleaded in the trustee's cross-complaint to which all parties answered. While the evidence here is admissible for certain purposes, it was not ad-

missible for the purpose of showing what Mr. Craig meant by what he said in 1934 at the time he said it. As a matter of fact we are inclined to agree with appellants that there is little, if anything, in the will which can be of any assistance in interpreting the inter vivos agreement. A reversal is not a necessary result of holding it was error to admit the will in aid of interpretation of the earlier trust agreement.

It is the claim of the widow that the crucial eleventh paragraph expresses the meaning that the trust property upon the death of the life tenant Frances Rader Craig goes to the heir or heirs of the trustor; that Frances was his only heir; that the property, therefore having at William's death vested in his sole heir, as a vested remainder in her, should be distributed to her heirs, not to the heirs or to the legatees of William. The widow-appellant can prevail only if it be established that Frances had a vested remainder, for her heirs would not be entitled to anything "under probate law" if it vested after her death.

[4] The widow argues that one of the strongest rules of the law is that of favoring the early vesting of future interests, and that, applying that rule to this trust, it should be held that the corpus vested in Frances as early as possible which would be when the trustor died. A remainder is deemed vested rather than contingent, if the question be doubtful and every testamentary interest will be presumed to be vested unless a contrary intention is clearly manifest. In re Estate of Rider, 199 Cal. 724, 251 P. 799.

However, the "early vesting" rule is not the cardinal rule of construction. "In the construction of wills the paramount rule, to which all others must yield, is that a will is to be construed according to the intention of the testator, as expressed therein, and this intention must be given effect as far as possible." In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893, 896.

The following considerations here set forth seem to compel a finding that the trustor did not intend to create a trust the remainder of which vested in his wife. At the end of her life estate, she would be dead and so could never personally enjoy the remainder. It is argued by the widow that, if there is a gift to a class following a life tenancy, the life tenant, if a member of the class, participates by representation in the remainder, citing Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 177 N.E. 621 and Crowell v. Chapman, 257 Mass. 492, 154 N.E. 397. However, in Re Estate of Wilson, 184 Cal. 63, 193 P. 581, where the testatrix had left a life estate to her son, remainder "among my heirs", the estate was held to go to testatrix' cousins, her heirs as of the time of her son's death, rather than to her son's (her only heir at her death) heir, his wife. In the instant case, as in the Wilson case, there was only one heir (Mrs. Craig) at trustor's death and, similarly, the inter vivos trust agreement in other paragraphs used the plural when referring to beneficiaries and remaindermen.

The language referring to the remainder certainly speaks *in futuro*. It refers to the probate law at the time of the wife's death. It is true that the probate code is amended rarely, but that does not mean that it cannot be amended. Why would a trustor, intending to create a presently vested interest, use words of futurity, which could only defeat his purpose? The words of futurity, so used, make it impossible for the remainder to have vested upon the death of the trustor.

In re Estate of Newman, 68 Cal.App. 420, 229 P. 898, 903, wherein the words " 'heirs at law wherever and whoever they may be' " were held to mean "heirs" in the technical meaning of the word, no special significance was attached to the phrase " 'wherever and whoever they may be' ". The court construed the last quoted phrase to be an ordinary expression of a testator who expected to live for yet some time, and did not of themselves indicate futurity of vesting.

A determination that the widow did not acquire a vested remainder, so that her children who are unrelated to the trustor, would not take the corpus of the trust, finds support in the general presumption of law that one intends to bequeath to one's heirs by blood, rather than to strangers. Whatever has heretofore been said about the widow's appeal compels affirmance of the judgment against her without regard to a judicial interpretation of the phrase "according to probate law". An additional ground appears for the same result, if the trial court is correct in finding that "according to probate law" applies to testate as well as intestate succession.

Self-interest requires each appellant to assert that the wording of paragraph 11 is not ambiguous, and that its meaning can and should be ascertained from the instrument alone. If it is so ambiguous that its meaning cannot be found, then the property would go to the executor of trustor's will under the rule that a trustor retains all of the trust property not embraced in the trust and not otherwise disposed of, Civil Code, § 866. The same thing would occur if the trust agreement were construed to give trustor a power of appointment, which power would have been exercised by the will which was admitted to probate.

The appellants and respondents appear agreed that a remainder was created, that the property should pass directly to the persons entitled to it under paragraph 11 of the trust agreement as remaindermen; and that each party represents a class ascertained by resort to the expression "according to probate law", whatever that may mean. The widow and the heirs say that means them because the expression means "under the laws of succession"; and the widow says her estate should get it because the remainder vested on the trustor's death, and the heirs say "not so", it is theirs because the remainder was contingent on the death of Mrs. Craig, the life tenant, at which time the members of the class could be ascertained. The respondent legatees say they are the remaindermen ascertained at the death of Mrs. Craig by resort to a will executed by the trustor. The widow-appellant does not seriously contend that the dispositive clause of paragraph 11 meant a disposition to the heirs of the surviving life tenant directly as a class of remaindermen, for it is apparent that the trustor was referring to himself, rather than his wife, when making disposition of the remainder.

"According to probate law" is not an abstruse expression which should cause any great difference of opinion as to its meaning. The fact that counsel has been unable to find a case defining the meaning of the exact words used proves nothing; for it is just as likely that no exact case appears for no one thought the expression ever needed a judicial definition as it is that the exact wording has never been used before to make a disposition of a remainder. The expression probate law or probate matters are certainly not unfamiliar terms.

"'Matters of probate' *include* the ascertainment and determination of the persons who succeed to the estate of a decedent, *either as heir, devisee, or legatee*," Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459.

[5] The trial judge is correct in referring to the meaning of "according to probate law" when he stated "the words refer to the *probate* law. The statute of succession is but part of the probate law. The 'probate law' relates to wills, the manner of executing and proving and interpreting them, as well as to intestacy. Here, again, if the trustor had chosen to leave the remainder to 'those who should be my heirs, at the time of the death of the life tenant', he could have said so. When he referred to the probate law, he meant the law relating to wills if he died testate, and the law of succession as of the death of the life tenant if he died intestate. We must judge what he intended by what he said". This understandable and concise statement requires no elaboration.

If "according to probate law" be an unambiguous expression, as contended by both the appellants, it cannot reasonably be said that getting property by legacy under a will is not according to probate law; and only getting it by way of intestate succession is according to probate law. Appellant-widow in her opening brief first observes under the heading "What is the True Meaning of 'Probate Law'?", that "The trial Court took the position of assuming its usual meaning, that it is that body of law pertaining to all phases of the law regarding Wills, administration of estates, succession of property upon death and matters of guardianship." That is what courts are supposed to do in finding out what a person meant by what he said, either orally or in writing, Civil Code, § 1644.

[6] Appellants contend the judgment is inconsistent in that four of the 24 persons who were named in Mr. Craig's will died after him and before the death of his wife; so that the persons not living at the time of ascertainment of probate law in force at the time share in the property as remaindermen. If this be contradictory, it would be for the remaining 20 legatees to complain and not for these appellants, who are not thereby aggrieved. The judgment is not, however, inconsistent for the property goes to a class which under the probate laws in force when Mrs. Craig died is disclosed by the will and decree of distribution introduced in evidence.

The correctness of the judgment can be ascertained by making and answering the following separate inquiries: When the persons named as legatees in the trustor's will got the corpus of the trust, was the membership of their class as remaindermen determined in accordance with probate law? If the heirs, as distinguished from legatees (the trustor having left a will), had obtained the corpus by determining who they were under the laws of succession, would that determination have been according to probate law?

According to probate law, property of a decedent is distributed to the legatees and devisees named in a valid will, rather than to those persons who would otherwise inherit under the laws of succession. The trustor in the inter vivos trust agreement said the members of the class of remaindermen would be determined "according to probate law", not "according to probate law minus the parts thereof relating to wills".

The American Trust Company, as trustee, appeals in order to clarify its rights and duties in respect to the trust property and to make sure that jurisdiction is retained to settle accounts and award compensation for services performed. The suggested amendment, while correct in its phrasing, is unnecessary for the judgment as it now stands includes all its suggestions at least by necessary implication. Appellant-trustee shall not be entitled to nor shall it be charged with any costs on appeal.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

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150 Cal.App.2d 30

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clyde MATTHEWS, Defendant and Appellant.

Cr. 5783.

District Court of Appeal, Second District, Division 3, California.

April 9, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., of violating Penal Code, § 288, and he appealed. The District Court of Appeal, Parker Wood, J., held that it would have to be assumed, in absence of statement by trial judge to contrary, that he had considered all of evidence received, and held that trial judge's statement, that a prior case, involving admissibility of psychiatrist's testimony as to disposition to commit such offense, was "not at all in point," did not necessarily indicate that trial judge had not considered, in the instant case, a psychiatrist's opinion that defendant was not disposed to commit offenses of nature of those with which he was charged.

Affirmed.

Criminal Law ⚷260(11)

It would have to be assumed, in absence of statement by trial judge to contrary, that he had considered all of evidence received, in prosecution for violating Penal Code, § 288; and trial judge's statement that a prior case, involving admissibility of psychiatrist's testimony as to disposition to commit such offense, was "not at all in point," did not necessarily indicate that trial judge had not considered, in the instant case, a psychiatrist's opinion that defendant was not disposed to commit offenses of nature of those with which he was charged. West's Ann.Penn.Code, § 288.

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Kates & Kates, San Fernando, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In a trial without a jury, defendant was convicted of two counts of violating section 288 of the Penal Code. Proceedings were suspended and probation was granted. He appeals from the judgment, sentence and order granting probation.

Appellant contends, in effect, that the court erred in not considering the testimony of a psychiatrist.

In the summer of 1955, Jean, a girl 10 years of age, her brother Victor, and her girl friend Vickie were on a "hike" on a road near Granada Hills. While appellant, who was a foreman of ranches in that area, was driving a truck on that road he overtook the hikers and, upon his invitation, they rode with him to a pond on one of the ranches. Appellant took his trousers off and, while wearing his shorts, waded in the pond. He exposed himself. The children also waded in the pond, wearing their underclothing. After appellant and the children had put on the clothing which had been removed, appellant carried Jean to a tree stump where they sat together. She testified that he asked her if she was growing, and he pulled up her shirt and looked at her breasts.

About a week later, appellant went to Jean's house and took her and her brother to the pond.

According to her testimony, he then committed acts which were a violation of said section 288.

About two or three weeks later, appellant went to Jean's home and took her, in his truck, to the middle of an orange grove. According to her testimony, he then committed acts which were a violation of said section 288. She also testified that he told her she was his second wife; and he told her not to tell her mother what had occurred.

In November, 1955, Jean and her girl friend Vickie walked to appellant's house and played there for a while and then they started looking and calling for him. She testified that he called out that he was in the blacksmith shop; when they went into the shop they saw appellant who had his pants and shorts down around his knees.

A police officer, who arrested appellant, testified that he told appellant he was charged with molesting the girl; that appellant said: he had been awfully careless but he did not think too much about it because they seemed like a family; he went swimming in the pond with the children, and he and they had their shorts on; he did not expose himself intentionally; he told the children not to tell their parents; he felt Jean's breast on one occasion; he had called Jean his wife.

Appellant testified that in July or August 1955, while he was going to one of the ranches, Jean and her brother stopped him and said they were going to the ranch for a picnic lunch; he suggested that they go to a certain place by some trees; they got in his truck and he took them to that place; in the afternoon he took them home; two or three weeks later he took the children to the pond; there were sticks and rocks in the pond; he took his pants off and, while wearing his shorts, waded in the pond and removed sticks and rocks; the children also waded in the pond, wearing their shorts; with reference to the incident at the blacksmith shop or garage, he had been doing some carpenter work which required overhead hammering, and splinters and flakes of old paint had fallen under his shirt, and in order to remove the splinters and flakes he let his pants down and at that time the girls came into the garage; he never intentionally exposed himself; he did not commit the acts, referred to by Jean, which allegedly were violations of section 288; he did not ask her if her breasts were growing; he had a conversation with Jean and Vickie about their breasts, but they began the conversation; on one occasion, while Jean had her shirt pulled up, he made a circle with his finger where the breast would eventually be; on one occasion he helped her pin her shorts with a safety pin.

It was stipulated that Dr. McNeil, who was called as a witness by appellant, was qualified as a medical doctor. He testified that he is a psychiatrist; he performed a regular psychiatric examination of appellant. Counsel for appellant asked the doctor if he had an opinion as to whether or not the appellant is disposed to become involved in sexual offenses with children. He replied that in his opinion appellant is not disposed to such acts.

The only contention of appellant is that "The Trial Court Committed an Error of Law in That the Court, in Effect, Instructed Itself as the Trier of the Facts, Not to Consider the Testimony of a Capable Psychiatrist." The contention is based upon a statement of the judge regarding the case of People v. Jones, 42 Cal.2d 219, 266 P.2d 38. While Dr. McNeil was testifying, counsel for appellant asked for permission to submit "a trial brief on the case of 'People against Jones'?" The judge replied that he had read that case. After the parties had rested, and while the judge was making statements regarding the case—just prior to rendering the decision, he said, among other things: "Well, as I stated yesterday, the Court has read that Jones case before and made it a point to read it again since the trial of this matter started, and it isn't at all in point in this matter at all, because in the Jones case there was the absolute and forthright denial by the defendant that he had done anything that the complaining witness had said that he had done. Whereas in this case, this defendant has very frankly admitted up to certain points that he did what the complaining witness says he did. I might agree with the defendant that he used poor judgment. And I am satisfied, from the evidence, that he hasn't * * * been entirely truthful with us, frank in everything that is in his mind as to the interpretation of the things that he did do." Appellant states that it is clear that when the court stated that the Jones case "isn't at all in point in this matter at all," the court thereby excluded from its consideration the opinion of Dr. McNeil that appellant was not disposed to become involved in sexual offenses with children. In the Jones case, wherein the charge was violation of said section 288, it was held that the trial court erred prejudicially in rejecting an offer of proof that a psychiatrist would testify that the defendant was not disposed to commit such type of offense. In the present case, the trial judge received the testimony of Dr. McNeil that in his opinion the defendant was not disposed to become involved in sexual offenses with children. The judge did not state that he would not consider the testimony of Dr. McNeil. The fact that the judge stated that the Jones case was not in point did not necessarily mean that the testimony which had been received would not be considered. The judge pointed out what he considered to be distinguishing features of the cases, namely, that in the Jones case the defendant denied all the acts asserted by the complaining witness, and in the present case the defendant admitted up to certain points that he did what Jean said he did. The remarks of the judge, in the present case, might indicate he considered that the admissions by defendant "up to certain points" refuted the opinion of the doctor by revealing a disposition on the part of defendant to become involved in such offenses. It is to be assumed, in the absence of a statement by the judge to the contrary, that he considered all the evidence which was received. The contention of appellant is not sustainable.

The judgment is affirmed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.

149 Cal.App.2d 867

FARMER BROTHERS COMPANY, a corporation, Plaintiff and Respondent,

v.

Charles KIERNAN, individually and doing business under the fictitious firm name and style of Tavern Waffle Shop, Defendant and Appellant.

Civ. 9056.

District Court of Appeal, Third District, California.

April 8, 1957.

Action against bar owner for value of coffee sold by plaintiff to restaurant which adjoined bar with connecting door and from which food was brought to be served in bar. The Superior Court, San Joaquin County, George F. Buck, J., rendered as judgment for plaintiff, and defendant appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence including presumption that bar owner obeyed law which required him to operate bona fide restaurant in connection with his liquor license was sufficient to suport findings that bar owner owned the restaurant and that restaurant operator incurred indebtedness to plaintiff as agent for bar owner.

Judgment affirmed.

1. Principal and Agent 🔑23(5)

In action against bar owner for value of coffee sold by plaintiff to restaurant which adjoined bar with connecting door and from which food was brought to be served in bar, evidence, including presumption that bar owner obeyed law which required him to operate bona fide restaurant in connection with his liquor license, was sufficient to support findings that bar owner owned the restaurant and that restaurant operator incurred indebtedness to plaintiff as agent for bar owner.

2. Evidence 🔑76

Failure of defendant to testify in his own behalf with respect to contentions which it was within his power to dispute allowed an inference that his testimony would have been unfavorable.

Chargin & Briscoe, Stockton, for appellant.

Forrest E. Macomber and Gordon J. Aulik, Stockton, for respondent.

WARNE, Justice pro tem.

This is an appeal by the defendant Charles Kiernan from a judgment for the value of coffee sold by the plaintiff to the Tavern Waffle Shop.

Charles Kiernan owned and operated a bar in Stockton called the Tavern. It is located in the same building as and adjoins a restaurant known as the Tavern Waffle Shop. There is a connecting door from the bar to the restaurant. Food from the waffle shop is served in the bar. In 1951 one of Farmer Brothers' salesmen, a Mr. Haslauer, dealt with Evelyn Oranges, who was then operating the Tavern Waffle Shop, and obtained the coffee account. In September, 1951 one Thor Himle took over the operation of the waffle shop. The sales were continued as before. Plaintiff billed the Tavern Waffle Shop for all coffee sold. The bills were sent to 42 South Sutter Street, which is the same address as the bar. Mr. Himle was the only one contacted for payment. At no time after the account was delinquent was a demand made upon Kiernan for payment until the time suit was filed. Mr. Kiernan had never been solicited personally for the account. It was stipulated that Kiernan was the owner of the on-sale liquor license in the bar known as the Tavern, and that the sales tax permit for the Tavern was in his name. Himle paid sales tax to Kiernan, who in turn paid it to the State of California. Mr. Haslauer testified that when he opened the account he knew by reputation that the waffle shop was owned by Mr. Kiernan. He also testified that Evelyn Oranges told him at the time he established the account that Kiernan owned the business, and that he did not extend any credit to Mrs. Oranges but to the Tavern Waffle Shop.

Plaintiff brought action against the defendant for the sum of $3,177.38, the balance then due upon the account. The complaint alleges, and the trial court found, that the defendant, Charles Kiernan, was doing business under the fictitious name and style of Tavern Waffle Shop. Judgment was accordingly entered against him for the said sum of $3,177.38.

The trial court impliedly found that Himle incurred the indebtedness to plaintiff as the agent of the defendant. It is defendant's contention that there is no competent evidence to establish that Kiernan was the owner of or operated the Tavern Waffle Shop. We cannot agree with defendant's contention.

[1] The fact that the sales tax permit was in the name of Kiernan, the fact that the on-sale liquor license was in Kiernan's name, the presumption that he obeyed the law which required him to operate a bona fide restaurant in connection with said on-sale liquor license, the fact that, without protest, the Tavern Waffle Shop was billed each month at 42 South Sutter Street, which is the address of the Tavern, the fact that the account sued on dates back prior to the time Himle was operating the Tavern Waffle Shop, and that there was no change in the name under which the business was operated when Himle came there, or after he left, are all facts and circumstances which, together with the testimony of Haslauer that Evelyn Oranges, who was operating the Tavern Waffle Shop at the time that the account was established, told him that Kiernan owned the business, and his testimony that Kiernan by reputation was the owner of the Tavern Waffle Shop, amply support the court's findings and the judgment.

[2] Furthermore, the defendant was in court but did not choose to produce evidence in his own behalf, although it was within his power to dispute his ownership of the Tavern Waffle Shop. This failure is of itself sufficient to support an inference that such evidence introduced would have been unfavorable. People v. Kelly, 77 Cal.App.2d 23, 26, 174 P.2d 342; Julson v. Julson, 110 Cal.App.2d 797, 801, 243 P.2d 558.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

149 Cal.App.2d 560

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Juan T. ALANIZ, Defendant and Appellant.

Cr. 5689.

District Court of Appeal, Second District, Division 3, California.

March 29, 1957.

Hearing Denied May 22, 1957.

Defendant was convicted of unlawful possession of heroin. The Superior Court of Los Angeles County, Beach Vasey, J., entered judgment on the verdict and an order denying motion of defendant for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence established the legality of the arrest of defendant without a warrant, and that Superior Court did not abuse its discretion in refusing to require police officers to disclose the identity of informers.

Judgment and order affirmed.

Vallée, J., dissented.

1. Arrest ⚷63(1)

In prosecution for unlawful possession of heroin, evidence established the legality of the arrest of the defendant without a warrant. West's Ann.Health & Safety Code, § 11500.

2. Witnesses ⚷216

In prosecution for unlawful possession of heroin, trial court did not abuse its discretion in refusing to require arresting police officers to disclose the identity of informers. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc., § 1881, subd. 5.

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Louis Romero, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with violation of section 11500 of the Health and Safety Code in that he unlawfully had heroin in his possession. He admitted allegations of the information that he had been convicted of two felonies (violations of said section 11500). In a jury trial, he was convicted. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that there was no probable cause for the arrest, and that the subsequent search and seizure were unlawful.

Officer Smith testified that on January 20, 1956, about 7:55 p. m., he saw an automobile stop in front of 24102 Fries Avenue in Wilmington; at that time he and Officer DeLeon were in an automobile near that address, and he (Officer Smith) drove their automobile to the automobile which had stopped; Officer DeLeon got out of their automobile and went to the driver's side of the other automobile; Officer Smith also got out of the automobile, which he had been driving, and went to the driver's side of the other automobile, arriving there about 15 or 20 seconds after Officer DeLeon arrived there; defendant was in the driver's seat of the other automobile; two boys, whose ages were 14 and 11 were also in the other automobile. Officer Smith tetified further that he arrested the defendant; and that Officer DeLeon arrested the defendant.

After the above testimony had been given, counsel for defendant requested the court to hear evidence out of the presence of the jury with respect to probable cause for the arrest. Thereupon, out of the presence of the jury, Officer Smth testified that about 10 days before the arrest an informer (referred to herein as informer A) gave him information as to a location where narcotics were being distributed; the information included directions regarding streets to travel in order to get to the location—no address was given; he had known the informer more than a year, and information he had previously received from him had been reliable. He testified further that on January 19 another informer (referred to as informer B) stated that narcotics were being dispensed "from this location" (the same location given by informer A), that the car was described as a 2-door black Chevrolet which was "lowered in the back," that the fellow was described as a Mexican with a mustache, and his name was Johnny; he (officer) had known the informer more than a year, and information which he had previously received from him had been reliable. He testified further that on January 20, about 6 p. m., another informer (referred to as C) called him by telephone and gave him "the block where the house was located and stated it was about in the center of the block"; the informer also said that two persons were involved and the name of one of them was Zacci, and the car was a 1950 black Chevrolet; he (officer) knew the informer, recognized his voice by telephone, and had previously received reliable information from him. He testified further that on January 20, about 6:30 p. m., another informer (referred to as D) told him and Officer DeLeon that narcotics were being dispensed "from this place," that he knew the exact house, and that the car involved was a black Chevrolet; he (officer) had known the informer more than a year.

Officer Smith testified further that on January 20, about 1 p. m., he went by the location, concerning which he had previously receiver information, and he saw a black Chevrolet in front of the house. He testified further that on January 20, just prior to the arrest, he saw a Chevrolet, which he had previously seen in front of the house, make a U-turn and park in front of the house; the man who was driving the Chevrolet fitted the description that had been given previously; the officers went to the Chevrolet within a few seconds after it stopped; the man therein said that his name was Johnny; he (officer) turned his flashlight on the man's arm and noticed that he had numerous scab formations over a vein, and some of them appeared to be fresh; in response to questions, the man said that he was not a user but he had been; he (officer) turned the flashlight into the car, through the open door, and observed a bindle on the floor board, which bindle appeared to be a bindle of heroin; the conversation with defendant might have taken 15 or 20 seconds; Officer Smith asked Officer DeLeon if he had defendant under arrest, and Officer DeLeon said "Yes," and Officer Smith said, "I you haven't he's under arrest now." He also testified that information given by the informers was confidential and that the public interest would suffer if he were to give the names of the informers.

Also, out of the presence of the jury, Officer DeLeon testified that on January 20, about 6:30 p. m., he had a conversation with informer D, whom he had known about three years; after that conversation he and that informer went to the vicinity of 24102 Fries Avenue, and the informer pointed out the house at that address as the place where he had purchased narcotics; he also pointed out a 1949 black Chevrolet automobile which was then in front of the house; the informer went to the house, stayed about 10 minutes, and upon returning stated that narcotics were in the automobile which was then in front of the house; he (officer) communicated said information to Officer Smith; after the arrest of defendant, Officer DeLeon (witness) searched the house, with the permission of Mrs. Jiminez who lived in the house; he found a needle, spoon, dropper and wet cotton, which were wrapped together and were in a linen cabinet in the bathroom; the son of Mrs. Jiminez was known as Zacci.

Also, out of the presence of the jury, Mrs. Jiminez testified that she lived at 24102 Fries Avenue; her son Zacci lived there also; on January 20, 1956, when there was a knock on the door, she told a girl to open the door; the person at the door said he was a police officer and he had to search her house: she told him that it was all right; defendant had been in her bathroom on that day.

The court ruled to the effect that there was probable cause for the arrest and search.

Thereupon, the trial proceeded in the presence of the jury.

Officer Smith testified further, repeating the testimony he had given (out of the presence of the jury) regarding: the marks on defendant's arm; the statement of defendant that he had been a user; and the bindle which was on the floor board. He testified further that it had been raining prior to and soon after the arrest; that he found two packages on the ground near the Chevrolet; those packages were dry.

Officer DeLeon testified that he participated in the arrest of defendant in front of 24102 Fries Avenue; he saw a small bindle on the floor of the Chevrolet, and he saw Officer Smith pick it up; he (witness) also saw two bindles in the street by the side of the Chevrolet, and he saw Officer Smith pick them up; he (witness) went into the house at said address and found the needle, spoon, dropper and cotton (Exhibit 3) in a linen cabinet in the bathroom; in response to questions, defendant said the "outfit" (Exhibit 3) was his, that he had put it in the house that morning (January 20), and he was using one and one-half "caps" of heroin a day.

The three bindles or packages contained heroin.

Mrs. Jiminez, called as a witness by defendant, testified that her son Seferino, who is known as Zacci, lived at her house (24102 Fries Avenue) and he was there on said January 20; Juan or Johnny, the defendant, was at her house on January 20 and he went into the bathroom; he had taken Henry and Richard Medina, her grandchildren, for a ride. (They were in the Chevrolet when defendant was arrested.)

Concha Medina, called as a witness by defendant, testified that she is the mother of the boys Henry and Richard, and she is the daughter of Mrs. Jiminez; on January 20 defendant had been at her house working on her automobile; about 7:20 p. m. of that day, defendant came to her house to take Henry to his grandmother Mrs. Jiminez, and to take Richard to his other grandmother.

Defendant testified that he owned the Chevrolet involved here; about 1:30 p. m. on the day of the arrest he drove a truck to Mrs. Jiminez' house; he had left his Chevrolet there the night previously, and he had gone in the truck to his home; soon after he arrived at Mrs. Jiminez' house, he and Zacci went in the Chevrolet to Concha Medina's house, where he (defendant) repaired her automobile; he and Zacci left her place about 6 p. m. and returned to Mrs. Jiminez' house, arriving there about 6:15 p. m.; he (defendant) went into the bathroom at that house and washed oil off his hands; he was in the house about 15 minutes and during that time Zacci used the Chevrolet; when Zacci returned the Chevrolet, defendant drove it to Concha's house, got the two boys, and drove back to the place in front of Mrs. Jiminez' house where he was arrested; he did not know that a bindle was in the automobile or that the two packages were on the street; the first time he saw the bindles was when the officers called his attention to them; he did not know what was in the bindles; he told the officers that the bindles were not his; he did not take the spoon and "outfit" (Exhibit 3) into the house; he told Officer DeLeon that those things (Exhibit 3) were not his (defendant's); during the evening there had been intermittent light showers or drizzles, but at the time of the arrest the street was dry; the bindles which the officers found on the street were dry, and the street was also dry; there were scars on his (defendant's) arm which were caused by punctures when he used heroin years ago.

Officer DeLeon, who had testified that he participated in the arrest, was called as a witness by defendant and he was asked: "Officer DeLeon, about how soon after the defendant stopped the car in front of Mrs. Jiminez' place did you effect the arrest?

He answered: "I would say almost immediately."

Zacci, called as a witness by defendant, testified that he did not use the Chevrolet about 6:30 p. m. on the day of the arrest, to go to the store.

[1] Appellant contends, as above stated, that the arresting officers did not have probable cause for arresting him. He argues that the information given by the informers was not sufficient to constitute probable cause. In Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222, the arrest was made upon information furnished by an informer, whom the arresting officer knew and who had supplied the officer with reliable information on two or three occasions. It was held in that case, 144 Cal.App.2d at page 17, 300 P.2d at page 225, that the arrest was lawful. "A valid arrest may be made solely by reason of information communicated by a reliable informant." People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064, 1065; People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24. In People v. Boyles, 45 Cal.2d 652, at page 656, 290 P.2d 535, at page 537, it was said that it is settled "that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." In the present case there were four informers, whom the arresting officers knew and who had previously supplied the officers with reliable information. The evidence was sufficient to show probable cause for the arrest. Also, the subsequent search of defendant and the seizure of the bindles were lawful.

Appellant also contends that the search of the house by Officer DeLeon was unlawful. The officers had information from the informers to the effect that narcotics were being distributed from the house. The officers had just arrested a person in front of the house an had found bindles which apparently contained heroin; and the person arrested appeared to fit the description of a person referred to, by one of the informers, as a person who dispensed narcotics from that location; and the person arrested appeared to be a user of narcotics. When the officer knocked on the door of the house, the door was opened. When the officer identified himself and said that he had to search the house, the lady who lived there told him that it was all right. The evidence was legally sufficient to prove that the search of the house was not unlawful.

Appellant contends further that the trial court abused its discretion in denying his motion that the witnesses, except the one testifying, be excluded from the courtroom. Such a motion is within the discretion of the trial court. People v. Boyden, 116 Cal.App.2d 278, 283, 253 P.2d 773. Apparently the motion pertained principally to the two police officers. When the motion was made, the deputy district attorney said that the two officers had testified at the preliminary hearing. It does not appear that there was an abuse of discretion.

[2] Appellant also contends that he was denied due process of law because the trial court did not require the police officers to disclose the identity of the informers. Section 1881, subdivision 5, of the Code of Civil Procedure provides: "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." Officer Smith testified that the information given by the informers was confidential and the public interest would suffer if the names of the informers were disclosed. In People v. Gonzales, 141 Cal.App.2d 604, at pages 607, 608, 297 P.2d 50, it was held that, under the circumstances therein, the court did not err in refusing to allow the defendant to cross-examine the police officers as to the name of their informant. It was said in that case 141 Cal.App.2d at page 608, 297 P.2d at page 52: "The officer's information must have come from a *reliable* source and the officer must act in good faith in testifying that he had received his information from a reliable person, and such good faith must pass the scrutiny of the trial judge. No abuse of discretion having been shown, the court's ruling was correct." In the present case, the court did not err in sus-

taining objections to questions as to the identity of the informers.

The judgment, and the order denying the motion for a new trial, are affirmed.

SHINN, Presiding Justice.

I concur in the judgment. As I read the record the officers arrested the defendant before they discovered any objects in his car or observed any scars on his arms. They acted upon the information they had received from informers, plus their own observations of defendant's actions as related to his surroundings. It is my opinion that neither the information received by the officers nor their observations of defendant's conduct, standing alone, would have furnished reasonable cause for the arrest.

Whatever may be our opinion of the character of informers in general and their reliability, we must realize that they have a necessary part in the fight against the traffic in narcotics. Scores of cases with which we are familiar establish this fact. I do not imply that all informers are venal. I do not doubt that there are unwilling addicts and former addicts who believe they have a duty to join in the fight against criminal and vicious activities that have assumed alarming proportions. But I do not believe that even those who are completely blind to the evils of illegal and dishonorable methods of law enforcement would go so far as to say that one citizen can cause the arrest of another by merely pointing a finger at him and calling him a law breaker. Accusations coming from an informer should be regarded as merely a starting point of an investigation. If the investigation does not develop facts which furnish substantial corroboration of the statements of the informers there is no reasonable cause for an arrest. There can be no formula for determining the sufficiency of the corroborative circumstances. Purveyors of narcotics are cunning. They have "ways that are dark and tricks that are vain." Conduct of those under suspicion of handling narcotics may be of major significance to a trained officer although in any other connection it would not even arouse suspicion. It is within the discretion of the trial court, in a hearing properly conducted in the absence of the jury, to determine whether the information, and the relevant corroborating circumstances justify the presentation to the jury of the entire evidence concerning the arrest and the discovery of contraband. I do not doubt that the evidence in the present case established the legality of the arrest. The observations of the officers as to the location of the house, the identity of Zacci and Johnnie (defendant is named Juan), the car described by the informants in which defendant was seated, the fact that one informant shortly before the arrest entered the house and came back stating that he had learned that the narcotics were in plain sight on the front seat of the car and that there were "a hell of a lot of them," the parking of the car in front of the house on separate occasions, and the fact that defendant answered the description of one of the men, furnished sufficient verification of the information the officers had previously received. The house under surveillance was the one described by the informers and it turned out to be the right house.

In the absence of the incriminating information there would have been no reason whatever for the surveillance or the arrest.

I agree with Mr. Justice VALLÉE that when the People make use of the statements of informers as proof of reasonable grounds for an arrest they waive the right to conceal from the court and the accused the name or names of the informers, but it does not follow that in every case the court must compel the disclosure of the names if the defendant demands it. It is a matter for the court, and not the prosecutor or the witness to decide. If concealment is unfair to the defendant—if nondisclosure would probably hamper his defense or if disclosure might furnish relevant evidence not otherwise available, concealment ought not to be permitted. Doubts should be resolved in favor of the defendant. He should not suffer from the court's mistakes.

In Roviaro v. United States, 77 S.Ct. 623, 628, quoted by Mr. Justice VALLÉE, the court, through Mr. Justice Burton, spoke as follows: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. * * *

"This is a case where the Government's informer was the sole participant, together with the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure."

I cannot see that permitting concealment of the names of the informers was an abuse of discretion or that it resulted in any prejudice to the defendant. If the informers had been called as witnesses their testimony would not have tended to establish any affirmative defense. At most, defendant could have hoped that they would deny having given any information to the officers. But when the entire evidence was before the court and it was established that the conditions observed by the officers corresponded with the facts stated by the informants there would have remained no reason to believe that the officers had not been given the information. In the fight against the narcotic traffic there are clear advantages in encouraging the cooperation of addicts and others in the detection of criminal activities. Much of this would be lost if information could not be given in confidence. The names of informers need not be disclosed when there is no reason to believe that concealment would be unfair to the defendant because disclosure might in some manner strengthen his defense.

The court did not abuse its discretion in preserving the anonymity of the informers, and defendant suffered no prejudice.

VALLÉE, Justice.

I dissent. The evidence is without conflict that the arrest was made solely on information received from one or more so-called informers. The attorney general so conceded at the argument. As I read the prevailing opinion, it holds that an arrest may be made solely on such information. Until the Supreme Court in unequivocal language says it is the law that information given by one or more informers is sufficient in itself to constitute probable cause for a police officer to believe a person has committed a felony and thus justify the arrest of that person, I cannot concur in such a holding. The Supreme Court has not done so. The Supreme Court of the United States characterizes the use of informers as "dirty business." On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270, 1277. They are persons who give information to the police with the expectation of receiving consideration of one sort or another therefor. Such characters are more frequently and more appropriately referred to as "stool pigeons" and "stoolies."

The arrest, and consequently the search, was made in violation of defendant's constitutional rights. Despite my utmost abhorrence and detestation of narcotic peddlers, I cannot give sanction to a prosecution for crime which involves commission of another crime. Unless two wrongs make a right, prosecutions and convictions which can only be obtained by graver violations of law should not be countenanced by any consideration of sound public policy. I reject the odious doctrine that the end justifies reprehensible means.

As I read the cases the majority view is that information received from an informer is insufficient in itself to constitute probable cause for an arrest. In People v. Moore, 141 Cal.App.2d 87, at page 89, 296 P.2d 91, at page 93 this court stated:

> "Information provided by an anonymous informer is relevant on the issue of reasonable cause, but in the absence of some pressing emergency an arrest may not be based solely on such information. Willson v. Superior Court, 46 Cal.2d [291, 294] 294 P.2d 36."

There is no evidence in the record of a pressing emergency or of any emergency. The officers testified there was nothing suspicious or out of the ordinary in defendant's driving of the automobile or in his conduct.

In United States v. Kind, 2 Cir., 87 F.2d 315, at page 316, a case in which an arrest and search was made on information received from an anonymous informer, the court stated:

> "The information received from the unnamed and unknown person was not sufficient to show that the crime charged was committed. A motion made to suppress this evidence was denied previous to the trial. It was renewed at the trial and denied. The search and seizure was clearly a violation of the Fourth Amendment (U.S. Constitution). [Citations.] And the evidence obtained thereby was improperly received."

In United States v. Lee, 2 Cir., 83 F.2d 195, at page 196, a prosecution for smoking opium, it is stated:

> "Nor was there probable cause to believe that an offense was being committed in the presence of the officers so that an arrest could be lawfully made without a warrant. According to the affidavit and testimony of the government agents, they proceeded first upon advice of an informer and upon the smell of the opium at a crack in the door. The first was inadequate to secure a warrant."

To the same effect, Contee v. United States, 94 U.S.App.D.C. 297, 215 F.2d 324, 326–327; Worthington v. United States, 6 Cir., 166 F.2d 557, 565–566; United States v. Baldocci, D.C., 42 F.2d 567; United States v. Tom Yu, D.C., 1 F.Supp. 357, 360; United States v. Castle, D.C., 138 F.Supp. 436, 439; Smallwood v. Commonwealth, 305 Ky. 520, 204 S.W.2d 945, 947; State v. Zupan, 155 Wash. 80, 283 P. 671, 674; People v. Guertins, 224 Mich. 8, 194 N.W. 561, 562; Eldredge v. Mitchell, 214 Mass. 480, 102 N.E. 69; Merwin v. State, Okl. Cr., 277 P.2d 208, 211; State v. Arregui, 44 Idaho 43, 254 P. 788, 793–794, 52 A.L.R. 463.

Reasonable cause justifying an arrest must exist at the time of the arrest. People v. Brown, 45 Cal.2d 640, 290 P.2d 528. An arrest cannot be justified by what a search, which follows, produces. People v. Gale, 46 Cal.2d 253, 255–256, 294 P.2d 13. And a search, whether incidental to an arrest or not, cannot be justified by what it turns up. People v. Brown, supra, 45 Cal.2d 643, 290 P.2d 529.

I am further of the opinion the court erred in sustaining objections of the prosecution to questions directed to the police officers seeking the identity of the informers. "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes." Samish v. Superior Court, 28 Cal.App.2d 685, 695, 83 P.2d 305, 310.

The Supreme Court of the United States, holding that it was prejudicial error to sustain objections of the prosecution to questions directed to federal narcotic agents seeking the identity of an informer in Roviaro v. United States (decided March 25, 1957), stated:[1]

> "Petitioner contends that the trial court erred in upholding the right of the Government to withhold the iden-

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[1] 77 S.Ct. 623, 626.

tity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that, therefore, the Government could not withhold his identity, his whereabouts, and whether he was alive or dead at the time of trial. The Government does not defend the nondisclosure of Doe's identity with respect to Count 1, which charged a sale of heroin to John Doe, but it attempts to sustain the judgment on the basis of the conviction on Count 2, charging illegal transportation of narcotics. It argues that the conviction on Count 2 may properly be upheld since the identity of the informer, in the circumstances of this case, has no real bearing on that charge and is therefore privileged.

"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 176, 83 L.Ed. 151; In re Quarles, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080; Vogel v. Gruaz, 110 U.S. 311, 316, 4 S.Ct. 12, 14, 28 L.Ed. 158. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

"The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.

"Three recent cases in the Courts of Appeals have involved the identical problem raised here—the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. Portomene v. United States, 5 Cir., 221 F.2d 582; United States v. Conforti, 7 Cir., 200 F.2d 365; Sorrentino v. United States, 9 Cir., 163 F.2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense. * * *

"The fact that petitioner here was faced with the burden of explaining or justifying his alleged possession of the heroin emphasizes his vital need for access to any material witness. Otherwise, the burden of going forward might become unduly heavy."

In United States v. Blich, D.C., 45 F.2d 627, at page 629, the court reasoned:

"We then come to discuss that feature of the case which involves the refusal of the officer to give the name of his informant. Counsel have cited no cases upon the exact point, although there is language in the case of United States v. Allen (D.C.) 16 F.2d 320, and Emite v. United States, 5 Cir., 15 F.2d 623, which would indicate that such an element might enter into the consideration of the court in the determination of whether or not a probable cause existed. * * * The only question here is as to whether or not, when the matter is presented to a court for the purpose of seeking a determination of whether, under all the circumstances, there was probable cause, this element of those circumstances may remain undisclosed. It is scarcely an answer to the proposition that an agent testifies that his informant was a reliable person, and that he believed the information so given, unless the court sitting in judgment may have the right to determine whether, under all the circumstances, such information was reliable and the agent was justified in having such belief. A belief must or should rest upon a substantial basis. It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information which he may have received. It is simply requiring the witness to sustain his motives and his beliefs by all the evidence at his command. It is conceivable that a prohibition agent in the earnestness and eagerness of performing his duty might adopt very shadowy leads. But what is of greater consequence is that an ill-intentioned person might give an officer information which would in many instances lead to humiliation and vexation of the innocent automobile driver upon the public highway, and yet, with the failure to disclose the name of his informant, the prohibition agent would be safely ensconced behind his blanket testimony that he was informed by a reliable person. * * *

"I will not go so far as to say that the testimony of the informer upon a hearing of this kind must be presented to establish the probable cause, but I am of the opinion that the only safe rule to adopt will be to require officers who presume to make search and seizures of automobiles on the public highway, without warrant, to disclose every element which goes to make up their case of probable cause, and that this rule reasonably includes the source of their information, so that the court may determine whether or not under all the circumstances a case of probable cause has been established, and perhaps as well to restrict informers to a sincerity of purpose."

In Smith v. State, 169 Tenn. 633, 90 S.W.2d 523, 524, the court stated:

> "So we think, when an officer seeks to justify an arrest upon 'a charge made upon reasonable cause,' the officer should be required to reveal the identity of the person making the charge as well as the nature of the charge. The court has to pass upon the officer's justification, and that justification is open to impeachment. A defendant should not be bound by the officer's statement that a charge had been made, and, unless the source of the charge was ascertained, neither its good faith nor reality could well be challenged. An unscrupulous officer, upon a fictitious story of 'a charge made,' might vindicate any arrest, however unlawful, if there could be no further inquiry."

In Mapp v. State, 148 Miss. 739, 114 So. 825, 826, the court stated:

> "One of the assignments of error is that the court erred in refusing to permit the defendant to ask the witness, and have him answer, from whom he obtained his information. As stated above, the court's ruling was to the effect that the witness would not be required to answer as to who gave him the information that the whisky was to be manufactured at the place described.
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> * * *

> "We think the defendant had a right to propound the question to the witness, and have it answered, as to where he obtained the information. This inquiry might have been followed up by others eliciting exactly what was said and the character of the person giving the information; and other pertinent questions showing the nature of the information communicated might also have led to the examination of the informant, who might have contradicted the officer with reference to the information given. The immunity from unreasonable search, seizure, and arrest is one of the most valued liberties afforded and secured by our Bill of Rights under the state and federal Constitutions. And these liberties secured tend to promote peace and order—consequently, the welfare and prosperity of the whole state. While communicating information to officers of the knowledge of a commission of crime by a citizen is commendable, such person making the communication and such officer acting upon it ought to be willing to face the issue resulting from acting upon such information. Where an officer acts without a warrant, he must, under the law, justify his action, and he cannot avoid doing so on the theory that to do so would violate any confidence or confidential communication. The rights of others are involved in such proceedings, and the court should obtain possession of all the information available, standing as nearly as possible in the place of the officer, and judging from the facts which the officer possessed, before it decides the sufficiency of the information to constitute probable cause."

Hill v. State, 151 Miss. 518, 118 So. 539, says:

> "The informant might have been shown to be a notorious liar in that community, or a person of unquestionable integrity. These facts the court must have, in order to determine whether the officer's belief in the truth of the statement was warranted, and in order to allow the defendant an opportunity to show that the statement upon which the officer acted was unworthy of belief and that no probable cause existed for such search."

United States v. Keown, D.C., 19 F. Supp. 639, at page 645, cited with approval in Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, states:

> "In the case here under consideration, the officers making the search and arrest knew the reputation of one of the defendants arrested to be that of a dealer in illicit liquor, but did not know where the defendant would be or what kind of car he would be using on the day of the arrest, but for facts furnished him by the informer.
>
> "If the information of the informer was unreliable or he was unworthy of belief, the officer did not have probable cause to make either the search or the arrest. It follows that the court must have all the facts before it can properly determine whether the officer acted on reasonable grounds. If an officer should stop a peaceful, law-abiding citizen on the highway and search his car, subjecting him to humiliation and ridicule, and the offended citizen should seek redress by a suit for damages, surely no court would say the officer would be relieved of responsibility by an answer that he was informed by a reliable person that the citizen was engaged in the illicit liquor traffic, but he could not and would not disclose the name of his informer, thus preventing a fair and impartial investigation of his conduct. The certainty of the of the law is one of its greatest attributes. We cannot have one law applicable to an identical state of facts for the innocent and another for the guilty. The guilty may sometime escape under such a rule, but this need not follow if the officer be diligent, and likewise the secrets of state may be kept inviolate. The officer may use

the facts furnished by the informer as a basis for his own investigation and discover sufficient facts to search or arrest without disclosing the source of his information.

"In the case here, the officers could have pursued the automobile until, from the conduct of the driver or a disclosure of the contents of the car, sufficient facts could have been ascertained to have legally made the search and arrest. Under such a state of facts, it would have been immaterial as to who the informer was, or from what source the officer obtained his information.

"Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Starkie on Evidence (2d Ed.) Vol. 1, page 160.

"When the government calls a witness whose testimony is based in part on that of an informer, it subjects the witness to cross-examination and the informer to whatever peril may arise out of such cross-examination. It is a sound rule to keep secret information furnished to the state of violations of its laws, but this commendable public policy must yield to a higher, or at least an equal, right accorded to an accused to have a court investigate the facts material to his offense in a criminal prosecution, and sometimes the departments of government will be put to a choice of either foregoing a criminal prosecution or disclosing the source of material information necessary to the conduct of orderly judicial procedure."

The Court of Appeals of New York in People v. Ramistella, 306 N.Y. 379, 118 N.E.2d 566, 568, stated:

"A second error occurred when the Trial Judge prevented cross-examination as to the location of the so-called 'confidential motor number' on the stolen automobile after evidence of that number had been introduced by the People. We are told that the motor number of automobiles is stamped in two places, one in plain view, the other in a secret location known only to car manufacturers, certain representatives of auto theft insurance companies and the police auto squads in the larger cities. The prosecution offered evidence to show that the motor number on the Sims car when it was stolen was 486214163; that on the car sold by Ramistella to the La Perlas the *visible* number, which had been tampered with, read 486220032; and that the number in the secret location was 486214163—the same as that of Mrs. Sims' registration. This testimony, if believed, rather conclusively established that the car sold by Ramistella to the La Perlas was the stolen car in question. We have no way of knowing what weight the jury gave the other evidence identifying the car.

"The argument of the People that this information must be kept secret in order to protect the public and to aid in the administration of penal justice is not persuasive. Even less compelling is the assertion that insurance companies will cease writing auto theft insurance if the confidential location is revealed. Neither the interests of the insurance companies nor the convenience of law enforcement agencies can justify depriving this accused of his constitutional right to cross-examine the prosecution's witnesses on so important a link in the case against him.

"The right to cross-examine is basic in our judicial system, Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; People v. Becker, 210 N.Y. 274, 304–305, 104 N.E. 396, 407; People v. Cole, 43 N.Y. 508, 512–513, and has been from earliest times, Friedel v. Board of Regents of University of New York, 296 N.Y. 347, 352, 73 N.E.2d 545, 548. Although in the last-cited case we held that 'once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused', such a denial or limitation of cross-examination has been upheld only where it has related to collateral matters, or where the right itself has been abused, [citations]. Surely a Trial Judge cannot deprive a defendant of his constitutional right to inquire where, as here, the matter is directly relevant to the principal issues of the case against him, People v. Becker, supra; Alford v. United States, supra; People v. Cole, supra.

"Even if the information in question were in any sense privileged, the People abandoned any such privilege by adducing on direct examination the discrepancy between the two motor numbers, United States v. Andolschek, 2 Cir., 142 F.2d 503, 506; United States v. Beekman, 2 Cir., 155 F.2d 580, 584; United States v. Keown, D. C., 19 F.Supp. 639; United States v. Coplon, 2 Cir., 185 F.2d 629, 638, certiorari denied 342 U.S. 920, 72 S. Ct. 362, 96 L.Ed. 688; see People v. Schainuck, 286 N.Y. 161, 36 N.E.2d 94; Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447. One may not 'fill a gap in his own evidence by recourse to what he suppresses', United States v. Coplon, supra, 185 F.2d at page 638; see, also, United States v. Reynolds, 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727.

"Of course the insurance companies and the police are free to use such confidential motor numbers in conducting their auto theft investigations. But in a court of justice they either must employ some other method of identifying the stolen car—as indeed they could have confined themselves to in this case—or, if the confidential number is used as evidence against the defendant, they must permit their witnesses to be cross-examined with respect thereto, including its confidential location. A prosecution witness may not have immunity from defendant's fundamental right of cross-examination upon so vital a matter as identification on the ground that his evidence is an impenetrable secret."

To the same effect, Riley v. State, 40 Okl. Cr. 380, 269 P. 390, 391.

Dissenting in United States v. Nugent, 346 U.S. 1, 73 S.Ct. 991, 998, 97 L.Ed. 1417, 1426, Mr. Justice Douglas wrote:

> "The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We should be done with the practice—whether the life of a man is at stake, or his reputation, or any matter touching upon his status or his rights. If FBI reports are disclosed in administrative or judicial proceedings, it may be that valuable underground sources will dry up. But that is not the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination."

I can only speculate on why the informers were not called by the prosecution. If they had the information the officers said they received from them, they were material witnesses against defendant. It seems not an unlikely assumption that blemishes and defects of character would have led a jury to distrust their testimony. It appears from the evidence they were probably narcotic users. Apparently they were close enough to the underworld to serve as bait.

In the present case the following procedure was pursued:

"The Court: * * * Mr. Smith [one of the police officers], I will instruct you that the law gives you the privilege of refusing to divulge the name of the informant if you so desire if the information was given to you in confidence, and the public interest would suffer by revealing the name of the informant. I am not informed as to whether or not that is the fact.

"The Witness: It is a fact. I do not wish to divulge the confidential information.

"The Court: Was it given to you in confidence by the informer?

"The Witness: Yes.

"The Court: Could you tell me whether or not the public interest would suffer if the name of the informer were given?

"The Witness: Yes, it would.

"The Court: I have used the word 'informant' in the singular. I believe you said there were four.

"The Witness: Yes, there were four.

"The Court: Does that apply to each of the four?

"The Witness: Yes, it does.

"The Court: Then I will sustain the ruling that I made on the objection to the last question."

The witness also testified the informants were reliable. The same procedure was pursued with Officer DeLeon. This procedure was manifestly wrong. The authorities are legion that it is for the court, not the witness, to determine whether the communications were made in official confidence and whether the public interest would suffer by disclosure.[2] There was no evidence as to how the public interest would suffer—only the opinions of the officers. Testimony of a police officer that such a person is reliable is a pure conclusion of the officer. It is strange indeed that in practically all the cases reaching the reviewing courts in recent months involving the lawfulness of the arrest or of a search, the basis of the arrest or search was either wholly or in large part information received from anonymous informers. As counsel for defendant put it below, "since the exclusionary rule came into effect there has been almost an identical pattern of testimony by police officers as to their reasons for making the arrest." If it is the law that an arrest is lawful if made solely on information received from informers and that the names of the informers need not be disclosed, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, might just as well not have been written.

Defendant contends that by calling the officers and having them testify to information they claimed they had received from the informers, the prosecution waived any right to foreclose the defendant from ascertaining the names of the informers on cross-examination. The prevailing opinion does not discuss the point, nor was it considered in the cases cited in that opinion. The point is good. Where an officer testifies he obtained information from an informer and what that information was, he thereby waives any right to refuse to disclose the name of the informer. On disclosure the defendant has the right to subpoena the person named and ascertain his version of the facts.

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[2] Wigmore says: "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States." 8 Wigmore on Evidence, 3d ed., 799, § 2379.

"The privilege exists, on grounds of public policy which are well known, for the purpose of keeping from the public those matters which come within the law of confidential communications. It would seem that one who might otherwise object on the ground of privilege is estopped to do so when he has introduced evidence which discloses the very intelligence which he claims is privileged. There appears to us to be a close analogy between this point and another which has frequently been decided. Where one introduces evidence of certain facts he waives the right to object to the offer of evidence of the same facts by his opponent South St. Louis Ry. Co. v. Plate, 92 Mo. 614, 5 S.W. 199; Hobbs v. Board, 116 Ind. 376, 19 N.E. 186; Chicago, K. & N. Ry. Co. v. Wiebe, 25 Neb. 542, 41 N.W. 297; Carstens v. Stetson & Post Co., 14 Wash. 643, 45 P. 313; Warren Live Stock Co. v. Farr, 8 Cir., 142 F. 116; Starcher v. South Penn Co., 81 W.Va. 587, 95 S.E. 28; Adams v. Ristine, 138 Va. 273, 122 S.E. 126, 31 A.L.R. 1413; Peter & Burghard [Stone] Co. v. Marion Bank (Ind.App.) 149 N.E. 79; Jameson v. Tully, 178 Cal. 380, 173 P. 577." Estate of Visaxis, 95 Cal.App. 617, 624, 273 P. 165, 168; Moreno v. New Guadalupe Mining Co., 35 Cal.App. 744, 753–756, 170 P. 1088.

The Supreme Court of the United States in On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 973, 96 L.Ed. 1270, 1277, has this to say:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."

The Supreme Court of Utah in State v. Hoben, 36 Utah 186, 102 P. 1000, 1005, said:

> "Though it should be conceded for the purpose of this decision that the matters inquired about were privileged under this subdivision [a statute similar to section 1881(5) of the Code of Civil Procedure], still the ruling was wrong, because the government itself invited the testimony and sought the disclosure. It opened the door and entered upon an inquiry concerning the very matters claimed to be privileged. * * * There is no doubt that there may be communications made to a public prosecutor which are privileged; and though it should be conceded that these communications were such, yet where the state, as here, invites a disclosure, and itself inquires about the matters claimed to be privileged, or permits, or acquiesces in, such inquiry, without objection, it may not have a disclosure of a part of the truth, and then be heard to assert that 'public interests' will suffer if the whole truth is disclosed. In other words, the state may not permit, or acquiesce in, the disclosure so long as the matters disclosed make against the defendant, and then put a stop to it when they are to the defendant's advantage."

State v. Yee Guck, 99 Or. 231, 195 P. 363, 365, says:

> "Among the contentions of the state on this point is one based on the last clause in section 733, Or.L., reading thus:
>
> "'A public officer shall not be examined as to communications made to him in official confidence when the public interest would suffer by the disclosure.'
>
> "Assuming, without deciding, that the conversation between the witnesses and the district attorney was privileged, it is a privilege of the officer—in this case the one in control of the prosecution. It is within his prerogative to waive the exemption embodied in the clause quoted. In offering the whole document for the jury's consideration he waived the exemption, and, moreover,

> was clearly of the opinion that the public interest would not suffer by submitting the transcription to the jury. This section therefore must be laid out of the case."

United States v. Schneiderman, D.C., 106 F.Supp. 731, at page 738, states:

> "Accordingly, since the prosecution at bar, conducted under the supervision of the Attorney General [28 U.S.C. § 507(b)], has adduced evidence 'touching the subject matter communicated' in the reports, it must be held that any privilege of withholding from inspection and use by the defense of sealed exhibits 729, 730 and 731 under authority of 'Department of Justice Order No. 3229' has been waived. See [United States ex rel.] Touhy v. Ragen, supra, 340 U.S. [462] at pages 468, 469, 472–473, 71 S.Ct. 416, 95 L. Ed. 417."[3]

Cf. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 233, 231 P. 2d 26, 25 A.L.R.2d 1418; People v. King, 122 Cal.App. 50, 56–57, 10 P.2d 89; In re Strand, 123 Cal.App. 170, 172, 11 P.2d 89.

My position in this respect is that the prosecution, having called the officers to whom the communications are said to have been made and required them to state what the communications were, thereby waived the privilege and subjected the officers to cross-examination on the subject-matter of the communications, including the names of the persons by whom they were made. The prosecution could not require the officers to disclose as much of the matter as was helpful to it, and then shut the door as to any further inquiry by the defendant relating to the communications. Having required a partial disclosure, or rather one substantially covering the entire matter, it waived its privilege, and the defendant became entitled to a full disclosure.

The communications, to the extent they were given, were important evidence for the prosecution; in fact they were the only evidence bearing on the legality of the arrest, i. e., whether the officers had probable cause for making the arrest—a vital issue in the case. The evidence which the officers gave may or may not have been truthful; they may or may not have received the communications; and if they received them, they may not have been obtained from persons worthy of credit; if they were not received from persons worthy of credit, it could have been found that the officers acted without probable cause in making the arrest; and if the names of the characters said to have made the communications had been given and one or more of them had been called as a witness and denied making the communication, it might reasonably have been found the communications were not made, that probable cause for the arrest did not exist. In the only California case which has come to my attention in which the alleged informer was identified by the officer, he (the alleged informer) was called by the defendant and testified he had not given the officer any information. People v. Lunbeck, 146 Cal.App.2d 539, 303 P.2d 1082. Certainly a defendant in a criminal action should not be precluded from rebutting the testimony of the officer and thus let the court determine the fact. As Wigmore, referring to the privilege, puts it, "It is not to be both a sword and a shield." 8 Wigmore on Evidence, 3d ed., 830, § 2388.

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[3] Wigmore refers to an English case and quotes therefrom as follows: "1863, R. v. Richardson, 3 F. & F. 693; murder by poison; a policeman, having testified to finding poison on a search of defendant's premises in consequence of information received, refused under police regulations to give the names of his informants. Cockburn, C. J., 'ordered him immediately to answer the question, observing that in this case it was most material to the ends of justice that it should be stated'; and it then appeared that the informants were 'two girls who were not called as witnesses for the prosecution.' The Chief Justice afterwards commenting strongly on the failure to produce them, the *Reporters* add: 'Though in this particular case it was not so, yet it might be in similar cases that the information was given by or derived from the really guilty party with a view to divert suspicion from himself and fix it on an innocent person; or again, it might be (and in this case it was so) that the information was derived from the accused herself and was accompanied by a statement showing her innocence. * * * The effect of applying the supposed rule in such cases, it is manifest, would be to enable prosecutors or policemen to produce such portions of evidence as they might please, and to withhold the witnesses the whole of whose evidence might demonstrate the innocence of the accused. It is extraordinary that it should ever have been supposed that (in ordinary cases at all events) there ever was such a rule; and the latest writer on the subject, Mr. Best, entirely ignores it except in political cases. And it may deserve consideration whether ever in such cases it applies where the question is asked, not merely with a view to elicit the name for purposes of observation or credit, etc., but when (as in the present instance) the party who gave the information must have been in a position to disclose something further as to the facts of the case.'" 8 Wigmore on Evidence, 3d ed., 756.

The privilege of a defendant in a criminal action to confrontation by the witnesses against him in the presence of the court is protected by the due process clause of the federal and state Constitutions. Snyder v. Com. of Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, 678, 90 A.L.R. 575. The denial of the right of cross-examination is a denial of due process. Olive Proration, etc., Committee v. Agricultural, etc., Commission, 17 Cal.2d 204, 210, 109 P.2d 918; People v. Valdez, 82 Cal.App.2d 744, 749, 187 P.2d 74; Langendorf United Bakeries v. Industrial Accident Comm., 87 Cal.App.2d 103, 104, 195 P.2d 887; Columbia, etc., Steel Div. v. Industrial Acc. Comm., 115 Cal.App.2d 862, 865, 253 P.2d 45; Ex parte Shackelford, 116 Cal.App.2d 864, 867, 254 P.2d 610; Argonaut Ins. Exchange v. Industrial Acc. Comm., 120 Cal.App.2d 145, 146–154, 260 P.2d 817. "It is a deprivation of constitutional due process to receive evidence without the opportunity to rebut and cross-examine." Columbia, etc., Steel Div. v. Industrial Acc. Comm., 115 Cal.App.2d 862, 865, 253 P.2d 45, 47. This court in In re Shackelford, 116 Cal.App.2d 864, at page 867, 254 P.2d 610, at page 612, said:

> "The petitioner (defendant) was entitled to be confronted by the witnesses, to have an opportunity to cross-examine them, and to examine the documentary evidence. It does not appear that he was accorded those rights. * * Receiving such additional evidence without according the petitioner such above-mentioned rights of confrontation and examination was a denial of a fair hearing, and amounted to a denial of due process of law."

Concurring in Peters v. Hobby, 349 U.S. 331, 75 S.Ct. 790, 800, 99 L.Ed. 1129, 1143, Mr. Justice Douglas stated:

> "Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life. We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where government with all its power and authority condemns a man to a suspect class and the outer darkness, without the rudiments of a fair trial. The practice of using faceless informers has apparently spread through a vast domain. It is used not only to get rid of employees in the Government, but also employees who work for private firms having contracts with the Government. It has touched countless hundreds of men and women and ruined many. It is an un-American practice which we should condemn. It deprives men of 'liberty'

> within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process. * * *
>
> "Those who see the force of this position counter by saying that the Government's sources of information must be protected, if the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty,' they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise."

Defendant was deprived of due process of law when he was denied the right to ascertain the names of the informers.

I would reverse.

Hearing denied; CARTER, J., dissenting.

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149 Cal.App.2d 831

Victor BERNATH, d/b/a the firm name and style of The Termite Co., Plaintiff and Respondent,

v.

John B. WILSON, Defendant and Appellant.

Civ. 22174.

District Court of Appeal, Second District, Division 1, California.

April 8, 1957.

Action in equity to set aside a default judgment entered in municipal court. The Superior Court, Los Angeles County, Morton L. Barker, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fourt, J., held that the evidence justified setting aside default judgment on ground that judgment debtor had a meritorious defense but was prevented from presenting it by entry of default prior to expiration of time within which to answer, as extended by oral agreement with opposing counsel, and had no knowledge of default until levy of execution more than six months after entry of default.

Judgment affirmed.

1. Judgment 🔑460(1)

Complaint stated cause of action in equity to set aside default judgment entered in municipal court on ground that judgment debtor had a meritorious defense but was prevented from presenting it at an adversary trial by entry of default prior to expiration of time within which to answer, as extended by oral agreement with opposing counsel. Canons of Professional Ethics, American Bar Association, Canons 25, 32; West's Ann.Code Civ.Proc., § 473.

2. Judgment 🔑461(3)

Evidence justified setting aside default judgment entered in municipal court on ground that judgment debtor had a meritorious defense but was prevented from presenting it by entry of default prior to expiration of time within which to answer, as extended by oral agreement with opposing counsel, and was prevented from making timely motion in municipal court to set aside default by lack of knowledge of default until levy of execution more than six months after entry of default. Canons of Professional Ethics, American Bar Association, Canons 25, 32; West's Ann.Code Civ.Proc., § 473.

3. Equity 🔑13

Equity will afford relief from a hard and difficult situation into which a party has been inveigled by strategems and unconscionable conduct of adverse party, who has thereby acquired an unfair advantage.

4. Equity ⚷54

One must exercise his own rights in such way as not to infringe upon the rights of another.

5. Estoppel ⚷59

One may not take advantage of his own wrong.

6. Equity ⚷55

For every wrong there is a remedy.

◆

George L. Hampton, Van Nuys, for appellant.

Frank T. Hennessey, North Hollywood, for respondent.

FOURT, Justice.

The action in this case was brought in the Superior Court in equity to set aside a default judgment secured in the municipal court by the appellant against the respondent. This appeal is from the judgment in the Superior Court in favor of the plaintiff and against the defendant.

The plaintiff had employed the defendant to solicit general construction work for him. It was agreed, among other things, that if the plaintiff subcontracted any job procured by the defendant, the plaintiff would pay the defendant therefor a commission of 33⅓ per cent of the net profit from said work. The defendant procured for the plaintiff certain work, the first of which shall hereafter be referred to as the "Bensinger Job". The plaintiff subcontracted this work to Omar Price for a price that would have yielded a profit, had Price completed the work for the money the parties had agreed upon. However, before Price performed the work the defendant and Bensinger complained to the plaintiff's manager about the slow progress being made by Price and about the unworkmanlike manner in which Price was doing the work. The defendant "asked the Plaintiff to throw Price off the job" and "to cancel the subcontract with Price" and the defendant stated that he would take over the Bensinger job and supervise it for the plaintiff. The plaintiff cancelled the subcontract with Price and the defendant thereupon supervised the work and it was completed at a loss to the plaintiff. The defendant made no complaint about the cancellation and acquiesced in what was done. The plaintiff never paid the defendant any part of the profit that would have been earned had the job been completed by the subcontractor as originally contemplated. In the case in the municipal court, the defendant here asked for $916.67 for this phase of his activities, such amount being one-third of the profit the plaintiff would have made had Price performed as he had agreed upon.

There was another transaction between the plaintiff and the defendant which shall be referred to as the "Gage Job". The defendant procured a construction contract from Travis and Lottie Gage whereby the plaintiff was to construct an addition to a building. The manager of the plaintiff requested the Gages to pay $1,000 on the contract, and such amount was thereupon paid by the Gages to the plaintiff. Thereafter, the plaintiff and the defendant, by a written contract, agreed that the plaintiff would pay to the defendant $500, in lieu of any other sums which he might be entitled to for his services in securing the Gage Job, such sum to be paid "upon completion and payment in full of the subject contract". Later the manager of the plaintiff demanded an added $1,500, from the Gages on their contract, at which time the Gages informed the plaintiff that they had discovered that he, the plaintiff, did not have a general building contractor's license in California, and that they would pay no further money and demanded of the plaintiff that he return the money theretofore paid to him by them. The manager of the plaintiff advised the Gages that he could not secure a loan for them sufficient to do the work unless the $1,500 was paid, as Gages had not disclosed in their application and agreement a second encumbrance on their property. Gages demanded the return of the money theretofore paid and stated that they did not wish to put any more funds into the project.

The plaintiff did not have a general contractor's license. The contract between the plaintiff and the Gages was then cancelled by mutual consent of the parties thereto, and the plaintiff paid to Gages the sum of $960.80, of the total of $1,050, theretofore paid to him by the Gages. The defendant was advised of the intention to return the deposit to the Gages, after deducting the expense of the permit for the job, and the defendant told the plaintiff's manager that it appeared that there was nothing else to do and agreed to the return of the deposit and the cancellation of the contract.

There was testimony to the effect that at no time prior to the defendant's filing the case in the municipal court did he ever complain to the plaintiff about the cancellation of the Gage contract, and that at no time prior to his leaving the employ of the plaintiff did he ever demand payment for either the Bensinger or the Gage jobs. On the Gage job the defendant requested the sum of $500 in the municipal court, being the amount which was set forth in the contract heretofore referred to.

On Monday, August 16, 1954, George L. Hampton, as attorney for the defendant herein, filed an action in the municipal court (Van Nuys), the summons was issued on the date of the filing of the complaint and service of a copy of the complaint and summons was made on the plaintiff herein on Monday, August 23, 1954. The papers so served upon the plaintiff were delivered by him to his attorney, Hiram D. Kellogg, and thereafter, on Friday, August 27, 1954, Kellogg telephoned Hampton and requested and received an extension of time within which to answer the complaint to and including Tuesday, the 7th day of September, 1954, which was the day following Labor Day, a legal holiday. On Monday, Labor Day, the 6th of September, 1954, Kellogg mailed the original answer prepared by him to the clerk of the municipal court, together with the filing fees and the same was received at the municipal court early on September 7, 1954. Further, at the time of the mailing of the original answer to the clerk of the municipal court, Kellogg mailed a copy of the same to Hampton, as the attorney for Wilson.

The trial court found that on Saturday, the 4th day of September, 1954, Hampton, contrary to his agreement and understanding with Kellogg, filed with the clerk of the municipal court a request for entry of default. Hampton apparently then waited for a period in excess of six months before any other proceedings were taken and did not advise Kellogg of what he had done by way of having the clerk enter the default. On March 18, 1955, two weeks after the six months had passed from the date of entry of the default, a judgment by default was secured upon testimony of the defendant given on March 15, 1955. Apparently, on March 21, 1955, an execution was levied upon the plaintiff, which was the first the plaintiff knew of any judgment or default against him. The complaint in the superior court alleged substantially the matter heretofore related, and further, that the plaintiff herein was deprived of the opportunity to move to set aside the entry of the default in the municipal court under section 473, Code of Civil Procedure, within the six months' period; that it is necessary that he apply to the superior court for equitable relief; that he asked Hampton to stipulate to set aside the judgment in the municipal court, but Hampton refused; that he has a good and sufficient defense to the action in the municipal court and that said contracts upon which the defendant based his claim created no obligation, and that he set forth the reasons why such was the case, and further that he could show facts which would require that the judgment in the municipal court would be different than that granted on the default. There was no demurrer filed by the defendant in the present case or any other objection made to the form of the pleadings in the superior court.

Appellant contends that the finding by the court to the effect that the plaintiff herein had a meritorious defense to the municipal court action, and that the defense upon which such finding or findings was based, and the grounds for the court's decision were erroneous.

[1–3] In this case it is our opinion that under the circumstances the complaint in equity was good and sufficient. The plaintiff here introduced proper and sufficient evidence to make it appear that a like judgment in the municipal court probably would not follow if the matter was tried as a contested proceeding. Plaintiff here, by the acts of the defendant's attorney Hampton, was prevented from having a fair adversary trial, or from presenting his case fully and fairly to the municipal court. A court of equity will relieve a plaintiff from a hard and difficult situation into which he has been inveigled by the strategems and unconscionable conduct of the defendant, who, in so dealing, has acquired an unfair advantage. 18 Cal.Jur.2d 164, Equity.

[4–6] Hampton as counsel for the appellant has cited us to many maxims of jurisprudence, including, for example, "one must use his own rights as not to infringe upon the rights of another"; "no one can take advantage of his own wrong" and "for every wrong there is a remedy". With each of such maxims we heartily agree generally, and further, we particularly agree that they apply to the case at hand.

It would seem appropriate, under the circumstances, to call attention to Canon 25 of the American Bar Association Canons of Professional Ethics, which read as follows:

"A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court", and it might also be appropriate to set forth the last sentence in Canon 32, which reads, "But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

The American College of Trial Lawyers have recently proposed a code of standing of ethics, deportment and conduct for the trial lawyer entitled "Code of Trial Conduct", Section 9(a) thereof titled "Relations with Opposing Counsel" reading in part as follows:

"9. Relations with Opposing Counsel.

"(a) A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed." American Bar Association Journal, Vol. 43, No. 3 (March, 1957) p. 225.

There was no prejudicial error in this matter. The cause should be heard on its merits in the municipal court.

All that the judgment in this case does, in substance, is to set aside the default entered on September 4, 1954, in the municipal court, and to set aside the judgment in the municipal court entered on March 18, 1955. The parties are right where they were before the defendant's counsel violated his agreement and understanding with plaintiff's attorney in reference to extending the time within which the answer could be filed.

Judgment affirmed.

DORAN, J., concurs.

WHITE, P. J., concurs in the judgment.

149 Cal.App.2d 741

Martha JAMES, Plaintiff and Appellant,
v.
Montague N. HERBERT, Joel H. Prescott, Jr., Roy M. Roberts, Doe One, Doe Two, Doe Three, Doe Four and Doe Five, Defendants,

Joel H. Prescott, Jr., and Roy Roberts, Respondents.
Civ. 21924.

District Court of Appeal, Second District, Division 3, California.
April 3, 1957.

Action for damages arising out of an alleged conspiracy by defendants to exclude plaintiff from further participation in the operation and management of a joint venture and to deprive her of her share of the profits. From a judgment of the Superior Court, Los Angeles County, A. Curtis Smith, J., entered on an order sustaining a general and special demurrer to the complaint, the plaintiff appealed. The District Court of Appeal, Vallée, J., held that complaint, which alleged that plaintiff entered into an oral agreement of joint venture with two of defendants for development and sale of realty owned by one of them, with profits to be divided equally, that they entered into the business contemplated by making arrangements for financing, engaging surveyors and causing subdivision maps to be made and adopted plans and specifications for the construction of residences on the lots, but that defendants wrongfully conspired with each other to exclude her from further participation in the venture, to cheat and defraud her and deprive her of her interest therein and her share of the net profits, stated a cause of action for conspiracy.

Judgment reversed.

1. Conspiracy 🔑18

Complaint, which alleged that plaintiff entered into oral agreement of joint venture with two of defendants for development and sale of realty owned by one of them, with profits to be divided equally, that they entered into business contemplated by making arrangements for financing, engaging surveyors and causing subdivision maps to be made and adopted plans and specifications for construction of residences on the lots, but that defendants wrongfully conspired with each other to exclude her from further participation in the venture, to cheat and defraud her and deprive her of her interest therein and her share of net profits, stated a cause of action for conspiracy.

2. Conspiracy 🔑1

Elements of action for civil conspiracy are formation and operation of conspiracy and damage resulting from act or acts done in furtherance of the common design.

3. Conspiracy 🔑6

Where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage and not the conspiracy which constitutes the cause of action.

4. Conspiracy 🔑19

A conspiracy may be inferred from nature of acts done, relations of parties, and interests of alleged conspirators, and other circumstances.

5. Conspiracy 🔑18

To be entitled to a joint recovery of damages against several defendants for inflicting a wrong through a conspiracy, plaintiff must allege and prove concert of action between defendants to accomplish purpose of conspiracy, that their actions were illegal and in furtherance of a common scheme or design to achieve unlawful purpose of conspiracy, their knowledge of conspiracy, and its unlawful purpose.

6. Appeal and Error 🔑917(1)

On appeal from judgment sustaining general and special demurrers to complaint, allegations of complaint are presumed to be true.

7. Joint Adventures 🔑4(1)

Under an agreement for a joint venture, parties assume status of fiduciaries and neither one has a right, while joint venture exists, to acquire property involved to exclusion of the other.

8. Joint Adventures ⚷5(2)

Complaint, which alleged that plaintiff entered into oral agreement with two of defendants for development and sale of realty owned by one of defendants, that other defendant was to arrange for financing of improvements and supervise construction operations, that plaintiff was to actively participate in management of business, contribute her services and use of her office and assist in making of arrangements for loan commitments, and that profits would be divided equally but losses shared by defendants only, stated facts sufficient to show creation of a joint venture.

9. Joint Adventures ⚷1.7

Contributions of respective parties to joint venture need not be equal or of same character and although it is usual for an equal sharing of profits and losses, parties may agree that all members shall participate in profits, but that only some of them shall bear losses.

10. Joint Adventures ⚷1.5, 1.10

Existence of a joint venture depends on intention of parties, and the agreement is not invalid because it may be indefinite with respect to details.

11. Frauds, Statute of ⚷56(9)

Oral agreement of joint venture whereby one of members was to contribute three parcels of realty to operations of venture was not within purview of statute of frauds.

12. Damages ⚷124(1)

Where, without fault on his part, one party to a contract is willing to perform but is prevented from doing so by other party, primary measure of damages is amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and anticipated profits which he would have derived from performance.

13. Damages ⚷40(2)

Where prospective profits are the natural and direct consequences of a breach of contract, they may be recovered.

14. Damages ⚷40(2)

Damages consisting of loss of anticipated profits need not be established with certainty, it being sufficient to show as a reasonable probability that profits would have been earned except for breach of contract.

15. Conspiracy ⚷20

Complaint, which alleged that plan for development and sale of realty had progressed to point where all costs and expenses in connection with venture had been ascertained, that sale price of each parcel had been fixed and determined, and that a ready market existed for properties, sale of which would realize a total net profit of a specified amount, was sufficiently certain as to what damages for alleged conspiracy consisted of and extent thereof.

16. Conspiracy ⚷20

Complaint, which alleged that defendants entered into a wrongful conspiracy with intention to exclude plaintiff from further participation in a joint venture and to cheat and defraud her of her interest therein, and that they were guilty of oppression, fraud, and malice in their acts and conduct with relation to her, stated sufficient facts for an award of exemplary damages.

17. Pleading ⚷192(2)

Uncertainty arising out of the legal effect of facts alleged is not a ground for demurrer.

18. Pleading ⚷192(2)

Where uncertainties in complaint appear to be matters within knowledge of defendant, a demurrer will not lie to such matters.

◆

Thomas F. McCue, North Hollywood, for appellant.

Arthur S. Wolpe, Beverly Hills, and Bernard Newman, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal in favor of defendants Prescott, Jr., and Roberts entered on an order sustaining their general and special demurrer to the amended complaint with leave to amend. Plaintiff declined to amend and the judgment of dismissal followed.[1] The record does not disclose the ground or grounds on which the demurrer was sustained. We are in accord with plaintiff's criticism of this practice.[2]

The amended complaint, to be referred to as the complaint, is for damages arising out of an alleged conspiracy of defendants to exclude plaintiff from further participation in the operation and management of a joint venture and to deprive her of her share of the net profits thereof.

The allegations of the complaint may be epitomized as follows:

[1] Plaintiff is a licensed real estate broker engaged in the real estate business in Palm Springs. In November 1953 she entered into an oral agreement of joint venture with defendants Herbert and Prescott, Jr. It was agreed: 1. Herbert would contribute to the operations of the venture three parcels of realty aggregating 60 acres, which he owned in the vicinity of Cathedral City. He would be paid out of the venture assets for the property at its fair and reasonable value as of the date of the organization of the venture. 2. Defendant Prescott, Jr., would arrange for the financing of improvements which the parties planned to make on the property and supervise construction operations in connection with any residences or other buildings to be constructed thereon. He would receive a reasonable builder's fee to be fixed by the joint venturers for his services. 3. Plaintiff would actively participate in the management of the business, contribute her services and the use of her real estate office, assist in the making of arrangements for loan commitments, and cooperate with her coadventurers in the planning of the size, shape, and location of lots into which the realty was to be subdivided and in the selection and choice of the type and kind of construction and other improvements to be erected thereon, and generally to participate actively in the supervision of the enterprise. She would be given an exclusive contract for the sale of all parcels contributed by defendant Herbert to the enterprise and would be entitled to receive and retain as her own the usual and customary real estate broker's commissions prevailing in the general area. 4. Any losses which might result from the operations of the venture would be borne by defendants Herbert and Prescott, Jr.; but the net profits would be divided equally.

In November 1953, pursuant to the agreement, the joint venturers entered into the business so contemplated and performed their respective duties and obligations to each other to and including the month of January 1954. By mutual agreement they fixed and determined the price payable to Herbert for his land and the terms of payment; made arrangements for the financing of construction work in connection with the enterprise; engaged surveyors and caused subdivision maps to be made of the land, caused it to be divided into 196 lots of various sizes and descriptions, and adopted plans and specifications for the construction of residences on the lots; ascertained and determined the cost of acquisition, construction, and expenses of sale and determined prices for the sale of the lots so improved so as to yield to the venture a net profit of not less than $1,000 a lot or a total minimum profit of $196,000. At that time and place there existed a ready market for the sale of the properties so improved at the prices established by the joint venturers; buyers ready, able, and willing to purchase the properties were readily available; and it was reasonably certain that the venture would earn from the operations within the period of a year from November 1953 a net profit of not less than $196,000 of which plaintiff would have been entitled to one-third, amounting to not less than $65,333.-33.

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[1] Defendant Herbert also filed a general and special demurrer which was sustained with leave. We are told that no judgment has been entered with respect to the case against him. The appeal concerns only defendants Roberts and Prescott, Jr.

[2] Plaintiff says: "Before discussing in detail the various points raised by respondents in their Demurrer to First Amended Complaint, we must in all sincerity go on record as deploring a practice which appears to have become more and more prevalent in the trial courts, to wit, the practice of failing to specify what ground or grounds of the demurrer appear to the court to be well taken and what grounds, if any, are in the opinion of the trial court not meritorious. In such a case as the one at bar where a demurrer, both general and special, is interposed to a complaint and some of the grounds are obviously wholly without merit and other grounds perhaps debatable, we think that the trial courts are doing a disservice to the appellate courts and to the parties to the action in merely, as here causing a minute order to be entered reading 'Demurrer sustained, 20 days to amend.' Such a ruling has the effect of unduly lengthening the record before the appellate court and consumes unnecessary time of court and counsel in the discussion of facts and law pertaining to points raised by the demurrer obviously having no merit whatsoever."

Plaintiff performed each and every duty and obligation required of her by the agreement, including the contribution to the venture of her time, the facilities of her office and the services of her employees, and has incurred and paid great expense for telephone and other services in reliance on the confidential relationship existing between her and her coadventurers, and at all times has been ready, able, and willing to fully perform all duties and obligations on her part to be performed in accordance with the agreement; but defendants Herbert and Prescott, Jr., in January 1954, entered into a wrongful conspiracy with each other and with defendant Roberts who knew that the venture between plaintiff and Herbert and Prescott, Jr., was still in force and effect, to exclude her from further participation in the venture, to cheat and defraud her and deprive her of her interest therein and her share of the net profits thereof, and to obtain and retain the business and profits for themselves.

Pursuant to the conspiracy, defendants excluded plaintiff from the management and participation in the venture, converted to their own use all of the assets, and have used and dealt with the property for their own profit and for purposes wholly unconnected with the business of the venture, have entered into an association with each other adverse to the interests of plaintiff—all without notice to, or the consent of, plaintiff—and have carried away and concealed from plaintiff the books and records of the venture and have wrongfully withheld from her all information concerning the assets and affairs thereof, and have destroyed the business of the venture and have terminated it. By reason of the acts and conduct of defendants she has suffered damage in the sum of $65,333.33. Plaintiff then alleges that defendants were guilty of oppression, fraud, and malice in their acts and conduct with relation to her, and she should be awarded exemplary damages of $25,000.

Defendants Roberts and Prescott, Jr., demurred generally and specially. As we have stated, the court sustained the demurrer without stating the ground or grounds. Plaintiff appeals.

[2-4] The first question is whether the complaint states facts sufficient to constitute a cause of action for conspiracy. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting from the act or acts done in furtherance of the common design. Where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Schaefer v. Berinstein, 140 Cal.App.2d 278, 293, 295 P.2d 113. A conspiracy may be inferred from the nature of the acts done, the relations of the parties, and the interests of the alleged conspirators, and other circumstances. Globe Dairy Lunch Co. v. Joint, etc., Culinary Workers, 117 Cal.App. 2d 190, 193, 255 P.2d 94.

[5] To be entitled to a joint recovery of damages against the defendants for in-

flicting a wrong through a conspiracy, the plaintiff must allege and prove: a concert of action between the defendants to accomplish the purpose of the conspiracy; that their actions were illegal and in furtherance of a common scheme or design to achieve the unlawful purpose of the conspiracy; and their knowledge of the conspiracy and its unlawful purpose. Clark v. Lesher, 106 Cal.App.2d 403, 409, 235 P. 2d 71; 11 Cal.Jur.2d 277, § 50.

In Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601, a partnership was formed for the operation of a dairy on leasehold premises. The plaintiff was ousted by his partner, Karales, and the defendants; and the leasehold, which was the basis of the partnership business, was assigned to another. The action was for damages on the ground the defendants and the plaintiff's partner had conspired to and had fraudulently appropriated and destroyed the partnership business. The court held, 186 Cal. at page 685, 200 P. at page 604:

> "The allegation, therefore, of the subsequent ouster of plaintiff by the defendants and the averment that it was done wrongfully and in pursuance of the alleged conspiracy with Karales, and that in pursuance of such wrongful and unlawful purpose they took possession of the dairy ranch, put Karales in charge, converted to their own use the growing crops, and deprived the plaintiff of any further use of the premises under this leasehold, furnishes the basis for a cause of action."

[6] In Greenwood v. Mooradian, 137 Cal.App.2d 532, 290 P.2d 955, and in Abbot Kinney Co. v. Harrah, 84 Cal.App.2d 728, 191 P.2d 761, the allegations with respect to the conspiracy itself were no more detailed than those at bar. We think a cause of action for civil conspiracy is sufficiently alleged. We are not concerned with the truth of the allegations; they are presumed to be true. Clark v. Lesher, 106 Cal.App. 2d 403, 409, 235 P.2d 71.

[7] "If there was an agreement for a joint venture the parties assumed the status of fiduciaries and neither one would have had a right, while the joint venture existed, to acquire the subject property to the exclusion of the others." Lasry v. Lederman, 147 Cal.App.2d 480, 305 P.2d 663, 667.

[8–10] Defendants contend the complaint does not plead all the elements of a joint venture relationship. The point is untenable. A joint venture is an undertaking by two or more persons jointly to carry out a single enterprise for profit. Goldberg v. Paramount Oil Co., 143 Cal. App.2d 215, 300 P.2d 329. Although it is usual to provide for an equal sharing of profits and losses, the parties may agree that all members shall participate in the profits, and that only some of them shall bear the losses. Wilson v. Brown, 96 Cal. App. 140, 142, 273 P. 847. The contributions of the respective parties need not be equal or of the same character. (30 Am. Jur. 681, § 10.) The existence of a joint venture depends on the intention of the parties. Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 764–765, 128 P.2d 665. The law requires little formality in its creation, and the agreement is not invalid because it may be indefinite with respect to details. Lasry v. Lederman, 147 Cal.App.2d 480, 305 P.2d 663. The complaint alleges facts sufficient to show the creation of a joint venture.

[11] Defendants argue that because Herbert owned the realty and as a part of his contribution to the joint venture he was to sell the realty to it, and the venture and venturers were thus going to acquire an interest in real property, the agreement was within the statute of frauds and unenforceable. In Moropoulos v. C. H. & O. B. Fuller Co., supra, 186 Cal. 679, 200 P. 601, it was held that where one holding a lease of realty entered into a partnership with another agreeing to the use and possession of the leased property in the business, a valid interest in the lease was thereby vested in the partnership and a formal assignment of the lease to the part-

nership was not required. In Wilson v. Brown, 96 Cal.App. 140, 273 P. 847, Champagne v. Passons, 95 Cal.App. 15, 272 P. 353, and Parker v. Trefry, 58 Cal.App.2d 69, 136 P.2d 55, one of the joint venturers had interests in realty and oral agreements were entered into with other parties for the transfer of those interests to a joint venture. Joint ventures were held to have been validly formed. The agreement alleged at bar is not within the purview of the statute of frauds. Coward v. Clanton, 79 Cal. 23, 21 P. 359; Bates v. Babcock, 95 Cal. 479, 30 P. 605, 16 L.R.A. 745; Koyer v. Willmon, 150 Cal. 785, 90 P. 135; Arnold v. Loomis, 170 Cal. 95, 148 P. 518; Scott v. Jungquist, 179 Cal. 7, 175 P. 412; Fitzgerald v. Provines, 102 Cal.App.2d 529, 227 P.2d 860; Lasry v. Lederman, 147 Cal.App.2d 480, 305 P.2d 663.

[12–14] Defendants assert anticipated profits from a new venture are too uncertain and speculative to constitute the basis for computation of damages. Where, without fault on his part, one party to a contract who is willing to perform is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance and the anticipated profits which he would have derived from performance. Buxbom v. Smith, 23 Cal. 2d 535, 541, 145 P.2d 305. Where the prospective profits are the natural and direct consequences of the breach of the contract they may be recovered. Profits are part and parcel of the contract itself, entering into and constituting a portion of its very element; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. Hoag v. Jenan, 86 Cal.App.2d 556, 562–563, 195 P.2d 451. Damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract. Stott v. Johnston, 36 Cal.2d 864, 875, 229 P.2d 348, 28 A.L.R.2d 580; Hacker Pipe & Supply Co. v. Chapman V. Mfg. Co., 17 Cal.App.2d 265, 267, 61 P.2d 944.

[15] Plaintiff alleges that the venture had progressed to the point where the joint venturers had ascertained all the costs and expenses in connection with the acquisition of, construction on, and sale of the subdivision properties and had fixed and determined the price for sale of each parcel, aggregating 196 in number; there then existed a ready market for the properties; and the sale of the properties could have been made so as to provide a total net profit of not less than $196,000, or $65,333.33 for her. The complaint is certain as to what the damage consists of and as to its extent.

[16] Finally, defendants assert plaintiff did not plead sufficient facts for an award of exemplary damages. This contention is also untenable. A general allegation that a defendant acted wilfully and knowingly in defiance of plaintiff's repeated protests and that the defendant's conduct was oppressive and malicious and for the purpose of damaging the plaintiff's lawful business has been held sufficient for the recovery of exemplary damages. Sterling Drug, Inc., v. Benatar, 99 Cal.App.2d 393, 399–400, 221 P.2d 965. Also see Bergevin v. Morger, 130 Cal.App.2d 590, 592–593, 279 P.2d 136; Morgan v. French, 70 Cal.App. 2d 785, 789–790, 161 P.2d 800; Kouff v. Bethlehem-Alameda Shipyard, Inc., 90 Cal. App.2d 322, 325, 202 P.2d 1059. Plaintiff pleads the elements that make up the basis of her claim for such damages. She alleges defendants were guilty of oppression, fraud, and malice, and the details of the fraud and malice are specifically alleged.

[17, 18] The complaint states facts sufficient to constitute a cause of action. With respect to the special demurrer, defendants merely say its validity is so obvious as to require no argument. Plaintiff

argues at some length that it is not well taken. In view of defendants' failure to sustain it, we should ignore it. However, our examination of the complaint discloses no basis for the special demurrer. Uncertainty arising out of the legal effect of facts alleged is not a ground for demurrer. County of Santa Clara v. Hayes Co., 43 Cal.2d 615, 619–620, 275 P.2d 456. While there are some uncertainties in the complaint, they appear to be matters within the knowledge of defendants A demurrer does not lie to such matters. Turner v. Milstein, 103 Cal.App.2d 651, 658, 230 P.2d 25. The complaint is sufficient as against both the general and special demurrers.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

149 Cal.App.2d 726

Leona B. WILSON; William Nicholas Wilson, Roberta Jean Wilson and Mary Kathleen Wilson, minors by their guardian ad litem, Leona B. Wilson, Plaintiffs and Respondents,

v.

Leslie Charles FOLEY III, Leslie Charles Foley, Jr. and Ruth B. Foley, Defendants and Appellants.

Civ. 21912.

District Court of Appeal, Second District, Division 2, California.

April 3, 1957.

Rehearing Denied April 26, 1957.

Action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment on verdict for plaintiffs, and defendants appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained jury's implied finding of negligence on part of the defendant who had parked the automobile and that question of truck driver's contributory negligence was for jury.

Judgment affirmed.

1. Witnesses 🔑317(1), 379(1)

Presumption that witness speaks the truth may be overcome by evidence that, on some former occasions, witness made a statement inconsistent with his testimony, and witness who is false in one part of his testimony is to be distrusted in other parts.

2. Appeal and Error 🔑996, 1002

Where there is substantial conflict in the evidence, including expert testimony, and conflicting reasonable inferences from such evidence, judgment will not be upset on ground of insufficiency of evidence.

3. Appeal and Error 🔑996

If inferences drawn from proof are reasonable, reviewing court has no power to substitute its deductions for those of jury.

4. Automobiles 🔑244(14)

In action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night, evidence sustained jury's implied finding of negligence on part of the defendant who had parked the automobile. West's Ann.Vehicle Code, § 582.

5. Automobiles 🔑173(4)

Parking of automobile on paved shoulder may, under certain circumstances, constitute negligence. West's Ann.Vehicle Code, §§ 81, 582.

6. Automobiles 🔑244(14), 246(46)

In action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night, evidence was sufficient to warrant finding that paved shoulder of highway was part of main-traveled portion of highway and to warrant giving of instruction that paved shoulder was a portion of the highway but that question whether shoulder was part of the main-traveled portion was one of fact.

7. Appeal and Error ⚿1170(9)

Where, in death action, it could not be said that verdict would probably have been different had certain instruction not been given, giving of such instruction, if erroneous, did not constitute prejudicial error. West's Ann.Const. art. 6, § 4½.

8. Appeal and Error ⚿1067
Automobiles ⚿246(27)
Trial ⚿260(8)

Ordinarily, in action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night, instruction to effect that looking and not seeing or failure to look constitutes negligence should have been given, but failure to do so was not prejudicial error in view of instruction that plaintiffs were entitled to presumption of due care on part of truck driver and in view of evidence as to fog.

9. Appeal and Error ⚿970(2)
Evidence ⚿546

Receipt or refusal of expert testimony is largely within trial court's discretion and will not be disturbed on appeal in absence of clear showing of abuse.

10. Appeal and Error ⚿1056(1)

In action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night, exclusion of testimony of defendants' expert that, in his opinion, truck had been traveling at minimum of 60 miles per hour at moment of impact was not prejudicial error, particularly in view of evidence that truck would not go over 52 miles per hour.

11. Death ⚿76

Before it can be held, as matter of law in death action, that decedent was guilty of negligence which contributed proximately to the accident, the evidence must point unerringly to such conclusion.

12. Death ⚿104(2)

In action for death of truck driver in collision between overtaking truck and defendants' automobile which had allegedly been parked partly on traveled portion of highway on foggy night, plaintiffs were entitled to have jury instructed that truck driver was presumed to have exercised due care and ordinary prudence.

13. Automobiles ⚿245(83)

In action for death of truck driver in collision between overtaking truck and defendants' automobile which allegedly had been parked partly on traveled portion of highway on foggy night, question of truck driver's contributory negligence was for jury.

◆

Eugene S. Ives, Los Angeles, for appellants.

Desser & Hoffman, Beverly Hills, by David M. Hoffman and Tom C. Williams, Beverly Hills, for respondents.

MOORE, Presiding Justice.

Defendants appeal from a judgment, after verdict, in an action arising from the collision of a fast-moving tractor hauling two semi-trailers and a stationary automobile.

The appeal is grounded upon the claims that

(a) No substantial evidence that negligence on the part of defendant Foley contributed to the happening of the accident;

(b) Error in instructing the jury that it was a question of fact as to whether or not the paved shoulder was a part of the main traveled portion of the highway;

(c) Error in refusing to admit certain expert testimony as to the speed of the tractor and trailers at the time of impact;

(d) Error in failing to instruct that looking and not seeing, or failure to look, is negligence;

(e) Plaintiffs' decedent truck driver was guilty of contributory negligence as a matter of law.

Sufficient Evidence

The accident occurred seven and one-fourth miles north of Santa Barbara on Highway 101. It was an early morning in April; the weather was foggy; normal visibility was materially reduced. One McLeod who had been driving his sedan southward took aboard a hitch-hiking sailor; thereafter he ran out of gas and stopped. At the point where McLeod stopped, the highway consisted of two lanes eleven feet wide on each side of the white center line, and eight-foot paved shoulders extending out from each side thereof. The paved shoulder was of a composition and texture different from that of the main traveled portion [1] of the highway. Having parked his car parallel to the highway, but half on the paved shoulder and half on the dirt shoulder, he left both headlights and tail lights burning and joined the sailor in flagging down traffic for the purpose of obtaining gasoline.

Soon thereafter, Foley, accompanied by one Sheridan, arrived from the north in a foreign- built vehicle and came to a stop at a point from 20 to 40 feet ahead of McLeod's sedan. The exact location of the foreign vehicle on the highway after it had come to a standing position was the subject of conflicting testimony. Mr. Foley having suffered retrograde amnesia in the subsequent collision was unable to testify. The only other surviving eye witnesses were Sheridan and McLeod. They testified that the Foley car was parked about two car-lengths ahead of the McLeod car and at a slight angle headed to the right, or west, with the right front wheel and about half of the right side off the paved shoulder and on the dirt, while the left rear wheel stood about four feet east of the outside edge of the paved shoulder. After Foley parked, he was accosted by the sailor who asked for a ride to get gasoline. On receiving an affirmative reply, the sailor entered the Foley vehicle. McLeod returned to his car, reduced the headlights to parking lights, turned on the interior lights and left the tail lights burning. Just as McLeod entered the Foley machine, its rear end was struck by a tractor pulling two loaded semi-trailers, property of Rainville Trucking Company, driven by Earl Wilson, husband and father of respondents. The sailor was killed and Wilson died from his resulting injuries.

The witness Haven, also driving a truck south, arrived while the dust of the Wilson crash was still in the air. He testified that McLeod told him the Foley vehicle was "setting in the highway" and pointed to the middle of it. Also, Haven observed gouge marks in the main traveled portion where McLeod pointed. There was expert testimony that these gouge marks were made by certain portions of the rear of Foley's machine, and photographs showed that its rear end was demolished. It was pushed forward and turned around clockwise, coming to rest off the right paved shoulder 77 feet and seven inches distant from the first gouge mark on the pavement. The truck proceeded south and ran into a culvert abutment west of the highway and came to rest with the tractor and one trailer in the ditch. The second trailer was stopped south of the culvert, coming to rest on its side and headed north. The distance from the first gouge mark to the abutment was 158 feet, eight inches. Haven testified that when he arrived, the Foley vehicle was approximately 70 feet south and west of the right front of McLeod's car on the dirt shoulder.

There is a conflict of evidence with respect to the point of impact. This conflict arises not only from the physical evidence of the gouge and tire marks on the pavement as against the testimony of the only two eye witnesses, but also from the conflicting expert testimony with respect to the meaning of the physical evidence. It is established that there were *two sets of tire marks* starting with the gouges. One set turned right toward the spot where the foreign vehicle rested, and the other set led to the culvert and the truck. There were no gouges on the paved shoulder and there were no tire marks north of the gouges on either the paved shoulder or the main traveled portion. There was opinion testimony that the point of impact was five or ten feet north of the most northerly gouge mark. The gouge marks were just a little south of McLeod's car, according to Haven. When Haven arrived, he found a crumpled piece of chrome lying by one of the gouge marks and threw it off the road. Also, he saw dirt lying "just behind the skid marks to just past the gouges." It was dirt "like you would get off underneath your car if you bump it or something, it falls on the pavement." Photographs of the foreign vehicle show that its rear end took the full force of the blow almost direct. Mr. Harper, an expert witness for respondents testified that, based on measurements of the gouges and the rear understructures of the foreign vehicle, it was his opinion that certain of the gouges had been made by its rear spring hangers.

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[1] By "main traveled portion" we refer to the 11-foot southbound lane.

In view of the foregoing evidence and drawing all reasonably favorable inferences from it, we conclude that there was substantial evidence upon which the jury found Foley guilty of negligence proximately causing the accident. In fact, without any expert testimony, but merely from a study of the photographs of the gouges, tire marks and resting places of the vehicles, the jury reasonably inferred that at the time of impact some portion of the rear of the foreign vehicle was protruding or resting upon part of the main traveled portion of the highway in violation of section 582[2] of the Vehicle Code.

[1] But appellants argue that the physical evidence is rebutted by the eyewitness testimony of McLeod and Sheridan and by the opinion of their expert witness, Lynch, who opined that the gouge marks were made by the truck. At the most, this merely creates a conflict in the evidence which the jury resolved against appellants and is binding on appeal. The jury may have disbelieved Sheridan and McLeod by reason of bias and interest. Sheridan was a longtime friend of Foley and an occupant of his vehicle and he testified that it was parked about sixty feet ahead of McLeod's car, part on the paved shoulder and part on the dirt, at an angle headed more nearly to the south. On cross examination he said he did not remember having told Officer Ferrari that the Foley vehicle stopped about 15 or 20 feet ahead of McLeod's car or that he had stated to the officer that Foley pulled toward the shoulder, and that "we were partially in the highway." It was stipulated that if Ferrari were recalled he would testify to the foregoing statements made to him by Sheridan shortly after the accident. Sheridan was a vague, unreliable and interested witness. McLeod was plaintiff in an action for damages against the Rainville Trucking Company and the California Freight Lines which was tried contemporaneously with this case. Appellants admit that McLeod was impeached by Haven with respect to the position of the Foley car, but argue that Haven's impeaching testimony does not constitute positive evidence of the fact, citing Albert v. McKay & Co., 174 Cal. 451, 456, 163 P. 666. Considered only as impeaching testimony this is true, but as stated in the Albert case, when a witness is impeached by proof of prior inconsistent statements, the effect is to discredit him as a witness. The jury

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[2] Vehicle Code, § 582. "Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.

"This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway."

was properly instructed that the presumption that a witness speaks the truth may be overcome "by evidence that on some former occasion he made a statement or statements inconsistent with his present testimony" and that "a witness false in one part of his * * * testimony is to be distrusted in others." Under these instructions the jury was entitled to disbelieve McLeod and we must presume that they did. In addition, McLeod himself testified that he had no recollection of how he got gasoline to move his car and continue his trip to Jacumba or of when he left Jacumba for his return trip to San Francisco. He had no recollection of his travel south to Jacumba, although the evidence shows he left the scene of the accident within a short time and before Officer Ferrari had an opportunity to question him. On his way back north the next day he drove about two miles past the scene of the accident when he was stopped by Ferrari who suspected that it was the same sedan which had been described to him as having been at the scene of the accident. McLeod still had the sailor's bag in his car with all the deceased sailor's identification. When Ferrari stopped him, McLeod was dazed and shocked. From McLeod's own testimony, the jury reasonably could have inferred that the shock of the accident had left him with an impaired recollection of what occurred immediately before it, and they were justified in relying upon the physical facts as against the conflicting oral testimony of Sheridan and McLeod.

[2, 3] It is a vain pursuit to attempt to upset a judgment on the ground of insufficiency of the evidence where there is a substantial conflict. Kaichen v. Showers, 146 Cal.App.2d 804, 304 P.2d 137. The same rule applies to expert testimony. Khan v. Southern Pacific Co., 132 Cal.App.2d 410, 415, 282 P.2d 78; Sims v. Weeks, 7 Cal.App.2d 28, 39, 45 P.2d 350. Also, the same rule applies to conflicting reasonable inferences. If the inferences drawn from the proof are reasonable, the reviewing court has no power to substitute its deductions for those of the jury. Callahan v. Gray, 44 Cal.2d 107, 111, 279 P.2d 963; Risley v. Lenwell, 129 Cal.App.2d 608, 625, 677 P.2d 897; Hamilton v. Pacific Electric Railway Co., 12 Cal.2d 598, 602, 86 P.2d 829.

A close inspection of the photographs of the highway and the testimony with reference thereto removes all doubt as to the wisdom of the jury. It is disclosed that there were six gouge marks in the main traveled portion of the paved area at the scene of the collision. They were not there prior to the accident. They varied in length from four inches to 56 inches. The one nearest the center line was 90 inches west of the center line and the farthest was 123 inches west. This places all of them within the eleven-foot main traveled southbound lane.

[4] Viewed in the light of the cited authorities, there is ample evidence to sustain the jury's implied finding of negligence on the part of Foley.

Instructions

At the request of Foley, the court instructed on the provisions of section 81 of the Vehicle Code[3]. Immediately following, the court on its own motion added the following: "Under this definition the paved shoulders of the road are included as a portion of the highway. Whether or not such shoulders are part of the main-traveled portion of the highway in any case is a question of fact to be decided in accordance with the evidence related thereto."

[5] Appellants contend that the addition of the above-quoted portion constituted prejudicial error. They point out that prior to 1948, section 582 of the Vehicle Code prohibited parking "upon the paved or improved or main traveled portion of the highway." They urge that deletion of the words "paved or improved" left only the

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[3] Vehicle Code, § 81. "'Street' or 'highway' is a way or place of whatever nature publicly maintained and open to the use of the public for purposes of vehicular travel."

"main traveled portion of the highway" to which the section would apply. Appellants say that under the wording of section 582, the paved shoulders were not part of the main traveled portion of the highway and therefore parking of the Foley car on the paved shoulder "could not be negligence as a question of law or fact." We may agree that the amendment of section 582 removed the former illegality of parking on a paved shoulder, but appellants go further and say therefore that so to park is *not* negligence as a matter of law or fact. This is a non sequitur. There are innumerable decisions in which lawful acts have been performed in such a negligent manner as to create liability. The time, place and circumstances are largely controlling. On a clear day, parking on an eight-foot paved shoulder may be the very essence of due care and prudence. But in the case at bar, the jury could very well have concluded that so to park on a dark, foggy night when there was ample room off the paved shoulder was not only negligent but foolhardy. The widening of an old highway by adding eight-foot paved shoulders constitutes an invitation to motorists to use them for travel as well as parking. Certainly, it cannot be said, as a matter of law, that it is *not* negligent to park on a paved shoulder under any and all circumstances, and the Legislature evidently held the same opinion when it removed the former illegality. Appellants' argument that because the Foley automobile was parked on the paved shoulder (if it was), there was no actionable negligence is erroneous. Under the weather conditions and other circumstances, the jury reasonably could have found negligence in the manner in which Foley parked his foreign vehicle.

[6, 7] On the whole, the evidence was sufficient to warrant a finding that the paved shoulder was a part of the main traveled portion of the highway in this instance. It follows that there was no error in the instruction now under consideration. But, if it were held erroneous, it could not be said to have worked prejudicial error for it appears that respondents should have prevailed. Art. VI, sec. 4½, Calif.Const. There was ample evidence upon which the jury could have found negligence without finding also that the paved shoulder was part of the main traveled portion of the highway. Since it cannot be said that the verdict probably would have been different had the instruction not been given, there is no prejudicial error.

[8] Appellants requested the giving of B.A.J.I. No. 140 to the effect that looking and not seeing, or failure to look was negligence. It was refused and appellants claim error. Their argument is that since the jury was instructed that Wilson was entitled to the presumption of due care, and since the foreign car was clearly visible from a distance of from 150 to 200 feet and Wilson made no attempt to stop the tractor or go around the car, the jury should have been instructed that failure to see that which is in plain sight means that the person is negligently inattentive. While ordinarily B.A.J.I. No. 140 should be given in a case such as this, where the jury has been told that respondents were entitled to the presumption of due care on the part of decedent, it cannot be said that in the instant case failure to read it constituted prejudicial error. There was much conflict in the evidence regarding the range of visibility. Even though Wilson might have *seen* Foley's tail lights in time to stop or pass around them, he might not have realized the vehicle was standing still until he was practically upon it. "It is not an easy matter to determine at night whether a vehicle seen ahead on the highway is standing still or moving, even though it be well lighted. It cannot be said as a matter of law that there is some *definite distance* from a parked vehicle at which an approaching driver must realize that the vehicle is standing still, in order to be free from negligence. * * * It must be remembered that automobile drivers have the right to anticipate that standing vehicles ahead of them will be parked off the highway, if it is practicable to so park them, and the right to act upon that assumption until there are reasonable grounds for be-

lieving that there is some vehicle ahead that is not so parked." Doane v. Smith, 63 Cal.App.2d 691, 696–697, 147 P.2d 650, 652. In the instant case, Wilson was driving the road practically every night and it could be inferred he knew, not only of the eight-foot paved shoulder, but also of the wide dirt shoulder adjoining it. He had a right to rely upon the presumption that lights ahead of him, if they were on the main traveled portion of the highway, were moving and not standing still. The effect of the fog was to diffuse the glare of Foley's tail lights which in turn rendered it difficult to judge the distance. While failure to give the requested instruction may have been error, it was not prejudicial to appellants in view of all the evidence.

Admissibility of Expert's Opinion of Truck's Speed

[9, 10] Appellants claim prejudicial error in the exclusion of the testimony of their expert, Frank C. Lynch. If allowed to, he would have testified that in his opinion Wilson's truck was traveling at a minimum of sixty miles per hour at the moment of impact. The receipt or refusal of expert testimony is largely within the discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse. Huffman v. Lindquist, 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R. 2d 485; People v. Haeussler, 41 Cal.2d 252, 261, 260 P.2d 8. Without discussing in detail all the factors Mr. Lynch considered in arriving at his opinion, it is sufficient to state that many of them were purely speculative and without foundation in the evidence. All the evidence of the collision and the course and behavior of the vehicles was found after the point of impact, that is, after the start of the first gouge mark. There was no evidence that the brakes had been applied before the impact. In fact, it was pure speculation as to whether they had been applied by Wilson, or by the breaking of the air line through the force of the impact. As the trial court aptly stated in refusing to admit the opinion: "I have tried many cases in which there was expert testimony of speed and in none of them have I ever seen an expert's opinion based on so many speculative factors as in this one." We find no prejudicial error in the exclusion of Lynch's estimate of 60 miles per hour, particularly in view of the fact that there was some evidence that Wilson's truck would not go over 52 miles per hour.

Contributory Negligence

[11–13] Appellants finally complain that Wilson was guilty of contributory negligence as a matter of law and base their contention primarily upon evidence that there was "unobstructed visibility ahead on the highway for lights of as a minimum 150–200 feet." But there was conflict in the evidence even as to this point. Ferrari testified that visibility existed for 150 to 200 feet "on approaching oncoming vehicles with headlights on" and that "tail lights were somewhat impaired due to spot fog patches." Haven testified that he did not see any lights on the back of McLeod's car until he got "right up close" and that at 200 feet he saw only the glare or reflection in the air of the fire in the burning Foley vehicle. It was this glare which first attracted Haven's attention and caused him to slow down preparatory to stopping. One Romero testified that as he approached the scene of the accident, he could see ahead only 25 feet and that fog banks were coming in at the scene. The jury was correctly instructed on the matter of contributory negligence at the request of appellants and it was a question of fact for the jury to determine whether, under the existing circumstances, Wilson should have seen the Foley vehicle in time to stop or swerve around it. The cases in which it can be said as a matter of law that the negligence of a plaintiff's decedent contributed proximately to the accident are rare, and before it can be held as a matter of law that such negligence exists, the evidence must point unerringly to that conclusion. Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826; Gottloeb v. Melrose Health Baths, 148 Cal. App.2d 313, 306 P.2d 568. In the instant case, plaintiffs were entitled to, and received, the instruction that the deceased Wilson was presumed to have exercised due care and ordinary prudence. This presumption, coupled with the conflict in the evidence as to the visibility, is sufficient to raise a question of fact for the jury on the subject of contributory negligence.

All the questions presented on this appeal were raised in the trial court on a motion for a new trial. The court had heard the witnesses and seen the visual evidence, such as photographs and diagrams. In denying the motion, the trial court impliedly found that the jury had correctly determined the issues of fact and that no error had been committed.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

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149 Cal.App.2d 621

John CARAS and Olympia Caras, Plaintiffs and Respondents,

v.

James E. PARKER, Leon Goldberg and Fannie Goldberg, Defendants,

Leon Goldberg and Fannie Goldberg, Appellants.

Civ. 21961.

District Court of Appeal, Second District, Division 1, California.

April 1, 1957.

Hearing Denied May 29, 1957.

Purchasers' action to compel specific performance of contract to convey real estate, against the original owner and his grantees. The Superior Court of Los Angeles County, Lloyd S. Nix, J., entered judgment requiring grantees to convey property and the grantees appealed. The District Court of Appeal, Fourt, J., held that where purchasers deposited full purchase price in escrow fund in accordance with escrow agreement, there arose a contract enforceable by specific performance, notwithstanding that at purchasers' insistence escrow agreement recited that it was contingent upon purchasers securing approval by city to subdivide lots and that such approval had not been procured.

Affirmed.

1. Vendor and Purchaser 🔑3(4)

Where escrow agreement entered into between vendor and purchasers provided that it was contingent upon purchasers procuring approval of city to subdivide lots that were subject of agreement, agreement was an option contract and not a contract of sale, and purchasers could attempt to secure approval of city and pay balance of purchase price but were under no obligation to do either.

2. Vendor and Purchaser 🔑3(4)

Distinction between a contract to purchase or sell real estate and an option to purchase is that "contract to purchase or sell" creates a mutual obligation while an "option to purchase" merely gives the right to purchase within a limited time without imposing any obligation to purchase.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract to Purchase or Sell" and "Option to Purchase".

3. Vendor and Purchaser 🔑18(3)

When offer made in option to purchase is accepted by any sufficient act or work of party acquiring right to accept or reject such offer within stipulated time, transaction between the parties ipso facto ceases to be an option but becomes a sale or contract of sale according to the circumstances of the acceptance.

4. Vendor and Purchaser 🔑18(4)

An option founded upon a valuable consideration cannot be withdrawn or revoked until the time fixed, and will be binding and obligatory upon the optionor or his assigns with notice, unless it expires by its own limitation.

5. Vendor and Purchaser 🔑18(1)

An option agreement supported by consideration is an enforceable contract notwithstanding its unilateral character.

6. Escrows 🔑1

An option agreement supported by consideration is sufficient foundation for the escrow of a deed to the property for the purchase of which the option was given.

7. Vendor and Purchaser 🔑12, 21

Escrow instructions signed by both parties, where they constitute all the necessary elements of a contract, may be regarded as the written contract of the parties, and since the agreement is in writing, consideration will be presumed. West's Ann.Civ.Code, § 1614; West's Ann.Code Civ.Proc., § 1963, subd. 39.

8. Vendor and Purchaser 🔑57

An option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon exercise of the option; and such right the optionor cannot defeat by repudiating the option.

9. Specific Performance 🔑57

In an option contract for purchase of real property, there is no mutuality of remedy until acceptance of option, and upon acceptance of offer by buyer there is created the contract of sale which gives rise to remedy for specific performance.

10. Specific Performance 🔑59
Vendor and Purchaser 🔑79

Where vendors and purchasers entered into an escrow agreement providing for conveyance of land upon deposit of specified purchase price in escrow within a stipulated time and such agreement provided that it was contingent upon purchasers securing approval of city to subdivide lots, deposit of balance of purchase price by purchasers without securing approval of city to subdivide lots constituted a waiver of contingency and created a contract of sale enforceable by the specific performance.

11. Parties 🔑96(2½)

Where vendor and purchasers entered into escrow agreement for purchase of real property and subsequent to agreement attorney for purchasers, with purchasers' consent, requested that deed convey attorney an undivided one-half interest, but when vendor repudiated original escrow agreement attorney voluntarily withdrew as a party in interest to specific performance action and such voluntary withdrawal was consented to by vendor and his assignees, vendors and assignees could not complain that attorney was not joined as a real party in interest. West's Ann.Bus. & Prof.Code, § 6129.

12. Specific Performance 🔑22

Where vendors and purchasers had entered into an escrow agreement for purchase of real property, and other parties, knowing the existence of agreement, induced vendor to breach his contract and convey land to them, specific performance in favor of the original purchasers would be decreed against parties inducing breach of contract.

Low & Stone, Beverly Hills, for appellants.

Tanner, Thornton & Myers, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal by defendants Leon and Fannie Goldberg, from a judgment ordering them to convey certain real property to plaintiffs, in an action for specific performance of a contract of sale.

A resúme of the pertinent facts of the case is as follows: Defendant James E. Parker was the owner of two lots in the city of Manhattan Beach. Parker agreed, on February 27, 1952, to sell this property to plaintiffs for the sum of $3,900. A six months escrow was entered into by plaintiffs and Parker at the Security-First National Bank of Los Angeles, El Segundo Branch, with the bank as the escrow agent.

In that part of the escrow instructions executed by plaintiffs as "Buyer," and at the end of the printed matter on the first page, the following appears in typewriting:

"This escrow is contingent upon Buyer securing approval of city of Manhattan Beach of property described above to be divided into eight lots." There was uncontradicted testimony that this provision was inserted at the buyer's request. The instructions signed by Parker as "Seller," authorized the escrow agent to deliver the deed when there was deposited in the escrow for his account the sum of $3,900, and Parker approved and agreed to be bound by the buyers' instructions.

An initial payment of $200 was made by plaintiffs to the broker, Hackius, who deposited it in the escrow on February 28, 1952. On August 11, 1952, there was a deposit in the escrow of $1,995.50, made in the form of a check of Dee B. Tanner, one of the attorneys herein for plaintiffs, and a deposit of $1,775.50, made in the form of a check of plaintiffs on the same day, or a total of $3,911.00, deposited in the escrow. A deed executed by Parker to plaintiffs, dated February 27, 1952, was deposited in the escrow. At the time the final monies were deposited, the escrow agent was requested by plaintiffs to modify the instructions to provide that "Title would vest in John Caras, a married man, an undivided one-half interest, and Dee B. Tanner, a married man, an undivided one-half interest."

Sometime about April, 1952, defendants Leon and Fannie Goldberg, husband and wife, hereinafter referred to as the Goldbergs, with information and knowledge of the escrow and of the agreement between Parker and plaintiffs, went to the latter and offered them $1,000, profit if they would, in effect, let the Goldbergs buy the property in question. This offer was refused by plaintiffs.

On April 23, 1952, Parker wrote a letter to the escrow holder wherein he repudiated the agreement. He wrote: "Please cancel Escrow #351408 as it serves no practical purpose since it is for 6 mos duration & I have no time to close my affairs before I reenter service.

"Mr. Hackius promised action in 30 days after escrow date & has failed to keep his promise. This leaves me with no time & consequently no further benefits to be gained."

The Goldbergs then purchased the property from Parker. An escrow was set up in the Inglewood Escrow Company on May 8, 1952, between Parker and the Goldbergs, and a deposit of $100 was made and the escrow was closed on July 9, 1952, the price being $5,800. On the latter date the deed was recorded from Parker to Goldberg.

A complaint was filed by plaintiffs on September 10, 1952, at which time they did not know that Parker had sold the property to the Goldbergs. Upon learning of the latter sale, and the facts and circumstances surrounding it, plaintiffs promptly filed an amended complaint on November 25, 1952, wherein it was alleged that the Goldbergs' purchase from Parker was with full knowledge of plaintiffs' contract, and that the Goldbergs conspired with Parker to breach the contract and convey the property to them, instead of to plaintiffs.

There was a motion by the Goldbergs for a judgment on the pleadings, which was granted, and upon appeal that judgment was reversed, Caras v. Parker, 131 Cal.App.2d 141, at page 142, 280 P.2d 226, at page 227, the court stating: "If the facts alleged can be proved, plaintiffs are entitled to specific performance of their contract as against them all."

Plaintiffs alleged in their complaint the performance of all the conditions to be performed by them, and the answer of the Goldbergs denied the same.

At the trial, appellants made an offer of proof to the effect that plaintiffs had never fulfilled the condition set forth in the escrow in that the approval of the city of Manhattan Beach had never been obtained for the division of the property into eight lots and that there had been no waiver of that condition. The offer of proof was denied.

The court found that plaintiffs had fully performed all of the conditions of the agreement required to be performed by them, and that since August 11, 1952, they have been entitled to have the property conveyed to them. It was also found that Parker's attempted cancellation of the escrow was without right and a breach of the contract. Further, the facts were found to be substantially the same as the facts heretofore related. The court then gave judgment to the plaintiffs, wherein the Goldbergs were ordered to convey the property to plaintiffs by a deed, plus costs of suit.

As grounds for reversal appellants contend that (1) there is no evidence to support the finding that plaintiffs performed all of the conditions of the agreement required to be performed by them; (2) there is a material variance between plaintiffs' pleading of performance and claim of waiver at the trial; (3) there was no specifically enforceable right against appellants since the contract lacked mutuality of obligation and remedy; (4) the attorney who acquired a one-half interest in the property and the litigation should be brought in as a real party in interest and (5) a specific judgment against respondents, without awarding them compensation or restitution and settling all the rights of all parties to the property is inequitable.

[1-3] These contentions are without merit. The condition or contingency in question makes it apparent that the agreement between plaintiffs and Parker was an option contract and not a contract of sale. Plaintiffs had six months in which they could attempt to secure the approval of the city to divide the property into eight lots and pay the balance of the purchase price. They were under no obligation to do either. As stated in Menzel v. Primm, 6 Cal.App. 204, 209, 91 P. 754, 756: "The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase.' 29 Am. & Eng. Ency. of Law, 2d Ed., p. 606. In other words, an option is a contract by which the owner of property invests another with the exclusive right to purchase said property at a stipulated sum within a limited or reasonable time in the future. Or, stated in another form, it is a right 'acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future.' 21 Am. & Eng. Ency. of Law, p. 924. When the offer thus made is, within the time stipulated, accepted by any sufficient act or words of the party acquiring the right to accept or reject such offer, the transaction between the parties, *ipso facto,* ceases to be an option, but becomes a sale or contract of sale, according to the circumstances of the acceptance."

[4] An option founded upon a valuable consideration cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the optionor, or his assigns with notice, until it expires by its own limitation. Braselton v. Vokal, 53 Cal.App. 582, 586, 200 P. 670; Dawson v. Goff, 43 Cal.2d 310, 316-317, 273 P.2d 1; Jonas v. Leland, 77 Cal.App.2d 770, 777, 176 P.2d 764; Copple v. Aigeltinger, 167 Cal. 706, 710, 140 P. 1073.

[5, 6] Since an option agreement supported by consideration is an enforceable contract, notwithstanding its unilateral character, it is a sufficient foundation for the escrow of a deed to the property for the purchase of which the option was given. Feisthamel v. Campbell, 55 Cal.App. 774, 779, 205 P. 25.

[7] Parker deposited in the escrow a deed to the property, executed by him to plaintiffs, which he authorized the escrow agent to deliver when he held in the escrow, for the account of Parker, the sum of $3,900. Escrow instructions signed by both parties, where they constitute all the necessary elements of a contract, may be regarded as the written contract of the parties. White v. Reskin, 90 Cal.App. 512, 517, 265 P. 1016; Brown v. Roberts, 121 Cal.App. 654, 658, 9 P.2d 517; Williams v.

Rush, 134 Cal.App. 554, 558, 25 P.2d 888. The agreement being in writing, consideration is presumed. Civil Code, § 1614; Code Civ.Proc. § 1963, subd. 39.

[8] As stated in Warner Bros. Pictures v. Brodel, 31 Cal.2d 766, at page 773, 192 P.2d 949, at page 952, 3 A.L.R.2d 691, "The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. 'The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance.' Seeburg v. El Royale Corp., 54 Cal.App.2d 1, 4, 128 P.2d 362, 363, see, Erickson v. Boothe, 79 Cal.App.2d 266, 272, 179 P.2d 611. Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon the exercise of the option, which the optionor cannot defeat by repudiating the option. See McGovney, Irrevocable Offers, 27 Harv.L.Rev. 644, 646, 654, and cases collected in footnote 5, p. 646; Corbin, Option, Contracts, 23 Yale L.J. 641, 656. Since the optionor promises to perform the contract to which the option relates, subject to a condition at the discretion of the optionee, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the option relates. [Citing cases.]"

[9, 10] In an option contract for the purchase of real property there is no mutuality of remedy until the acceptance of the option. Upon the acceptance of the offer by the buyer, there is then created the contract of sale and it is this contract which gives rise to the remedy for specific performance. Jonas v. Leland, supra, 77 Cal.App.2d 770, 777, 176 P.2d 764. Therefore, by depositing the balance of the purchase price plaintiffs waived the contingency and accepted the offer, thus creating a contract of sale.

[11] At the first trial it developed that Dee B. Tanner, one of the attorneys for plaintiffs, had deposited in the escrow one-half of the purchase money and had plaintiffs request a change in the escrow instructions at the bank to provide that the deed to be executed by Parker would show Tanner as the owner of a one-half interest therein. A timely motion was made wherein it was contended that Tanner was a real party in interest and that he was not joined as a party to the action. This motion was denied.

The record of the first trial, which is in evidence herein, discloses the following:

"Mr. Tanner: I will clear this up, if you would like me to, your Honor.

* * * * * *

"Mr. Tanner: There was a contract employing me as the attorney for Mr. John Caras and his wife, and under the terms of that contract I agreed that I would entertain and proceed in the prosecution of their lawsuit for specific performance of this property against Mr. Parker.

"At the time we first started to file this action under this contract, I agreed and they agreed with me that if we were successful in obtaining this property that as compensation for my services they would give me one-half of this property if I paid them half of what they paid for it, and that was our agreement.

"Then we advised the escrow there at the bank to that effect and I did put up half of the money at that time.

"Then I later wrote a letter to the bank on September the 9th as follows:

" 'Mrs. Green, Escrow Department, re Escrow 35-1408.

" 'Gentlemen:

" 'Enclosed is a copy of the complaint that will be filed Wednesday, September 10, 1952. Also this is to advise you that if the seller, Mr. Parker, will revoke his direction to you cancelling this escrow agreement under date of April 23, 1952, but still refuses to sign additional escrow instructions allowing title to come to myself and Mr. Caras, then in that event it will be agreeable to me that we use the deed he has already executed and which you hold in escrow and open a second escrow there at the bank allowing these buyers, Mr. and Mrs. Caras, to convery to me a one-half interest in this property under a second escrow.

"'I want you to know this in the event that Mr. Parker revokes his cancellation letter of April 23 but refuses to sign the new escrow modification direction prepared since my deposit in escrow.

"'Yours very truly, Dee B. Tanner.'

* * * * * *

"The Court: This comes pretty close to being champerty."

A recess was taken and counsel went into the judge's chambers. Shortly thereafter, in open court, Tanner stated:

"Mr. Tanner: Yes, your Honor. In view of the contract interest I have with my client, I intend to withdraw as the attorney and I will have another attorney, my partner, continue with this case, or other counsel that I can obtain for my clients, subject, of course, to their consent.

"I wish to state for the record that I have no interest whatever against the defendants in this case personally or their attorneys by reason of my contract to render services to my clients, the Carases.

"The Court: In addition to that, you waive any rights that you may have to contend that you are a necessary or proper party to this action?

"Mr. Tanner: Yes, I will stipulate that I am not such a party.

"The Court: Does counsel accept the stipulation?

"Mr. Stone: It is acceptable to the defendants Leon Goldberg and Fannie Goldberg.

"Mr. Cowitt: It is acceptable to the defendant Parker."

Appellants contend they were entitled to have Tanner included as a party so that a defense based upon the Business and Professions Code, § 6129,[1] could have been advanced; that such conduct violates the spirit if not the word of that section; and that a decree awarding the property to plaintiffs alone does not protect appellants against some future claim by the attorney.

There is no evidence that Tanner had purchased or secured the one-half interest in the transaction with the intention of bringing suit, and furthermore, there is no showing of a solicitation by Tanner. Quite the contrary appears, and we will not presume any criminal intent or purpose.

The trial court properly denied appellants' motion. Tanner was not a party to the contract which was the subject of the action. Although plaintiffs requested a change in the escrow instructions, such change was never accepted by Parker. Caras was the real party in interest and no issue to the contrary was raised by the pleadings. Moreover, appellants at the first trial stipulated that Tanner was not a necessary party.

[12] Appellants complain that the decree, as presently drawn, leaves plaintiffs with the property, Parker with $5,800, and appellants with an inequitable result. A quick answer to that complaint is that appellants brought the trouble onto themselves. They knew there was an agreement between Parker and plaintiffs; they attempted to buy out plaintiffs for $1,000, and when they found they could not do so, went to Parker and offered him $2,000 more than plaintiffs had agreed to pay. In other words, appellants were the driving force to induce Parker to breach his agreement and but for their conduct, so far as the record before us discloses, there would have been no breach. Furthermore, appellants should have cross-complained and joined Parker if they had desired to adjudicate their rights as against Parker.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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[1] **Section 6129, Business and Professions** Code, reads:

"Every attorney who, either directly or indirectly, buys or is interested in buying any evidence of debt or thing in action, with intent to bring suit thereon, is guilty of a misdemeanor."

149 Cal.App.2d 792

Willard D. MILLER, as Executor of the Last Will and Testament of W. D. Miller, Deceased (substituted in the place and stead of W. D. Miller) and Lottie M. Miller, Plaintiffs, Cross-Defendants and Respondents,

v.

F. D. TABER and Marie E. Taber, Defendants, Cross-Complainants and Appellants.

Civ. 8930.

District Court of Appeal, Third District, California.

April 4, 1957.

Suit by buyers of timber growing upon land to reform deeds conveying land so as to exclude therefrom merchantable timber, to grant buyers right to go upon land and cut and remove timber and to declare rights and duties of respective parties under agreements and instruments executed between them and for money judgment. The Superior Court, Siskiyou County, James M. Allen, J., entered judgment declaring buyers to be owners of all of merchantable timber situated on land and purchasers of land appealed. The District Court of Appeal, Van Dyke, P. J., held where purchasers of timber land had contracted to sell timber but had executed deed purporting to convey land to buyers who had not only paid price for timber but also had paid balance of purchase price to vendor of land, land purchasers' deed to timber buyers constituted mortgage only and three deeds, subsequently executed by timber buyers placing record title back in land purchasers, constituted release of mortgage and timber buyers' right to timber was not affected by latter deeds.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

On appeal conflicts in evidence must be resolved in support of judgment.

2. Woods and Forests 🔑2

Where purchasers of timber land had contracted to sell timber but had executed deed purporting to convey land to buyers of timber, who had not only paid price for timber but also had paid balance of purchase price to vendor of land, even though deed from land purchasers constituted mortgage only and conveyed no legal title to land to timber buyers and timber buyers had no formal conveyance of timber from land purchasers, buyers were owners of timber.

3. Woods and Forests 🔑2

Timber standing upon land can be conveyed before severance and be subject of complete ownership.

4. Mortgages 🔑32(5), 139, 309(3)

A deed given to secure repayment of money owed is a mortgage and conveys no title, serving merely to create a lien as though the instrument were a mortgage in form, and conversely a reconveyance, that is, a following deed, which purports to convey title to mortgagor, amounts to no more than a release of lien.

5. Mortgages 🔑32(5), 309(3)

Where purchasers of timber land had contracted to sell timber but had executed deed purporting to convey land to buyers who had not only paid price for timber but also had paid balance of purchase price to vendor of land, land purchasers' deed to timber buyers constituted mortgage only and three deeds, subsequently executed by timber buyers placing record title back in land purchasers, constituted release of mortgage, and timber buyers' right to timber was not affected by latter deeds.

6. Appeal and Error 🔑1071(6)

Where trial court had construed various instruments conveying land between land purchasers and buyers of timber growing on land as a mortgage and release of mortgage which did not affect buyers' right to timber, there was no necessity for reformation of instruments to secure buyers' title to timber, and therefore failure of trial court to find on issue of mutual mistake was not prejudicial, although timber buyers had requested relief of reformation of instruments.

7. Appeal and Error ⟹1033(9)

Where facts in negotiations between timber land purchasers and buyers of timber growing on land, who had furnished down payment and subsequently had paid balance of principal together with some accumulated interest and accruing taxes, would have appeared to have warranted finding that timber buyers were entitled to return of principal subsequently paid, but court had awarded only principal paid in down payment, land purchasers, on appeal, could not complain that judgment against them was less than it should have been.

8. Woods and Forests ⟹2

Under contract between purchasers of timber land and buyers of timber growing on land, who were to furnish land purchasers with down payment for timber land, providing that taxes advanced by timber buyers for all years after 1952 were to be refunded by land purchasers, taxes paid by timber purchasers for years 1951 and 1952 were correctly ordered to be refunded.

9. Reformation of Instruments ⟹44

In action by buyers of timber growing on land for reformation of three deeds purportedly conveying land back to original purchasers of land so as to exclude therefrom merchantable timber, where three deeds had been construed as releases of timber buyers' lien on land, and, although deeds had been executed allegedly for purpose of exchanging timber land with government for other timber lands, testimony that original purchasers had exchanged land with government for other timber land was properly excluded.

◆

Mark M. Brawman, Yreka, for appellants.

Barr & Hammond, Yreka, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment declaring respondents to be the owners of all merchantable timber situate upon certain property owned by appellants. On and before November 17, 1950, the Fruit Growers Supply Company, a corporation, was the owner of approximately 10,000 acres of land located in Siskiyou County. Defendants entered into an agreement to purchase the land from the supply company for $20,142.10, payable $6,000 down and the balance in installments with 6% interest on the unpaid balance. Appellants needed aid in financing the purchase and, accordingly, executed an agreement with W. D. Miller, now deceased, and his wife, Lottie M. Miller. In consideration of their advancing to him $6,000, they assigned to Miller and wife all right and title to the merchantable timber located on the property with the right to enter upon the land, to cut and remove the same. Respondents, whom we shall hereafter refer to as Miller, since W. D. Miller was the active participant for the spouses, not only paid the $6,000 which he had agreed to pay, $5,000 of which represented the price for the merchantable timber, but also paid the balance of the purchase price to the supply company, along with some accumulated interest and accruing taxes. After the down payment had been made, the supply company executed and placed in escrow a deed conveying the property to appellants, and simultaneously appellants executed and placed in escrow a deed purporting to convey the same property to Miller. When the full purchase price had been paid to the supply company, both deeds were placed of record. It is without dispute in the evidence that the deed from appellants to Miller was a mortgage to secure the repayment to Miller of funds advanced by him in the purchase of the property over and above the $5,000 he paid for the timber. By the terms of the agreement between appellants and Miller, no limitation of time was fixed as a period in which Miller must remove the timber. Appellants never repaid to Miller any of the funds which they were obligated to pay. In September of 1952, and after a part of the property had been logged by Miller, appellants represented to him that they desired a reconveyance of part of the property in order that they might negotiate an exchange with the federal government, whereby they would obtain lands then owned by the government and which had timber upon them. Accordingly, Miller did reconvey a considerable body of land by a deed which contained no reference to Miller's right to timber. Again, in December of 1952, and under similar circumstances, a second deed was executed by Miller which reconveyed another portion of the property to appellants, but this time the deed contained a reservation of timber growing upon Section 19 and portions of Section 24, part of the reconveyed property, but contained no such reservation as to other lands embraced within the deed. The reservation, however, gave the right to remove the timber on the said reserved portions at any time prior to December, 1953, and it is in the evidence that all timber on the portions so reserved was taken off by Miller within the time allowed. In July of 1953 Miller reconveyed the balance of the property to appellants by a deed which did reserve the timber upon the land, giving Miller until July 30, 1958, to remove it.

After receiving the last deed, appellants refused to allow Miller to remove any more timber or to go upon the land for that purpose, insisting that since the deeds, save for the reservations noted, were absolute, Miller had no interest in the timber; and, thereupon, this action was brought by Miller, since deceased, and his wife. The complaint referred to all of the instruments and written agreements hereinbefore referred to and recited the foregoing history of affairs between the parties. Miller asked that the deeds be reformed so as to exclude therefrom the merchantable timber growing upon the land therein described and to grant to Miller the right to go upon the land and cut and remove the trees. It was also asked that the respective rights and duties of the parties under the agreements and instruments executed between them be determined and declared. By a third cause of action a money judgment was asked.

[1–3] Although there was conflict in the evidence as to some of the matters hereinbefore recited, we have stated them in accordance with the rule on appeal that the conflicts must be resolved in support of the judgment. The trial court decided that the contract between appellants and Miller was of such nature that thereby Miller purchased from appellants all the merchantable timber standing on the land they were buying from the supply company; that he paid for it at the time of the contract or shortly thereafter and pursuant thereto, and that appellants having sold the timber to Miller and having received the full purchase price, Miller became, as between the parties to the agreement, the owner of the timber, and remained so throughout the transactions with appellants. The court also determined that when the full purchase price had been paid to the supply company, its deed to appellants was delivered to them, and their deed to Miller was delivered to him and that the latter deed constituted a mortgage only and conveyed no legal title to Miller, but created a lien upon appellants' title to the land less the timber to secure the repayment to Miller of the sums he advanced for the purchase of the property less the $5,000, which was the price he paid for the timber. It thus appears that before receiving the mortgage deed Miller had bought and paid for the timber and had begun to harvest it. True, he had no formal conveyance from appellants, but it was competent for the court in this action to declare him, by virtue of the facts, to be the owner of the timber. There is no doubt that timber standing upon land can be conveyed before severance and be the subject of separate ownership. Gibbs v. Peterson, 163 Cal. 758, 127 P. 62. Therein, the Supreme Court quoted from 28 American and English Encyclopedia of Law, Second Edition, page 541, as follows:

> "While there is much apparent conflict in the decision as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be

> absolute, and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time. * * * The question in each case is as to what is the contract between the parties."

[4] It is familiar law that a deed given to secure the repayment of money owned is a mortgage and conveys no title, serving merely to create a lien as though the instrument were a mortgage in form. As a corollary, a reconveyance, that is, a following deed which purports to convey title to the mortgagor, amounts to no more than a release of the lien. Sunderland v. Griffith, 1 Lab. 197; Fletcher v. Morlock, 251 Mich. 96, 231 N.W. 59. In the latter case, the court said:

> "The conveyance to Hendryx and wife was a mortgage; this fact is so fully established that we will not discuss it further.
>
> "Plaintiff's title under her deed was perfect except for this mortgage. If the mortgage when paid had been discharged by proper writing of record, plaintiff's title would have been free. * * * 41 C.J. 315 * * * A reconveyance by Hendryx and wife was not necessary to reinvest absolute title, but it was needed to clear record title. 41 C.J. 363.
>
> "Equitably the reconveyance by Hendryx and wife is a discharge of mortgage."

[5] When Miller executed the three deeds which placed the legal title of record back in appellants, nothing more was necessarily accomplished than the release of the mortgage and the clearing of the record title. Miller's right to the timber was not affected by the reconveyance of the land except as those instruments did specifically alter his contractual rights. The first deed contained no reference to the timber whatever and therefore did not affect the rights thereto. The second specifically set up a limitation as to two sections of land, whereby Miller had to remove the timber by a future date or lose his rights thereto. It was shown that within the time reserved he did remove the timber from those two sections. The third and last deed likewise limited his right to remove timber from land described therein to July 30, 1958, and provided that as to such timber as was not removed prior to that date Miller's title should be forfeited to the appellants. The decree of the court was in accordance with the foregoing. It declared appellants to be the owner of all of the land which had been originally purchased from the supply company. It declared Miller to be the owner of all merchantable timber standing upon the land with the right to remove the same without limit as to time in accordance with the contract of sale of the timber, but limited to July 30, 1958, as to the land covered by the last deed.

[6] In support of their appeal appellants make certain specific allegations of error. They first contend that the trial court did not have sufficient evidence before it to reform the deeds upon the ground of mutual mistake. It is true that the complaint asked reformation of the deeds upon that ground, that the trial judge in a memorandum opinion declared that he did not believe a sufficient case of mutual mistake had been made out. However, this action was one for declaratory relief and was not confined wholly to the matter of reformation. What the trial court did was to give effect to the three deeds as releases of the mortgage lien and in this, as we have said, we think it acted correctly. There was no necessity for reformation once the deeds were understood to have been nothing more than releases of the mortgage lien created by the deed from appellants to Miller. Appellants also complain that the trial court failed to find on the issue of mutual mistake, but, in accordance with what we have just said, such findings were unnecessary.

[7] Finally, appellants contend that the money judgment rendered is not supported by the evidence. By the contract between

them, made when appellants contracted to purchase the land from the supply company, Miller was specifically bound only to the extend of furnishing the first $6,000 to be paid for the property. Five thousand of this was not repayable to him, being the purchase price of the timber. Appellants did agree, however, to repay the $1,000 and any other sums that Miller might advance to them wherewith to pay the supply company. Also, appellants agreed to repay to Miller any taxes he might pay on the land "after 1952". As we have said, Miller actually paid the entire purchase price. It would appear that Miller was entitled to recover all of the funds he advanced, save possibly taxes paid by him which we will discuss further. However, the trial court gave judgment for the $1,000, that is, the remainder of the $6,000 after subtracting therefrom the $5,000 paid for the timber, for the sum of $1,013.60 for taxes, and for the sum of $1,206.13 for interest accrued. Appellants attack the interest award and their argument is as follows: The trial court gave no judgment for the purchase price of the property advanced by Miller, save only to the extent of $1,000. It is to be assumed, therefore, that the trial court considered there had been a waiver by Miller of his right to repayment of the principal, and it should, therefore, logically follow that the waiver must have included the right to recover interest. There was no specific finding of waiver. We do not attempt to explain why the principal was not allowed save as to the sum of $1,000. The contract and the facts would appear to have warranted it. However, Miller is not appealing, and as against the judgment we cannot indulge in any presumption that the court found there had been any waiver at all. Appellants cannot complain that the judgment was less than it should have been.

[8] As to the taxes the contract provided: "Taxes advanced by you for all years after 1952 are to likewise be refunded, as well as principal and interest before I am to make any profit. A further sum of $5,000.00 need not be refunded by me to you, for this amount is the consideration that you are to give for the timber." The contract was made in September of 1950, at which time the taxes for the year 1950–1951 were a lien on the land. Since the record does not disclose otherwise, we assume that the supply company paid those taxes. We think the trial court correctly construed the contract as obligating appellants to refund to Miller any taxes he might pay for the years 1951–1952 and following. The 1951–1952 taxes were paid by Miller and the judgment ordered the amounts refunded.

[9] Appellants contend that the court erred in striking out a portion of appellant F. D. Taber's testimony. The following appears: Taber was asked on cross-examination if he had disposed of any of the land. He said he had not, nor had he made any contract to do so. He was then asked if, since the date of his contract to purchase the land, he had entered into any contract with any one for exchange of any of the land, and answered that he had made an exchange with the government. The court thereupon struck that part of the testimony from the record, and appellants contend that it erred in so doing because the answer was responsive to the question asked; the testimony was material as showing part performance by Taber of his understanding and agreement with Miller to exchange lands with the government whereby Miller might acquire additional timber; and was material as rebutting the statement by the witness Lewis, who was Miller's agent, that apparently nothing had been done by Taber to effect any exchange of lands. This evidence, appellants say, would have, along with other evidence, compelled the court to make a finding, had it found at all upon the subject matter, that there was no mutual mistake in the form of the deeds from Miller back to appellants. We have already said that the judgment is to be supported, not upon the theory of reformation for mutual mistake, but upon the theory that the deed from appellants to Miller being a mortgage only, the deeds back were releases and did not, except as specif-

ically declared, affect Miller's title to the timber or his right to remove the same without limitation as to time.

There being no further contentions of error, the judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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149 Cal.App.2d 630

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Quincy McCRASKY, Defendant and Appellant.

Cr. 5781.

District Court of Appeal, Second District, Division 1, California.

April 1, 1957.

Hearing Denied May 29, 1957.

Defendant was convicted of selling, furnishing and giving away heroin. The Superior Court, Los Angeles County, Noble, J., entered judgment on conviction and denied motion for new trial and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction, and that fact that city police officer used informer to secure evidence, and provided opportunity for defendant to sell and furnish heroin, did not of itself constitute entrapment.

Affirmed.

1. Criminal Law 🔑661

In prosecution for selling and furnishing heroin, fact that court relied on sole testimony of city police officer, and officer's informer was not called to testify, was not error. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law 🔑661

Prosecution is not required to produce all witnesses who might have knowledge of crime so long as there is fairly presented to the court material evidence bearing upon charge for which defendant is on trial.

3. Poisons 🔑9

In prosecution for selling and furnishing heroin, prosecution was not required to call corroborating witness to support testimony of city police officer, but defendant could have called as a witness, officer's informer who was available to testify if subpoenaed. West's Ann.Code Civ.Proc., § 1844.

4. Criminal Law 🔑1159(2, 4)

The District Court of Appeal will not attempt to determine weight of evidence or credibility of witnesses, but will decide only whether upon face of evidence it can justly be held that sufficient facts could not have been found by jury to warrant inference of guilt.

5. Criminal Law 🔑742(1)

In prosecution for selling and furnishing heroin, credibility of defendant's testimony contradictory to that of city police officer was for jury, and jury was authorized to accept officer's testimony relating to manner in which defendant procured and sold heroin. West's Ann.Health & Safety Code, § 11500.

6. Poisons 🔑9

Evidence sustained conviction under indictment charging that defendant sold, furnished and gave away a preparation of heroin. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law 🔑569

In prosecution for selling and furnishing heroin, evidence sustained finding of jury that criminal intent originated in mind of defendant, who raised issue of entrapment. West's Ann.Health & Safety Code, § 11500.

8. Criminal Law 🔑37

Fact that city police officer used informer to secure evidence, and provided opportunity for defendant to sell and furnish heroin, did not of itself constitute entrapment.

9. Criminal Law ⚷37

Defense of entrapment is available where it can be shown that plan to commit crime originated in mind of police officer, but not where officer merely afforded suspect opportunity of committing crime.

10. Arrest ⚷70

Where defendant was eventually taken before magistrate five days after his arrest, section of Penal Code requiring officer executing warrant to take defendant before nearest or most accessible magistrate of county in which offense is triable was not applicable to contention that defendant had been denied a fair trial. West's Ann.Pen. Code, § 828.

11. Criminal Law ⚷1116

Contention that defendant was held five days before arraignment could not be considered on appeal in absence of support or mention thereof in the record. West's Ann. Pen.Code, § 825.

12. Criminal Law ⚷1166(1)

Alleged fact that defendant, charged with selling and furnishing heroin, was not taken before magistrate for five days after arrest did not require reversal in absence of showing that such violation of statutory rights resulted in unfair trial. West's Ann. Health & Safety Code, § 11500; West's Ann.Pen.Code, § 825.

◆

Quincy McCrasky, in pro. per.

Edmund G. Brown, Atty. Gen., George M. Goffin, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County, defendant was accused of violating Section 11500 of the Health and Safety Code in that he did sell, furnish and give away a preparation of heroin. A plea of not guilty was entered and a jury found defendant guilty as charged. His motion for a new trial was denied and he was sentenced to State Prison. From the judgment of conviction defendant prosecutes this appeal.

The following will serve as a fair epitome of the factual background surrounding this prosecution.

One Louis (Sonny) Dennis was an undercover informant for Hubert Greene, a Los Angeles city police officer. They had worked together on a number of cases prior to the instant one. On all these occasions Officer Greene had paid Dennis for the information he transmitted to the officer, but the latter testified he paid the informer regardless of whether the information resulted in an arrest, and that no payment amounted to more than $5. The officer's instruction from his superior was to give the informer $5.00 each time they worked together. To the knowledge of Officer Greene, Dennis was not a known narcotics user. The officer's first knowledge of defendant was obtained from Dennis.

Officer Greene testified that on the morning of September 7, 1955, about 10:15 o'clock, he met the informer Dennis at the latter's residence. That the two of them went directly to defendant's cleaning shop, which consisted of a small room near 30th Street and Central Avenue in the City of Los Angeles, and in which at the front thereof, was a pressing machine. It is conceded that defendant and the informer were known to each other. At the time of this visit there was a third person in the shop, but Officer Greene, defendant and Dennis conversed outside the presence and hearing of this other person. Officer Greene further testified that the informer asked defendant "if he had any stuff" and the latter replied, "Let's step out on the sidewalk and talk". That the three of them went out on the sidewalk, where the informer Dennis inquired of defendant whether the latter could purchase a "spoon". That defendant said he could but that he would have to make a phone call first. He walked into a liquor store that was located next to the cleaning establishment, made a phone call, and then returned to the street. The three of them re-entered the cleaning shop. Officer Greene then asked the defendant how much it would cost him for the "spoon", and the defendant told him that the price would be $25. The officer gave him the $25.

The defendant asked Officer Greene to go to the corner of 33rd and Wadsworth and wait for him at this location. He stated that he would deliver the heroin at that location in approximately 10 minutes. Officer Greene went to this corner and at about 10:55 a. m. the defendant appeared. The officer got out of his automobile and met him, and the defendant gave him the bindle. During this entire period of time Dennis was with Officer Greene. Three days later defendant was arrested. In the interim between the purchase of the heroin on September 7th until defendant's arrest on September 10th, Officer Greene had seen defendant several times, but when he visited defendant's establishment on these subsequent occasions he did not inform defendant that he was a police officer nor did he receive any narcotics from defendant or hear anyone inquire about or ask for narcotics.

As a witness in his own behalf defendant testified that he was in the cleaning and pressing business at the aforesaid address and had been for 16 years; that he does not nor has he ever used any narcotics, and that he had never to his knowledge seen any heroin.

With regard to the informer Dennis, defendant testified that the former would attend the shop while defendant would run errands, such as "taking cleaning to the wholesale cleaners and go out and pick up cleaning ond go out and eat my lunch". That Dennis received no regular compensation, but that "sometimes he bought his lunch and gave him 25 or 50 cents".

As to the date here in question defendant testified that on September 7, 1955 he saw the informer Dennis prior to the time he came to the cleaning establishment with Officer Greene. That on that occasion Dennis told defendant he needed $5 but that defendant informed him he did not have any money. Dennis thereupon departed but returned later in the company of Officer Greene, and introduced the latter to defendant in front of the store. That Dennis thereupon told the defendant he wanted to talk to him in the rear of the store. That, accompanied by Dennis, he went to the rear where Dennis told defendant that Greene had money; that Dennis had a chance to make some money, and wanted defendant to help him but that he (defendant) refused, saying, "No, I won't do no favor today. I haven't got time". Defendant further testified that Dennis "kept on begging. Then I says, 'What favor do you want done?' ", to which Dennis replied, "I want you to deliver some stuff". That defendant replied, "What stuff * * * I don't want to fool with no stuff". In answer to a question as to whether he knew what was meant by "stuff", defendant replied, "Well, I heard it on the avenue. They call it dope". According to defendant's testimony, Dennis "kept on begging and begging" and finally the informer said he would do the dealing on the telephone and defendant should talk to the man at the other end of the line. That defendant was to do the talking on the telephone because the other party on the telephone would suspect Dennis of being a "stool pigeon," and would not sell the "stuff" to him. According to defendant's testimony, he and Dennis then went to an adjoining liquor store, where Dennis told defendant that the name of the man at the other end of the line was Peter. That defendant introduced himself to Peter and this man stated that he did not know him. Defendant told him that a friend of his had mentioned his name. He then asked him if he wanted to make a $25 deal. He was told to meet Peter down the alley. He met him. Peter's face was familiar. The defendant had seen him on previous occasions on the avenue. The defendant gave the money, which had been given to him by Dennis, and Peter transferred to him the package. The money had been given to the defendant by Dennis in the back of the cleaning establishment. The defendant took the package to the location where he was to meet Officer Greene and Dennis and he handed it into the car where Officer Greene and Dennis were sitting. Defendant then went back to his shop.

He testified that he had not seen Mr. Dennis since September 7th. However, he had seen Officer Greene five or six days in succession after he had delivered the "dope" to him. Defendant testified that he has never delivered narcotics to anyone before and he only did it this time because Dennis kept begging him to do so, and because Dennis had always been honest with him in the past. Defendant testified further that he had not changed the wrapping on the bindle but that he had transferred the package as it had been given to him.

[1–3] As his first ground for reversal of the judgment appellant contends that "The court was guilty of abuse of discretion in not permitting the informer to testify where the court relied upon the sole testimony of Officer Greene". This contention cannot be sustained because, first of all, neither side was required to produce all witnesses who might be able to testify so long as there is fairly presented to the court the material evidence bearing upon the charge for which the accused is on trial. There is no requirement in either the federal or state constitution that all witnesses or persons who may have knowledge of the crime be produced in court or called to testify. People v. Tuthill, 31 Cal. 2d 92, 98, 187 P.2d 16; People v. Chapin, 145 Cal.App.2d 740, 303 P.2d 365; People v. O'Neill, 78 Cal.App.2d 888, 891, 892, 179 P.2d 10; People v. Parry, 105 Cal.App.2d 319, 322, 323, 232 P.2d 899. Moreover, if in the opinion of appellant, the testimony of the informant would have aided his cause, he could have called him as a witness. He was well acquainted with the informant Dennis and at the time of trial it was brought out that the latter was then confined in the Los Angeles County Jail situated in the same building where the trial was being conducted, and could have been produced as a witness within a short time if subpoenaed. It was not necessary that the prosecution call a corroborating witness to support the testimony of Officer Greene because this is not the type of case in which the law requires corroboration. People v. Gebron, 124 Cal.App.2d 675, 676, 268 P.2d 1068; Code Civ.Proc. § 1844.

[4–6] Next, appellant contends that the testimony of Officer Greene should have been disbelieved and that the former's testimony clearly established the defense of entrapment. Under familiar rules it is now established law, many times reiterated by the appellate courts of this state, that the weight of the evidence or the credibility of witnesses will not be determined on appeal. Our consideration is limited to a determination of whether upon the face of the evidence it can justly be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. In other words, as was said in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780: "'It must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. [Citing cases.]" And, as a necessary corollary to the rules above noted, the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the witness, Officer Greene, and therefore, to disbelieve the testimony of appellant and accept that of Officer Greene as to the immediate circumstances surrounding the transaction here in question.

As to the issue of entrapment, our Supreme Court, in People v. Nunn, 46 Cal.2d 460, 471, 296 P.2d 813, 819, had this to say:

"This court has held that where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he commits a crime, raises no inference of unlawful entrapment. (People v. Braddock, 41 Cal.2d 794, at page 802(10), 264 P.2d 521.) Also that entrapment as a matter of law is not established where there is any substantial evidence from which it may be inferred that criminal intent to commit a particular offense originated in the mind of the accused. (People v. Terry, 44 Cal.2d 371, at page 372(2), 282 P.2d 19.)"

[7, 8] We are satisfied that in the instant case the jury was justified in finding from the evidence that the criminal intent originated in the mind of the accused. The testimony clearly shows that a police officer used an informer or undercover operator to secure evidence and simply provided an opportunity for appellant to commit the offense charged against him. This does not of itself constitute entrapment. People v. Crawford, 105 Cal.App.2d 530, 537, 234 P.2d 181; People v. Nunn, supra, 46 Cal.2d at page 471, 296 P.2d at page 819; People v. Williams, 146 Cal.App.2d 656, 304 P.2d 100.

[9] Appellant relies upon the cases of People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114, and People v. Crawford, supra, but these cases simply reaffirm the doctrine that the defense of entrapment is available when it can be shown that the plan originated in the mind of the police officer, but is unavailing in cases where the officer merely afforded a suspect the opportunity of committing the crime. The third case cited by appellant, People v. Gallagher, 107 Cal.App. 425, 290 P. 504, does not aid him. The reversal in that case was based on the ground that the court should have afforded the accused the benefit of an instruction on the law of entrapment when the facts warranted such an instruction. The foregoing three cases are not here cogent or in point.

[10–12] Appellant next contends that he was denied a fair trial because there was a delay in taking him before a magistrate. In that regard it is asserted that appellant was arrested on September 10, 1955 and he "was not taken before a magistrate until September 15, 1955 contrary to Section 828 of the Penal Code (The duty of an officer executing a warrant)". Since appellant concedes that he was eventually taken before a magistrate we do not regard the provisions of Penal Code, § 828 as applicable. Under the facts advanced by appellant we shall consider that his contention refers to a violation of the provisions of Section 825 of the Penal Code which provides in part that, "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays * * *". Appellant's contention that he was held for five days before being taken before a magistrate finds no support or even mention in the record, and no complaint of any such delay was made in the trial court. Such a complaint may not be made for the first time on appeal. People v. Watts, 126 Cal.App.2d 659, 662, 272 P.2d 814. Moreover, the violation of appellant's rights because of failure to observe the provisions of Penal Code, § 825 does not require a reversal unless there is a showing that such wrongful conduct resulted in an unfair trial. There is no such showing here. We are not here confronted with a case wherein an accused during the interim between his arrest and the claimed delay in bringing him before a magistrate, made any confessions, or that during such period anything occurred which militated against appellant at his trial. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest cannot be said to have affected the outcome of his trial. People v. Guarino, 132 Cal.App.2d 554, 558, 282 P.2d 538; People v. Stroble, 36 Cal.2d 615, 626, 226 P.2d 330.

Finally, appellant asserts that, "The warrant was contrary to the Penal Code, Sections 814, 815, 820 (see Clerk's Transcript, page 3, lines 12 to 16). If the record is true there never was a warrent issued, and we will presume the record is true". However, the aforesaid citation to the clerk's transcript shows, "Bench Warrant issued". We fail to perceive the applicability of Penal Code, Sections 814 and 815, which have to do only with the contents or form of a warrant of arrest, and wherein it is required that the name of the accused be shown as well as the time of its issuance, the place where it is issued and the name and title of the magistrate issuing the same. As to Section 820 of the Penal Code, it has been repealed, Stats.1935, p. 1526.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

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149 Cal.App.2d 659

Elrwin F. SELBY, Plaintiff, Cross-Defendant and Respondent,

v.

Samuel E. BATTLEY, Jr., and Edythe M. Battley, his wife, Defendants, Cross-Complainants and Appellants.

Civ. 17040.

District Court of Appeal, First District, Division 2, California.

April 2, 1957.

Hearing Denied May 29, 1957.

Action by contractor against owners of two lots in subdivision which contractor was developing, with whom contractor had entered into agreement providing that he would improve projected street, install sidewalks, curb, gutters and utility connections, and excavate one lot, in exchange for conveyance of other lot, for specific performance of such agreement. Defendants maintained cross-action seeking to quiet title to lots in question. The Superior Court, County of Alameda, Marvin Sherwin, J., entered judgment decreeing specific performance and defendants appealed. The District Court of Appeal held that since plaintiff had not completed improvement, he was not entitled to specific performance, but that since his failure to do so had been merely due to his underrating difficulties, though contracts specified that time was of the essence, plaintiff was entitled to relief against forfeiture.

Judgment affirmed, as amended.

1. Specific Performance 🔑94

Where real estate contractor engaged in reviving old subdivision agreed with owner of two lots therein to improve projected street, on which lots were situated, with pavement, sidewalks, gutters and curbs, to have utility mains installed and to excavate one of the lots in exchange for conveyance of the other lot, and agreed that time was of the essence, his failure to timely complete pavement, sidewalks, gutters, and to have gas mains installed due to trouble in complying with governmental requirements and slow cooperation of public utilities and delays of subcontractors, was not such impossibility as law excuses and barred his right to specific performance of the lot owner's obligation to convey. West's Ann.Civ.Code, §§ 1511, 3392.

2. Contracts 🔑309(1)

If thing to be done is not naturally or necessarily impossible under all circumstances, positive contract to do it is binding, though performance is rendered impracticable, or even impossible, by some unforeseen cause over which promisor has no control but against which he might have provided in his contract. West's Ann.Civ. Code, § 1511.

3. Contracts 🔑303(1)

Statute stating that causes therein listed excuse performance of contract did not serve to excuse contractor's obligation under contract requiring him to install pavement, sidewalks, gutters and gas mains in exchange for conveyance of a lot where contractor had not done so because of difficulty in compliance with governmental requirements, slow cooperation of public utilities and unexpected difficulties and delays of subcontractors. West's Ann.Civ. Code, § 1511.

4. Specific Performance ⚷99

Where time is expressly made of essence in contract, delay which is not considered excusable in action for damages at law will prevent action for specific performance in equity, though equity may grant relief if result would otherwise be severe forfeiture. West's Ann.Civ.Code, § 1511.

5. Contracts ⚷318

Where contractor re-developing old subdivision entered into agreement with owner of two lots therein providing that contractor would improve projected street and blacktop it, construct sidewalks, curbs and gutters, have gas and sewage mains installed and excavate one lot in exchange for conveyance of other lot, but because of underrating difficulty of what was to be accomplished, slow cooperation of utilities and delays of subcontractors, did not complete pavement, sidewalks, gutters and gas mains at time specified in contract to be of essence, contractor was nevertheless entitled, under statute to relief against forfeiture. West's Ann.Civ.Code, § 3275.

6. Contracts ⚷237(1)

Additional agreement by which new and onerous terms are imposed upon one of the parties without any compensating advantage requires a consideration to support it.

7. Contracts ⚷318

Under statute providing for relief against forfeitures upon making full compensation to other party, fact that time was of the essence to agreement does not prevent relief. West's Ann.Civ.Code, § 3275.

8. Contracts ⚷318

Normally to secure relief, under statute, against forfeitures, party must plead and prove facts justifying statute's application. West's Ann.Civ.Code, § 3275.

9. Judgment ⚷252(1)

Where, in response to plaintiff's suit for specific performance of contract to convey lot, defendants filed equitable cross-action to quiet title thereto, since defendants thus submitted matter to conscience of court and all matters relevant to relief of plaintiff from forfeiture were tried without objection, plaintiff could be awarded such relief though he had not requested it in pleadings. West's Ann.Civ.Code, § 3275.

10. Quieting Title ⚷43

In quiet title action, no specific pleading of defendant's claim is required and he may, under a general denial, prove whatever right he has.

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Phillips, Avakian & Johnston, J. Richard Johnston, Oakland, for appellants.

Harold D. Mefford, Hayward, for respondent.

PER CURIAM.

This is an appeal by defendants and cross-complainants, hereinafter called defendants, from a judgment decreeing specific performance of defendants' agreement to convey to plaintiff a certain lot in East Oakland Highlands in Alameda County, and denying them relief on their cross-complaint to quiet title in so far as it relates to said lot.

Plaintiff, a real estate broker and contractor was engaged in reviving an old subdivision for which a map had been filed in 1926, but the improvement of which had been abandoned. Defendants owned two lots, numbered 11 and 12 in said tract. Plaintiff agreed to improve the projected street on which the lots were situated in front of Lot 11, with sidewalks, curbs, gutters, blacktop street and water, gas and sewage mains and to excavate said lot suitable for building a house, and thereafter to place corner survey stakes all within 90 days from the date of the contract, April 28, 1954, in consideration of the transfer to him of Lot 12. Plaintiff used for the contract a printed form for a deposit receipt in which was filled out that he purchased Lot 12 for $1,000, to be paid by performing the above work, and which contained printed provisions among which were that the essence of the agreement is time and that plaintiff, who signed both as broker and as purchaser, might extend time for performance for 30 days. On July 29, 1954 defendants gave notice in writing that if on August 28, 1954 the work was not completed, the agreement would be forfeited. On August 27, 1954, plaintiff sued for specific performance of the agreement alleging among other things that he had duly performed all the conditions of said agreement on his part to be performed precedent to conveyance of said property. The answer in substance denied that the work agreed upon had been substantially performed at the time of the complaint and relied on the contract clause that time was of the essence, on inadequacy of consideration and on oral promises of plaintiff to do extra work which was not done. A cross-complaint for quieting of title to both lots (11 and 12) was added. The answer to the cross-complaint denied defendants' right and admitted a claim of interest by plaintiff.

At the trial defendants expressly abandoned any defense based upon inadequate consideration. The evidence showed that on August 28, 1954 the work had not been substantially completed, but that with the exception of the replacing of some survey stakes which had gotten lost and which plaintiff promised to replace and of the allegedly promised extra work, the work was fully completed on November 1st or 2nd, 1954. Much evidence was received as to the causes of the delay. It was shown that the compliance with governmental requirements concerning the construction of the street and the slow cooperation of public utility corporations and subcontractors in the installation of the mains caused unexpected difficulties and delays. The court also inquired into the effect of the delay and it was expressly conceded by defendants that they did not claim there had been any financial damage due to the delay. Plaintiff testified that to make the lot level he even brought in dirt from elsewhere, without the contract requiring him to do so. At the end of the trial the court declared that it might well be that the letter of the contract would require a forfeiture, but that it would be an extreme shock to the court's conscience to decree that. The judgment quieted title of defendants to Lot 11 only and decreed the specific performance of defendants' agreement to convey Lot 12.

Appellants object to a finding "that only an inconsequential amount of said performance to be made by plaintiff was not completed at the time specified in said contract; that the delay resulted in spite of reasonable efforts on the part of plaintiff to complete said performance; that such delay was occasioned by difficulties in complying with governmental requirements and construction not contemplated by the parties at the date of the contract; that such delay in performance on the part of plaintiff was immaterial and excusable." They urge mainly that there were here no circumstances excusing timely performance under section 1511 of the Civil Code and that as time was made of the essence the delay could not be considered immaterial. Hence, plaintiff was not entitled to specific performance of the contract. Relief from forfeiture could not be granted because plaintiff had not pleaded default and facts justifying relief. Respondent takes the position that under the circumstances shown by the evidence he is entitled to relief from forfeiture under section 3275 of the Civil Code and to specific performance under section 3392 of said code because his failure to perform was only partial and temporary and the default did not cause any damage which required compensation and further that appellants could not succeed in their equitable action to quiet title, because they were not willing to do equity but tried to obtain the advantage of the improvements made by respondent without giving any consideration for it. (As to the latter point the same position was expressly taken by the trial court in its memorandum decision.)

The meaning of the attacked finding that only an "inconsequential" amount of the performance to be made by plaintiff was not completed at the time specified in the contract is not very clear. If it is intended to mean that at said time plaintiff had substantially fulfilled his obligations then the finding would not be supported by the evidence, which shows without conflict that at said time the pavement, sidewalks, gutter and gas main had not been installed. It took two more months to do so. Respondent concedes the delay but contends that the correctness of the quoted finding is immaterial, because at any rate the decision is correct under his theories stated before. In this respect two questions are presented: (1) Can, notwithstanding that there was no timely substantial performance and that time was expressly made of the essence, the specific performance decreed be upheld independent from the issue of threatening forfeiture and relief from it? (2) Can the specific performance be upheld on the basis of such relief?

[1–4] 1. The difficulties which plaintiff encountered were not of a kind which excuses performance or timely performance on the ground of impossibility, permanent or temporary. "If the thing to be done is not naturally or necessarily impossible under all circumstances, a positive contract to do it is binding, though the performance is rendered impracticable, or even impossible, by some unforeseen cause over which the promisor has no control but against which he might have provided in his contract." Caron v. Andrew, 133 Cal.App.2d 402, 407–408, 284 P.2d 544, 547, hearing in Supreme Court denied; 12 Cal.Jur.2d "Contracts", p. 461, § 238; Williston on Contracts, Revised Edition, Vol. 6, § 1964. Neither are they an excuse under any provision of section 1511 of the Civil Code. When time is expressly made of the essence, a delay which is not considered excusable in an action for damages at law, will also prevent an action for specific performance in equity, except that equity gives relief if the result would otherwise be a severe forfeiture. (Corbin on Contracts, Vol. 3, p. 800, Vol. 5, p. 781, et seq.; Williston, supra, Vol. 3, pp. 2371–72.) No California case to the contrary has been cited. We must hold that independent from relief from forfeiture respondent was not entitled to specific performance.

[5–7] 2. There can be no doubt that under the facts shown, relief from forfeiture would be justified. The fact that defendants would receive all the advantages of plaintiff's performance, without suffering any damage by reason of delay—the finding to that effect is not attacked on appeal—whereas plaintiff would lose all consideration for the work done and costs paid by him is a strong example of an unconscionable forfeiture. The trial court clearly so stated. Evidently, plaintiff's default was not grossly negligent, wilful or fraudulent to as to exclude relief under section 3275 of the Civil Code, but was the result of underrating of the difficulty of what was to be accomplished, resulting in a delayed but complete performance. The findings to that effect are supported by the evidence and binding on this court. Appellants' contention that supplemental promises of plaintiff had not been fulfilled was correctly disregarded, because an additional agreement by which new and onerous terms are imposed upon one of the parties without any compensating advantage requires a consideration to support it. Main St. & A. P. R. Co. v. Los Angeles Trac. Co., 129 Cal. 301, 305, 61 P. 937; Berkowitz v. Tyderko, Ltd., 13 Cal.App.2d 561, 564, 57 P.2d 173. No such consideration was shown or asserted by defendants. (It ill befits them to try at the same time to deprive plaintiff of all compensation and to hold him to gratuitous additional promises.) The fact that time was of the essence of the agreement does not prevent relief under section 3275, supra, if its conditions have been satisfied. Barkis v. Scott, 34 Cal.2d 116, 118, 208 P.2d 367; Bolln v. Petrocchi, 95 Cal.App.2d 589, 213 P.2d 513.

[8–10] Normally, in order to secure relief under section 3275 a party must plead and prove facts justifying its application, Barkis v. Scott, supra, 34 Cal.2d at page 120, 208 P.2d at page 369; Hayward Lbr. & Inv. Co. v. Construction Prod. Corp., 117 Cal.App.2d 221, 223, 255 P.2d 473. However, this case is distinguished by the fact that defendants themselves also submitted the matter to the conscience of the court by instituting an equitable action to quiet title, and that all matters relevant to the relief of forfeiture were tried without objection. In a quiet title action no specific pleading of defendant's claim is required, but under general denial he may prove whatever right he may have. Smart v. Peek, 213 Cal. 452, 454, 2 P.2d 380. In Gonzalez v. Hirose, 33 Cal.2d 213, 217, 200 P.2d 793, a judgment quieting title in plaintiff was reversed after the granting of relief against forfeiture to defendants by the Supreme Court, although no such relief had been prayed for and no facts justifying it had been alleged in the answer. In McGlasson v. Blythe, 143 Cal.App.2d 152, 299 P.2d 325, there had been reciprocal quiet title actions in relation to the same property and the trial court had quieted title in the cross-complainant. This court affirmed, although the cross-complaint was insufficiently formulated, because the questions involved had been actually tried and should at any rate be decided under the original complaint and the cross-defendant had not been prejudiced. 143 Cal.App.2d at pages 177–178, 299 P.2d 325. In our case all matters regarding the attitude of plaintiff and the absence of damage to defendants have been tried without objection and findings made thereon. No prejudice appears. Following the Gonzalez case, supra, we would at any rate have to affirm the judgment on the cross-complaint, denying quieting of title to lot 11 in defendants on the basis of relief from forfeiture. It would then be wholly against the letter and purpose of Art. VI, § 4½ of the California Constitution to reverse the judgment on the complaint for specific performance, because of the lack of allegations regarding relief from forfeiture, after which appellant could in the trial court amend his complaint on the basis of our suggestion, Hurley v. Lake County, 133 Cal.App. 219, 221, 23 P.2d 838, and would be entitled to relief in accordance with the decision on the cross action. The judgment will therefore be affirmed also as to the original action.

Appellants' objection to the finding as to the reasonable value of lot 12 at the date of the contract is immaterial because they expressly waived any defense based on inadequacy of consideration.

However, it seems desirable to amend pursuant to section 956a of the Code of Civil Procedure the findings of fact so as to clarify them and to bring them in better accord with our above analysis of the facts and law. For that purpose the following amendments will be made.

From finding 3 the sentence "that the reasonable value of said Lot 12 at the date of said contract did not exceed $1,000.00" will be deleted.

Finding 4 will be deleted in its entirety and replaced by the following:

"4. That at the time specified in said contract a substantial part of the performance to be made by plaintiff was not completed in spite of reasonable efforts on the part of plaintiff to timely complete said performance; that thereafter plaintiff diligently pursued his efforts with the result that on or about November 1, 1954 plaintiff's performance under the terms of said contract was fully and fairly completed with the exception only of the replacing of some survey stakes, which was performed since then; that said delay in performance was occasioned by unexpected difficulties encountered in complying with governmental requirements and in perfecting the construction agreed upon; that said delay was not caused by any grossly negligent, wilful, or fraudulent breach of duty by plaintiff; that denial of recovery to plaintiff on the ground of said delay would result in an unconscionable forfeiture."

The findings are amended as stated above; the judgment is affirmed.

150 Cal.App.2d 39

Leone BECK, Plaintiff and Respondent,

v.

CITY OF PALO ALTO, a municipal corporation, Defendant and Appellant.

Civ. 17128.

District Court of Appeal, First District, Division 2, California

April 10, 1957.

Action by pedestrian for injuries suffered when she tripped over defect in sidewalk and fell. The Superior Court, County of Santa Clara, Edwin J. Owens, J., entered judgment for pedestrian, and city appealed. The District Court of Appeal, Stone, J., held that where pedestrian walking in daylight in residential district was injured when she tripped over defect in sidewalk, caused by one slab of concrete being pushed higher than contiguous slab, difference in elevation was not over one and ⅞ths inches and nothing distracted pedestrian's attention as she approached defect, city was not liable for injuries.

Reversed.

1. Appeal and Error 🔑895(2)

Question whether defect in sidewalk was trivial or not is reviewed by appellate court without regard to finding of trial court in redetermination of issue from the record, but this rule does not apply to question of whether municipality had notice of condition and a review of trial court's findings as to actual notice. West's Ann. Gov.Code, § 53051 et seq.

2. Appeal and Error 🔑1010(1)

If there is substantial evidence to support finding of trial court, it will not be reversed by reviewing court.

3. Municipal Corporations 🔑819(6)

In action by pedestrian for injuries suffered when she slipped and fell on city sidewalk because of alleged defect in sidewalk, evidence sustained finding that city had notice of condition of sidewalk. West's Ann.Gov.Code, § 53051 et seq.

4. Municipal Corporations 🔑806(3)

Where pedestrian walking in daylight in residential district was injured when she tripped over defect in sidewalk, which was caused by one slab of concrete being pushed higher than contiguous slab, but difference in elevation was not over 1 and ⅞ths inches, and there was nothing to hide defect or obstruct view of one approaching it, and nothing distracted pedestrian's attention as she approached defect, city was not liable for injuries. West's Ann.Gov. Code, § 53051 et seq.

5. Municipal Corporations 🔑766

The size of sidewalk defect, which allegedly caused injury, is only one circumstance to be considered, and as no court has fixed an arbitrary measurement in inches, below which defect is trivial as matter of law and above which it becomes a question of fact whether or not defect is dangerous, all of the circumstances surrounding condition must be considered in light of facts of particular case. West's Ann.Gov.Code, § 53051 et seq.

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Robert E. Michalski, City Atty., Palo Alto, for appellant.

Lakin, Spears & Gullixson, Palo Alto, for respondent.

STONE, Justice pro tem.

Respondent commenced this action seeking damages for injuries suffered when she slipped and fell on a sidewalk. Plaintiff lived in Palo Alto, on Hale Street, within a few blocks of the scene of the accident. On September 22, 1953, she went to the tailor shop at 144 Willow Road. On her return home about 4 p.m. she proceeded along Palo Alto Avenue from Middlefield toward Fulton. She walked on the right-hand side of the sidewalk, the side toward the houses. The sun was shining, the walk was dry. In front of the premises at 750 Palo Alto Avenue she tripped over a raised portion of the sidewalk and fell, striking her knee. She testified that she had looked for 25 to 50 feet ahead as she walked and had seen no defect in the sidewalk. At that point, the sidewalk curves.

B. L. Gould testified that he moved to 750 Palo Alto Avenue in September, 1952. Within two months his two-year old daughter, who could walk, but was wobbly, fell over the defect. At that time he first noticed the defect. He testified the break in the sidewalk had not changed in the ten months before plaintiff's accident. He estimated the deviation was at least an inch, although he never measured it. He did not report the break in the sidewalk to the city. He called the City Engineer's office on August 25, 1953, to advise him that the street sweeper was missing the gutter in front of his house. Irwin Johnson, Assistant City Engineer, testified that one of his duties was to repair and supervise the examination of sidewalks in Palo Alto. The city provides its own utility services, thus, a city meter reader enters each of the premises at least once a month. Each meter reader is instructed to report defective sidewalks. Prior to September 22, 1953, no report of a defect at the scene of the accident was received.

Johnson testified that the Engineer's office also conducted tree-planting functions. On August 25, 1953, he received a complaint from B. L. Gould that the street sweeper continually skipped the Palo Alto Avenue side of the corner. He told one Carl Stevenson to investigate, and Stevenson reported back that there were two large pepper trees. On September 4, 1953, Johnson went to 750 Palo Alto Avenue to examine the two pepper trees at the premises. He examined the one pepper tree adjacent to where plaintiff was injured. Two branches were removed from the tree to allow the street sweeper to sweep cleanly around the corner. Johnson stood on the sidewalk as he examined the pepper tree, but he did not see any rise in the vicinity of the pepper tree. By city standards, a "repairable hazard" is an elevation over one-half to three-quarters of an inch elevation. He did not see any such elevation. He testified that the break's elevation was then less than three-quarters of an inch. At most, it requires a week to send a repair crew to such a place.

Johnson testified that by measurement he found that the maximum elevation of the break in that portion of the sidewalk nearest the building on October 4 or 5, 1953, was one and one-eighth inches. B. L. Gould testified that he estimated the elevation to be at least one inch at all times. John Beck, plaintiff's husband, testified that he measured the break on September 23, 1953, and found the elevation to be one and seven-eighths inches on the property side.

The trial court, sitting without a jury, found for the plaintiff. From this judgment, defendant appeals.

Liability in this case is predicated upon what is commonly known as the Public Liability Act. It is now embodied in the Government Code beginning with section 53051, and specifies that liability of a municipality is predicated upon there being a defective condition which is dangerous, and notice to or knowledge by the municipality of the condition. Appellant challenges the finding of the trial court as to both issues, alleging that the condition was trivial and that the city had no notice of the condition. Appellant asks this court to review the evidence on both issues, making no distinction between the question of notice and the question of whether the defect was trivial.

[1-3] The question of whether the defect was trivial or not is reviewed by the appellate court without regard to the find-

ing of the trial court. It is a redetermination of the issue from the record. Barrett v. City of Claremont, 41 Cal.2d 70, 256 P.2d 977; Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990; Ness v. City of San Diego, 144 Cal.App.2d 668, 301 P.2d 410. This rule does not apply to the question of notice and a review of the trial court's findings as to actual notice. There was a conflict in the evidence in this case and the trial court apparently disbelieved the city engineer. The classical rule prevails that if there is substantial evidence to support the finding, it will not be reversed by a reviewing court, Casper v. City of Los Angeles, 140 Cal.App.2d 433, at page 438, 295 P.2d 452. There was ample evidence to sustain the finding of the trial court as to notice of condition of the sidewalk. The record indicates the City of Palo Alto had notice of the condition as it existed whether it was dangerous or not.

A review of the question of whether or not the defect was trivial comes within the rule enunciated in Barrett v. City of Claremont, supra, 41 Cal.2d at page 73, 256 P.2d at page 980, as follows:

> "The plaintiff contends that, in any event, the question of whether the defect was trivial or substantial is one of fact, which the jury has resolved in her favor. But, as was said in Whiting v. City of National City, supra, '[i]t is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise the city could be held liable upon a showing of a trivial defect.' 9 Cal.2d at page 165, 69 P.2d at page 991."

[4] The defect here was caused by one slab of concrete sidewalk being pushed higher than the next contiguous slab apparently by the root or roots of a pepper tree. The respondent's husband testified he measured the elevation at the point where the two sections of concrete met and found it to be one and five-eighths inches in the center of the sidewalk, and one and seven-eighths inches at the property side. The city engineer testified he measured the difference in elevations and found them to be one and one-eighth inches on the property side tapering to one-fourth of an inch at the street side. The property owner estimated the difference to be about one inch. The courts have held a defect in a sidewalk to be trivial as a matter of law when the difference in elevations was: one and one-half inches in Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; one inch in the case of Dunn v. Wagner, 22 Cal.App.2d 51, 70 P.2d 498; seven-eighths of an inch in Ness v. City of San Diego, supra; and three-fourths of an inch in the case of Whiting v. City of National City, supra.

[5] The size of the defect is only one circumstance to be considered, as no court has fixed an arbitrary measurement in inches below which a defect is trivial as a matter of law and above which it becomes a question of fact whether or or not the defect is dangerous. All of the circumstances surrounding the condition must be considered in the light of the facts of the particular case. In the instant case the difference in elevations of the sidewalk was in a residential area at the edge of the city. There was nothing to hide the defect or obstruct the view of one approaching it. The respondent tripped over it in broad daylight. She testified nothing distracted her attention as she approached the point where she tripped and fell. The case comes within the line of decisions holding a city is not liable for a defect

under such conditions. See Ness v. City of San Diego, supra; Whiting v. City of National City, supra; Dunn v. Wagner, supra; Nicholson v. City of Los Angeles, supra; Barrett v. City of Claremont, supra.

The judgment is reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

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149 Cal.App.2d 638

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John CARROLL and Joseph Evans, Defendants,

John Carroll, Appellant.

Cr. 5801.

District Court of Appeal, Second District, Division 1, California.

April 1, 1957.

Hearing Denied May 29, 1957.

Proceeding on petition for writ of error coram nobis, filed over twenty-four years after judgment was entered upon conviction for robbery in first degree with four prior convictions. The Superior Court of Los Angeles County, Herbert V. Walker, J., denied petition and defendant appealed. The District Court of Appeal, White, P. J., held that where alleged insufficiency of evidence of prior convictions to support judgment that defendant was habitual criminal was known to defendant at time judgment was entered and could have been corrected on appeal or by motion for new trial, question was not reviewable by means of writ of error coram nobis, and that, in absence of explanation for twenty-four year delay in filing petition, denial of writ was proper.

Affirmed.

1. Criminal Law 🔑997(1, 2)

Writ of error coram nobis is designed to bring to attention of trial court errors of fact which, without negligence on part of accused, were not presented to court at time of trial, and writ is not intended to redress irregularity at trial which could be corrected on motion for new trial or by appeal.

2. Criminal Law 🔑997(6)

Where alleged insufficiency of evidence of prior convictions to support judgment that defendant was habitual criminal was known to defendant at time judgment was entered and could have been corrected on appeal or by a motion for new trial, question was one of issuable fact and mixed law and fact which was before trial court when judgment was pronounced, and was not reviewable by means of writ of error coram nobis. West's Ann.Pen.Code, § 644, and (b).

3. Criminal Law 🔑997(8)

Prerequisite to issuance of writ of error coram nobis is showing that petitioner could not have discovered facts alleged at any time substantially earlier than at time of petition for writ.

4. Criminal Law 🔑997(2)

Since purpose of writ of error coram nobis is to secure relief where no other remedy exists, petitioner must take advantage of every remedy provided by law to defeat judgment pronounced against him.

5. Criminal Law 🔑997(12)

In absence of showing of excuse for negligence in waiting over twenty-four years before attempting to set aside judgment by writ of error coram nobis, denial of writ was proper.

6. Habeas Corpus 🔑48

If petition for writ of error coram nobis were to be treated as petition for writ of habeas corpus, it was misdirected to Los Angeles County Superior Court by petitioner who was restrained in County of Sacramento, and no appeal would lie from denial of such petition for writ of habeas corpus. West's Ann.Const. art. 6, § 5; West's Ann.Pen.Code, § 1506.

John Carroll, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

Appellant John Carroll appeals from an order of the Superior Court of Los Angeles County denying his petition for a Writ of Error Coram Nobis.

The record herein reflects that in 1931 an amended information was filed by the District Attorney of Los Angeles County wherein appellant Carroll and one Joseph Evans were accused of the crime of Robbery. As to appellant herein, four prior felony convictions were alleged, as follows: Burglary in the County of Los Angeles in October, 1923; Grand Theft in Los Angeles County in October, 1923; Burglary, third degree, and Larceny in the District Court of the State of Kansas, County of Johnson on September 14, 1917; and Breaking Jail, a felony, in the District Court of the State of Kansas, in and for the County of Johnson, on September 13, 1917. As to each prior felony conviction alleged, it was also charged that appellant served a term of imprisonment therefor in a penal institution.

Appellant was duly arraigned and entered a plea of not guilty. Following a trial by jury, appellant Carroll and defendant Evans were found guilty of Robbery as charged and it was found to be Robbery of the first degree. The court found appellant to be an habitual criminal and he was sentenced to imprisonment in the State Prison at Folsom for the term prescribed by law for the crime of Robbery of the first degree with prior convictions of Burglary, Grand Theft, Burglary, third degree, and Larceny and Breaking Jail.

Judgment was entered October 19, 1931.

It appears that no appeal was taken from the judgment and appellant does not contend to the contrary.

Almost twenty-five years later, on August 28, 1956, appellant Carroll filed in the Superior Court of Los Angeles County a document denominated by him as "For the Writ of Error Coram Nobis" and in which he averred that "the prior convictions for which he was adjudged an habitual criminal do not embrace the intendment of the Legislature as defined under Section 644 (b) of Penal Code." In support of his contention appellant argues that, "Said prior convictions (See Exhibit (A) of case No. 45674) do not as of now, constitute an Habitual Criminal as defined under Section 644(b) of the 1949 California Penal Code; under said Section one must serve three or more Sentences seperately, see In re Brees, 1950, 99 Cal.App.2d 328, 221 P.2d 756.

"Petitioner has been in but two Prisons prior to the present Committment and has served but two terms or sentences as embraced by Section 644."

From the order of the court below denying the writ petitioned for, appellant prosecutes this appeal.

[1] It is now settled law in this state that the writ of error coram nobis is limited in its objectives. The writ is designed to bring to the attention of the trial court *errors of fact,* which, without negligence on the part of the accused, were not presented to the court at the time of trial. The writ in question was never intended to redress an irregularity occurring at the trial which could be corrected on motion for a new trial or by an appeal.

The function of the writ was thus epitomized in People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375, 378: "The writ of error *coram nobis* never issues to correct an error of law, nor to redress an irregularity occurring at the trial that could be corrected on motion for new trial or by appeal. It is issued to correct an error of fact, existing at the time of trial but unknown to the trial court through no fault of the petitioner, and which fact, had it been known, would have resulted in a different judgment, or would have prevented the rendition of the challenged judgment. [Citing cases.]" See also People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505.

[2–4] In the instant proceeding, if the judgment that appellant Carroll was an habitual criminal was not supported by the evidence, that fact was known to him at the time such judgment was entered and could have been corrected on appeal or by a motion for a new trial. We are satisfied that this question cannot be reviewed on its merits in this proceeding. It was a question of issuable fact and mixed law and fact which was before the trial court when the judgment was pronounced. And upon a motion for a new trial or upon a direct appeal from a judgment, had such an appeal been taken, could have been raised therein. People v. Moore, 9 Cal.App.2d 251, 253, 49 P.2d 615; People v. Whitton, 112 Cal.App.2d 328, 332, 246 P.2d 60; People v. Ingles, 97 Cal.App.2d 867, 871, 218 P.2d 987; People v. Herod, 112 Cal.App.2d 764, 766, 247 P.2d 127; People v. Dunlop, 102 Cal.App.2d 314, 316–318, 227 P.2d 281. For an appellant to be entitled to a writ of error coram nobis he must show at least that he could not have discovered the facts he alleged at any time substantially earlier than at the time of his petition for the writ. People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13. Since its purpose is to secure relief where no other remedy exists, it is incumbent upon a convicted person to take advantage of every remedy provided by law to defeat the judgment pronounced against him.

[5] Another feature of this case should be mentioned and that is the failure of appellant to make any pretense of diligence or of excuse for his negligence in waiting for over twenty-four years before attempting to set aside a judgment by a remedy of limited scope. In the absence of such showing the court below was obliged to deny the petition for that writ. People v. Emery, 99 Cal.App.2d 173, 174, 221 P.2d 223. The reason for this rule and the necessity for it is cogently set forth in People v. Martinez, supra, 88 Cal.App.2d at pages 773, 774, 199 P.2d 375. See also People v. Collins, 97 Cal.App.2d 552, 556, 218 P.2d 87; People v. Lumbley, 8 Cal.2d 752, 761, 68 P.2d 354; People v. O'Connor, 114 Cal.App.2d 723, 727, 728, 251 P.2d 64; People v. Krout, 90 Cal.App.2d 205, 209, 202 P.2d 635.

[6] Appellant suggests on this appeal that his petition in the court below might have been misnamed and that a petitioner "who establishes a right to relief under a form of writ different from that sought will be granted such relief in the form of the proper writ". The answer to this is that if the petition in the court below were to be treated as a petition for Writ of Habeas Corpus it was misdirected to the Los Angeles County Superior Court by the appellant who is allegedly restrained of his liberty in the County of Sacramento, Constitution of California, Article VI, § 5, and no appeal would lie from the denial of such a petition for a Writ of Habeas Corpus, Penal Code, § 1506.

For the foregoing reasons, the order from which this appeal was taken is affirmed.

DORAN and FOURT, JJ., concur.

150 Cal.App.2d 24

Hugh M. TERRELL, Plaintiff and Appellant,

v.

LOCAL LODGE 758, INTERNATIONAL ASSOCIATION OF MACHINISTS and Menasco Manufacturing Company, a Corporation, Defendants,

Local Lodge 758, International Association of Machinists, Respondent.

Civ. 21976.

District Court of Appeal, Second District, Division 3, California.

April 9, 1957.

Action to recover damages from employer for allegedly wrongful discharge and from union for failure to appeal plaintiff's grievance to arbitration. The Superior Court, Los Angeles County, A. Curtis Smith, J., entered summary judgment in favor of defendant union, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that uncontroverted affidavits in support of motion for summary judgment stated facts showing that union was under no obligation to process discharged member's grievance.

Affirmed.

1. Judgment 🔑186

On defendant's motion for summary judgment, trial court must determine whether plaintiff has presented any facts which give rise to a triable issue. West's Ann. Code Civ.Proc. § 437c.

2. Judgment 🔑185.2(8)

If affidavits disclose no triable issue of fact and affidavits in support of motion for summary judgment state facts, which, if proved, would support a judgment in favor of moving party, summary judgment is proper. West's Ann.Code Civ.Proc. § 437c.

3. Judgment 🔑185.2(8)

The propriety of granting or denying motion for summary judgment depends upon the sufficiency of the affidavits filed. West's Ann.Code Civ.Proc. § 437c.

4. Judgment 🔑185.2(4)

Affidavit in opposition to defendant's motion for summary judgment does not present a triable issue unless it states facts showing that a cause of action exists on the merits. West's Ann.Code Civ.Proc. § 437c.

5. Labor Relations 🔑221

Statement in union constitution of aim to settle disputes between members and employers did not obligate union to process members' grievances.

6. Labor Relations 🔑221

Provision in collective bargaining agreement by which employer recognized and accepted union as sole bargaining agent for specified employees did not obligate union to process a member's grievance.

7. Judgment 🔑181(11)

The very purpose of summary judgment procedure is to determine whether there is a triable issue of fact regardless of sufficiency of the pleadings, and failure of counteraffidavits to controvert facts shown in affidavits supporting motion for summary judgment cannot be remedied by resort to allegations of complaint. West's Ann.Code Civ.Proc. § 437c.

8. Judgment 🔑185.3(13)

In action against union to recover damages for failure to appeal discharged employee's grievance to arbitration, affidavits in support of, and opposition to, union's motion for summary judgment did not disclose any obligation of union to process member's grievance or present any facts giving rise to a triable issue. West's Ann. Code Civ.Proc. § 437c.

9. Labor Relations 🔑221

In absence of agreement, a member has no cause of action against union for its failure to process his grievance to arbitration.

10. Judgment 🔑185.3(13)

Where uncontroverted affidavits in support of motion for summary judgment stated facts showing that union was under no obligation to process discharged member's grievance against employer, defendant union was entitled to summary judgment in action for damages for failure to appeal member's grievance to arbitration. West's Ann.Code Civ.Proc. § 437c.

Hugh M. Terrell, in pro. per.

Rose, Klein & Marias and Robert P. Dockeray, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff appeals from a summary judgment granted on motion of defendant Local Lodge 758, International Association of Machinists, to be called "Union."[1]

Union is affiliated with International Association of Machinists as a local lodge. Prior to the time in question it had entered into a collective bargaining agreement with Menasco Manufacturing Company which provided four steps for the processing of grievances. Step One did not apply to the discharge of an employee. Step Two was a meeting between representatives of Union and of Menasco in an attempt to settle the grievance. If no agreement was reached an appeal could be taken to Step Three—an appeal board. If a settlement was not reached under Step Three the grievance could be appealed to Step Four—arbitration.

The complaint alleges: On or about July 7, 1952, plaintiff became a member of Union, and Union promised in writing to process any grievance of plaintiff against Menasco "which it considered meritorious" through the steps set forth in the collective bargaining agreement. On September 12, 1953, plaintiff was in the employ of Menasco and he was discharged without cause. Plaintiff filed a grievance with Menasco; Step Two and Step Three meetings were held as provided in the agreement, which terminated without settlement of the grievance. On information and belief, Union considered the grievance meritorious but negligently failed to appeal to Step Four. As a direct consequence of Union's failure to appeal to Step Four plaintiff sustained damages of $34,320. Union's answer admitted the discharge of plaintiff; admitted it did not carry the grievance procedure further than Step Three; denied it ever agreed either in writing or otherwise with plaintiff to carry any grievance of his through to arbitration.

[1–3] In considering a defendant's motion for summary judgment, the trial court is to determine whether the plaintiff has presented any facts which give rise to a triable issue. Gardner v. Jonathan Club, 35 Cal.2d 343, 347, 217 P.2d 961. "Section 437c, Code of Civil Procedure, provides, *inter alia,* that if it is claimed that an action has no merit the defendant may, upon proper notice make a motion, supported by an affidavit of any person having knowledge of the facts, that the complaint be dismissed and judgment entered. The plaintiff, however, 'by affidavit or affidavits, shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact.' If it appears from an examination of the affidavits that no triable issue of fact exists, and that the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving party, then summary judgment is proper. [Citation.] It is thus apparent that the propriety of granting or denying the motion depends upon the sufficiency of the affidavits that have been filed." Cone v. Union Oil Co., 129 Cal.App.2d 558, 562, 277 P.2d 464, 467.

In support of the motion for summary judgment Union filed an affidavit of Alfred Klein to which there was attached as a part thereof the deposition of plaintiff, and an affidavit of C. C. Bogardus, business representative of Union, to which there was attached a copy of the constitution of Grand Lodge, International Association of Machinists. Plaintiff filed a counter-affidavit. The affidavit of Mr. Klein disclosed that plaintiff relied on the constitution of the Grand Lodge and the collective bargaining agreement between Union and Menasco as the sole basis for his claim that Union had promised in writing to process any grievance in his behalf. The specific provision of the constitution of the Grand Lodge on which plaintiff relied, as disclosed by his deposition, reads:

> "The Grand Lodge of the International Association of Machinists aims:
>
> * * *
>
> "5. To settle all disputes arising between our members and employers, by direct negotiation whenever possible,

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[1] The motion of defendant Menasco Manufacturing Company for a summary judgment was granted. That judgment was affirmed in Terrell v. Local Lodge 758, etc., Machinists, 141 Cal.App.2d 17, 296 P.2d 100.

> and in cases where Arbitration is resorted to, to reserve our freedom to accept or reject the decision rendered except in those cases where it is previously agreed by both parties that the decision shall be binding."

The affidavit of Mr. Klein also disclosed that plaintiff relied on a provision of the constitution of the Grand Lodge which is set out in the margin.[2] The specific provision of the collective bargaining agreement on which plaintiff relied, as shown by his deposition, is set out in the margin.[3] The affidavit of Mr. Bogardus incorporated the collective bargaining agreement as a part of it; stated there was nothing in plaintiff's application for membership in the Union which bound the Union to process any grievance of plaintiff against Menasco; and that Union never at any time promised to process any such grievance. Thus there were before the trial court in support of the motion plaintiff's application for membership in Union and the particular parts of the constitution of the Grand Lodge and of the collective bargaining agreement on which plaintiff relied as supporting his claim that Union was obligated to process his grievance against Menasco to arbitration.

The counter-affidavit of plaintiff stated he became a member of Union on his own volition, predicated partially on an oral promise made by Mr. Bogardus in the presence of the director of industrial relations of Menasco "which was prompted by an inquiry on the part of this affiant relative to their respective positions regarding the processing of grievances should this affiant ever decide to become a member of the union"; the collective bargaining agreement states the Union is the sole bargaining agent; the grievance was processed through Step Two without settlement; there is no record showing that Step Three was pursued; Union promised orally to process any meritorious grievance he had against Menasco; the constitution and the collective bargaining agreement "contain nothing but promises from the first written word to the last written word of what the union *aims* to do relative its members"; and quotes the provisions of the constitution set out above; he relied on a written promise made and filed by Union representatives in the collective bargaining agreement to be his sole agent.

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[2] "Every application for a charter for the organization of a L. L. [Local Lodge] shall contain the following information: The number of machinists, automobile, heavy duty or aircraft machinists or mechanics, specialists, machinists' helpers, apprentices and production workers employed in the locality. The name of each applicant who is a member of any L. L., together with his card number and the number of the L. L. to which he belongs. The name of each applicant whose membership has been previously cancelled, together with the number of the L. L. of which he was last a member. The petition and pledge of the applicants in language as follows:

"'The undersigned residents of (place) ———, (State) ———, believing the International Association of Machinists to be well calculated to improve our intellectual and social conditions and promote our economic well-being and advancement, respectfully petition the International Association of Machinists to grant us a charter to open a new lodge, to be located in the City (or town) of ———, county of ———, State of ———. We pledge ourselves individually and collectively to be governed by the Constitution, laws, rules and usages of the International Association of Machinists. The Lodge desires to be recognized as ——— Lodge.'"

[3] "Sec. 5. Union Recognition and Work Jurisdiction

"1.51 The Company recognizes and accepts the Union as the sole bargaining agent for all the Company's hourly-paid employees except:

"a. Employees in the Company's Division of Industrial Relations

"(1) having access to and authorized to work with Personnel Records;

"(2) in First Aid.

"b. Truck drivers who operate on public highways off the Company's premises (covered by Local Lodge 578, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America).

"c. Uniformed guards and firemen (covered by Local Lodge 1, American Federation of Guards).

"d. Office, clerical and administrative employees other than those defined in the labor grades.

"e. Specifically excluded are all salaried employees, unless by working such salaried employee performs work that comes under the jurisdiction of the International Association of Machinists, and/or other work classification covered in addition thereto by this Agreement."

[4-6] An affidavit in opposition to a defendant's motion for a summary judgment does not present a triable issue unless it states facts showing that a cause of action exists on the merits. Hardy v. Hardy, 23 Cal.2d 244, 246-247, 143 P.2d 701. The counter-affidavit of plaintiff does not controvert the facts stated in the affidavits of Mr. Klein and Mr. Bogardus. It appears from the counter-affidavit that plaintiff relies on the documents referred to by him in his deposition and related by Mr. Klein, i. e., his application for membership in Union, the constitution of the Grand Lodge, and the collective bargaining agreement. In no one of these did Union agree to process plaintiff's grievance through Step Four—arbitration. The application for membership does not contain any promise to do anything with respect to grievance procedure. Assuming the constitution of the Grand Lodge can be construed as an agreement between Union and plaintiff, it contains nothing obligating Union to process grievances. It merely states that Grand Lodge "aims" to settle disputes between members and employers. We find nothing in the part of the collective bargaining agreement relied on by plaintiff which obligates Union to process a member's grievance. Construing the agreement in Terrell v. Local Lodge 758, etc., Machinists, 141 Cal.App.2d 17, at page 19, 296 P.2d at page 102, the court stated:

> "The contract provides that only the company or the union is empowered to appeal a grievance to either step three or step four."

[7, 8] The failure of the counter-affidavit to controvert the facts shown in the affidavits supporting the motion cannot be remedied by resort to the allegations of the complaint. Code Civ.Proc. § 437c. The very purpose of the summary judgment procedure is to determine whether there is a triable issue of fact irrespective of the sufficiency of the pleadings. Looking at the affidavits alone, it is uncontroverted that there was no obligation on Union to process plaintiff's grievance and that plaintiff did not present any facts giving rise to a triable issue.

[9] In the absence of an agreement, a union member does not have a cause of action against the union for its failure to process his grievance to arbitration. Considering a collective bargaining agreement similar to the one between Union and Menasco the court, in Bianculli v. Brooklyn Union Gas Co., Sup., 115 N.Y.S.2d 715, at page 718, stated:

> "Under the above quoted provisions, the Union alone has the right to demand arbitration and there is no independent right of an employee within the bargaining unit either to compel the Union to institute arbitration proceedings, or to require the Company to submit to arbitration without regard to the Union.
>
> "The philosophy of the Union in retaining control over disputes and of the Company in requiring the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of a Union would create a condition of disorder and instability which would be disastrous to labor as well as industry."

To like effect, United States v. Voges, D.C., 124 F.Supp. 543.

[10] Since defendant's affidavits state facts showing the action has no merit, and those facts are not controverted by plain-

tiff's affidavit, summary judgment was proper.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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149 Cal.App.2d 836

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward HOOD, Defendant and Appellant.

Cr. 5822.

District Court of Appeal, Second District, Division 1, California.

April 8, 1957.

Rehearing Denied April 23, 1957.

Prosecution for felonious possession of a "billy club". From judgment of conviction and order of commitment made and entered by the Superior Court, Santa Barbara County, Atwell Westwick, J., the defendant appealed. The District Court of Appeal, Fourt, J., held that where defendant, who authorized policeman to drive his automobile to police station, told policeman to "go ahead" when asked if he could search his automobile, and there was no evidence that officer used any force or duress or that defendant was nervous, distraught or upset, search of automobile, in which a "billy club" was found, was not illegal.

Judgment affirmed.

1. Criminal Law 🔑260(11)

In prosecution before court for felonious possession of a "billy club" found under front seat of defendant's automobile during search thereof by police officer who asked permission to search automobile, and was told by defendant to "go ahead," question as to whether defendant gave policeman consent to search automobile was one of fact for determination of trial court. West's Ann.Pen.Code, § 12020.

2. Criminal Law 🔑260(11)

Finding by trial court supported by substantial evidence is binding upon reviewing court.

3. Searches and Seizures 🔑7(27)

Where defendant, who authorized policeman to drive his automobile to police station, told policeman to "go ahead" when asked if he could search defendant's automobile, and there was no evidence that officer used any force or duress or that defendant was nervous, distraught or upset, search of automobile in which a "billy club" was found, was not illegal.

Francis Price, Jr., Santa Barbara, for appellant.

Edmund G. Brown, Atty. Gen., Herschel Elkins, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction and order of commitment made and entered in the superior court in and for the county of Santa Barbara on October 15, 1956.

In an information filed in Santa Barbara county defendant was charged with a violation of the provisions of section 12020 of the Penal Code, namely, the felonious possession of a "billy club". By stipulation the matter was presented to the trial court upon the transcript of the proceedings had in the preliminary hearing. The defendant consented to the stipulation and waived a jury trial and was found guilty as charged. He made an application for probation, but apparently later reconsidered and withdrew the application, and the court thereupon ordered the probation officer to make a pre-sentence report. The defendant was sentenced to imprisonment in the state prison for the time prescribed by law.

A resume of the facts is as follows: On August 17, 1956, Harry Hobson, a policeman of the Santa Barbara police force, was informed by a man named Pembleton that he had been the victim of a robbery and that the robber drove a "'49 or '50 Chevy two-door dropped down in the back end"; that the robber was about five feet ten inches tall, weighed about 150 pounds, was dark complexioned and had dark curly hair. Pembleton told officer Hobson that the man, later identified by Pembleton, struck him, knocked him down, struck him several times while he was on the ground, and that while he was in the latter position he felt his wallet being pulled out of his pocket and that the robber then ran away.

[1] The next day officer Hobson, in ordinary street clothes, saw the defendant through a porch screen at an address on Haley Street in Santa Barbara and asked him to come out. When the defendant complied with the request Hobson then identified himself as being from the police department and asked the defendant if he would go to the police station with him and "be checked out on a robbery case". The defendant stated that he would do so and Hobson asked him if he would drive his own car. Defendant stated that he had no driver's license, but that Hobson could drive defendant's car and that he would go with him. Hobson then drove the defendant's automobile with defendant riding therein to the police station.

At the police station parking lot Hobson asked the defendant if he could search defendant's car and defendant answered, "Yes, go ahead." Hobson opened the door on the driver's side of the automobile and upon looking under the front seat found a fourteen inch billy club with a wooden handle and a leather thong attached thereto, used for wrapping around the wrist. Hobson then asked defendant, "What is this?" and defendant answered that it was a billy club and said further, "I was hoping you wouldn't find that." Hobson inquired as to how long it had been in the automobile and was told by the defendant, "It's been in there about five months." The defendant was then arrested. While at the police station parking lot, the defendant further said in reference to Pembleton, "That's the man I hit."

At the preliminary hearing the defendant was present when the officer testified and thereafter defendant took the witness stand himself and testified as to his name and date of birth and nothing else.

Defendant now contends that the finding of the billy club in his automobile was the result of an unlawful search and seizure and any evidence in reference thereto was inadmissible.

[2] The question as to whether there was a consent given by the defendant to search the automobile is one of fact primarily for the trial court to determine. People v. Gorg, 45 Cal.2d 776, 782–783, 291 P.2d 469; People v. Smith, 141 Cal.App.2d 399, 402, 296 P.2d 913; People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852; People v. Allen, 142 Cal.App.2d 267, 298 P.2d 714. The court's finding, when supported by substantial evidence, is binding upon the appellate court. Here there was no conflict in the testimony.

In People v. Burke, 47 Cal.2d 45, 301 P.2d 241, 243, the officer asked the defendant if he had any narcotics in his house at that time, and the defendant answered, "No." The officer then said, "'You don't mind then if we search your apartment do you?'" and the defendant said, "No, go ahead." In answer to the defendant's contention that there was an illegal search and seizure, the court said, 47 Cal.2d at page 49, 301 P.2d at page 243:

"It was not necessary here, however, for the People to show that the search and seizure were reasonable as incident to a proper arrest, for they showed that defendant freely consented to the search of his apartment which disclosed the evidence which defendant has since claimed was illegally obtained."

And in People v. Michael, supra, 45 Cal. 2d 751, at page 753, 290 P.2d at page 853, the court said:

"To protect his right to object to an unreasonable search or seizure a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person [citing cases], but if he freely consents to an entry or search, * * * his constitutional rights are not violated and any search or taking of evidence pursuant to his consent is not unreasonable."

The defendant did not in any sense contradict the testimony of the officer, although, as heretofore indicated, he took the witness stand and testified as to his name and age only. The officer further stated that he never at any time used any force or duress or made any threats to or against the defendant.

[3] The defendant did not state nor indicate that there had been any coercion nor that he was submitting to any implied authority at the occasion at the police parking lot or otherwise, nor did he testify that he was nervous, distraught and upset and didn't know what he was doing. Full opportunity was afforded the defendant to examine the officer on voir dire examination to show that there was force or other improper methods used, if such was the fact. This he entirely failed to do.

It is uncontradicted that the defendant was not in custody before the request to search his automobile was made. The record shows clearly that the defendant voluntarily accompanied the officer to the police parking station and that he was not under arrest until after the billy club was located.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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149 Cal.App.2d 760

Trueman W. STANSBURY, Plaintiff, Cross-Defendant and Appellant,

v.

Rae Helene STANSBURY, Defendant, Cross-Complainant and Respondent,

Thomas W. Stansbury, Cross-Defendant and Appellant.

Civ. 5376.

District Court of Appeal, Fourth District, California.

April 3, 1957.

Proceeding for annulment of marriage, brought by husband, wherein the wife filed cross-complaint, in which husband's father was named as a defendant, for divorce and division of community property. The Superior Court, Kern County, W. L. Bradshaw, J., rendered judgment annulling marriage and decreed that property be divided equally between parties, and husband and his father appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that although property settlement agreement, which had been approved in prior interlocutory divorce decree had provided for division of community property, parties had effected reconciliation and agreed that property settlement agreement be cancelled and that all property previously accumulated or thereafter acquired became community property of parties.

Affirmed.

1. Husband and Wife ⟹279(3)

In proceeding for annulment of marriage wherein husband alleged that there was no community property because community property had been divided in property settlement agreement which had been approved in prior interlocutory divorce decree, evidence sustained finding that parties effected reconciliation and agreed that property settlement agreement be cancelled and that all property previously accumulated or thereafter acquired should become community property of parties.

2. Husband and Wife ⚿279(3)

Whether a property settlement agreement in connection with divorce continues in force after reconciliation depends on mutual intentions and understanding of parties.

3. Husband and Wife ⚿279(3)

Where property settlement agreement between husband and wife had been approved in interlocutory divorce decree, reconciliation of parties, followed by resumption of marital relations, operated to cancel executory provisions of property settlement agreement and reconciliation was an executed oral agreement cancelling property settlement contract.

4. Fraudulent Conveyances ⚿299(12)

In proceeding for annulment of marriage wherein husband alleged that wife was estopped from claiming one-half of interest in oil lease because she joined, in order to defraud husband's creditors, in assignment of interest to husband's father, who collected royalty checks and withheld sum as payment of debt owed to him by husband and gave balance to husband and wife, and later reconveyed interest of son alone, evidence sustained implied finding of court that wife had not joined in transfer in order to defraud husband's creditors.

5. Fraudulent Conveyances ⚿174(5)

Even if assignment by husband and wife of interest in oil lease to husband's father was executed to defraud husband's creditors, upon subsequent assignment thereof by father to son, son became revested with interest, and wife was not estopped from claiming that interest was community property of husband and wife.

6. Marriage ⚿63

In proceeding for annulment of marriage, evidence sustained finding that wife had been single woman not previously married at time of marriage to husband, that husband represented to her that he was divorced and competent to contract marriage, that wife believed representation and did not know that previous marriage of husband was in force, and so believing entered into ceremonial marriage and lived with him as wife in putative state of marriage in belief that valid marriage existed until invalidity of marriage was tendered by him in his complaint for annulment.

7. Marriage ⚿54

Woman who lives with man as his wife in belief that valid marriage exists, is entitled, upon termination of their relationship, to share in property acquired by them during its existence, and proportionate contribution of each party to property is immaterial, for property is divided as community property would be upon dissolution of valid marriage.

8. Evidence ⚿18

In proceeding for annulment of marriage, court would not take judicial notice that automobile did not exceed $3,000 in value and that since furniture was insured for $10,000 it was worth that amount, where there was evidence that furniture had cost $2,500 and at time of trial was approximately 9 years old.

◆

Kendall & Howell, Bakersfield, and Robert E. Krause, Long Beach, for appellants.

Oscar F. Catalano and Frederick E. Hoar, Bakersfield, for respondent.

MUSSELL, Justice.

Plaintiff, Trueman W. Stansbury, hereinafter referred to as "Trueman", and defendant, Rae Helene Stansbury, hereinafter referred to as "Rae", were married in New York on February 25, 1945, and at the time of this marriage, plaintiff's previous marriage with one Jennie H. Stansbury was not dissolved and was in full force and effect. He had secured an interlocutory decree of divorce from her on July 28, 1944, and the final decree terminating this marriage was not entered until August 9, 1945.

Plaintiff and defendant came to California and lived together as man and wife until plaintiff filed his complaint herein for annulment of his marriage to Rae, on June 9, 1955. On November 5, 1952, Rae filed an action for divorce against Trueman in Kern county, alleging cruelty and asking for a division of the community property. On

November 12, 1952, the parties entered into a property settlement agreement, dividing the community property and agreeing that all property thereafter acquired by either party should be the property of the party acquiring it. On January 21, 1954, the parties entered into a written stipulation which, among other things, stated that the parties had effected a complete reconciliation and it was their desire that the court set aside the interlocutory decree which had been entered on December 10, 1952. In accordance with this stipulation, the court set the interlocutory decree aside by order dated January 25, 1954.

On May 12, 1955, Trueman filed an action for divorce against Rae in Los Angeles county, alleging cruelty and that there was no community property, the parties having entered into a property settlement agreement on November 12, 1952, whereby they divided and converted into separate property such community property as was theretofore owned and possessed by them. This action was transferred to Kern county on a motion for change of venue and was then voluntarily dismissed. Thereafter Trueman filed the complaint herein for annulment on June 9, 1955. In this complaint Trueman alleged that there was no community property, the parties having, on November 12, 1952, entered into a property settlement agreement dividing said property. Rae filed an answer to this complaint and also filed a cross-complaint and an amended cross-complaint for divorce in which Thomas W. Stansbury, defendant's father, was also named as a defendant and in which Rae alleged the existence of community property consisting of a 1% overriding royalty in all oil, gas and other hydrocarbons produced from certain lands therein described, a house and lot in Bakersfield, a 1955 Chevrolet car and certain household furniture.

The trial court rendered judgment annulling the marriage and decreed that the community property be divided equally between the parties, awarding one-half of the 1% overriding royalty in all oil and gas and other hydrocarbons produced from the property described therein to each of the parties; awarding one-half of such royalties in the possession of defendant's father, Thomas W. Stansbury, to each of the parties; awarding the household furniture to Rae, the Chevrolet to Trueman, and the residence of the parties to the parties as cotenants in equal shares. Trueman and Thomas Stansbury appeal from the judgment, claiming that the evidence is insufficient to support the findings and judgment. Their principal contention is that the court erred in the division and award of the property of the parties, particularly the 1% overriding royalty.

On September 23, 1952, Milton Stansbury and James H. Davis, doing business as Crown Drilling Company, entered into a lease covering the property involving the 1% royalty herein and oil came in on this property on December 25, 1952. Prior to that time Trueman had been engaged in the business of "getting leases" and had done some work for the Crown Drilling Company for which they had orally promised him a 1% interest. Trueman testified in this connection that he did not receive any document that formally gave him an interest in this lease until April, 1953; that on March 16, 1953, the Division of Corporations issued a permit for the issuance of the 1% interest to him and an assignment was executed March 26, 1953, by the Crown Drilling Company to him. This assignment provided, among other things, that the overriding royalty should be paid only by the party producing oil, gas and other hydrocarbon substances and only if, as and when such substances were produced and saved under the lease and sold or removed from the lands. Oil was commercially produced from this lease in January, 1953, and some time in March of that year Trueman received the first royalty check in the sum of $190. In 1953 the Crown Drilling Company sold its interest in this lease to Standard Oil Company and thereafter the royalty checks were increased in amounts until they reached the sum of $1,200 per month.

On May 3, 1953, Trueman and Rae assigned the 1% royalty interest to Thomas Stansbury and he thereafter collected the royalty checks. He withheld $1,000 from them to take care of an indebtedness owed by Trueman and gave the balance to Trueman and Rae, sometimes to both of them and sometimes to one or the other. Thomas testified that he took the assignment "as a favor" and the record shows that on September 1, 1954, he and his wife, in writing, reconveyed and transferred the said royalty interest to Trueman. Appellant Thomas Stansbury has no interest in the royalty other than in the disposition of money he still holds under the assignment to him.

Appellant Trueman contends that the royalty interest is his separate property under the terms of the property settlement agreement of November 12, 1952, particularly under the provision thereof as to after-acquired property.

[1] The interlocutory decree of December 10, 1952, in the action in Kern county between Rae and Trueman Stansbury, contained an order approving the property settlement agreement. However, that decree was set aside pursuant to a stipulation of the parties. This stipulation, which was signed by both parties and acknowledged before a notary, recited that the parties have effected a full and complete reconciliation and were living together as husband and wife. In this connection, the court found that the parties effected a reconciliation and then and there agreed that said property settlement agreement be abrogated, annulled and canceled and that any and all property previously accumulated or thereafter acquired should become the community property of the parties. This finding has substantial evidentiary support and cannot be here disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557.

In addition to the written stipulation of the parties acknowledging a reconciliation, Rae Stansbury testified that after the divorce in which she obtained the interlocutory decree on December 10, 1952, and on the same day, she went home and the following conversation with Trueman took place:

> "He said, 'I can't understand why we can't act like grown people.' He says, 'After all we have taken our vows for keeps.' I said, 'I have always felt that way, Trueman.' And he said, 'Well, I promise you I will be a better husband to you, I will try to be kind and courteous, I will try. We will get along there's no question about it, I know we can get along.' Then he said, he went into the bedroom and on the dresser there was a large envelope, the usual business type envelope with Fleharty's—I don't remember all the individuals in that law office, and in it there was the divorce complaint as well as two copies of the property settlement agreement; so he said, 'We don't have any need for this.' And he picked it up and tore it up handed it to me and said, 'Throw it in the wastepaper basket.' He said, 'We are man and wife and there should be no separate property. We own everything together, whatever is yours is mine and whatever is mine is yours.' And that was about all."

Richard DeWitt, a next door neighbor, testified that he and his wife moved into his home in August, 1952, at which time the Stansburys were then residing in their residence; that during the Christmas holidays of 1952, Trueman stated to him that he and Helene had an oil well come in; that they were going to share in this oil well and that in 1955 Trueman referred to a trust he and Helene had from an oil well. Another neighbor, Mrs. Coach, testified that right after Christmas, 1952, Trueman and Helene came over and were very enthusiastic, said the well had come in on Christmas Day they had an interest in and that it was one of the finest Christmas presents he and Helene could have had; that Trueman said that Helene wouldn't have to teach after they had a few wells on the lease.

Trueman testified that while living with his wife in 1952, 1953 and the early part of 1955, the royalty payments were used to pay the expenses of the house, the payments on the home itself, car payments, utility bills, fire insurance, clothing for his wife and taxes.

Rae testified that after Trueman had filed his divorce action in Los Angeles county she was served with the complaint and objected to his allegation therein that there was no community property; that he then stated that it was an error, saying, "I know, we have our car, we have our home, and the 1% overriding royalty."

[2, 3] Whether a property settlement agreement does or does not continue in force depends on the mutual intentions and understanding of the parties. Morgan v. Morgan, 106 Cal.App.2d 189, 234 P.2d 782; Margolis v. Margolis, 115 Cal.App.2d 131, 251 P.2d 396. There is substantial evidence herein of an actual reconciliation of the parties as of December 10, 1952, and their continuous residence and cohabitation together in good faith as man and wife until the final separation in March, 1955. The reconciliation, followed by the resumption of marital relations, operated to cancel the executory provisions of the property settlement agreement and it was an executed oral agreement cancelling the property settlement contract. Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 418, 419, 95 P.2d 966. The evidence also shows that when the property settlement agreement was executed on November 12, 1952, the 1% royalty was not in existence except as an oral promise contingent on actual production and sale of oil from the premises from wells not yet drilled. The royalty was not mentioned in the agreement and there is no evidence that it was in fact contemplated by the parties.

[4, 5] It is contended by appellants that Rae Stansbury was estopped by her fraudulent purpose in executing an assignment and delivery of the 1% overriding interest to appellant Thomas W. Stansbury. This argument is based on the assumption that Rae joined in the transfer in order to defraud Trueman's creditors. There is a conflict in the evidence in this respect and the trial court's implied finding cannot be disturbed. If we assume that the assignment was fraudulently executed, the 1% royalty interest was reconveyed by Thomas Stansbury to Trueman and he then became revested with the interest conveyed by the assignment.

As is said in Roesman v. DeHart, 80 Cal.App.2d 737, 740, 182 P.2d 263, 264:

> "It is the general rule that one who conveys property to another in fraud of creditors cannot recover the property from his fraudulent grantee. 12 Cal. Jur. 1026. It is otherwise however if the fraudulent grantee voluntarily reconveys to the fraudulent grantor. The rule applicable in such cases was quoted by this court from 27 C.J. 658 in Williamson v. Kinney, 52 Cal.App.2d 98, 103, 125 P.2d 920, 923:
>
> " 'While a fraudulent grantee is under no legal obligation to reconvey, it is said that he is under a moral obligation to do so, and all subsequent acts done by him in execution of this duty should be favorably considered in equity, the moral obligation being a valuable and sufficient consideration for a reconveyance. If in fulfillment of his moral obligation he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third person have intervened, the fraudulent grantor will become revested both in law and in equity with the title previously conveyed to his grantee; and the grantee will be estopped from thereafter setting up any claim to the property.' "

[6] The trial court found that at the time of the marriage in New York on February 25, 1945, Rae Stansbury was a single woman and had not been previously married; that Trueman Stansbury represented to her that he had been previously married but that said marriage had been dissolved and terminated and that he was a divorced man and legally competent to contract a valid marriage with Rae Stansbury; that she, in good faith, believed said representations and was without any knowledge that

the previous marriage of Trueman and Jennie Stansbury was in full force and effect and believed that he had procured a valid decree of divorce from her, and so believing entered into said ceremonial marriage with Trueman Stansbury and thereafter lived with him, as his wife, in a putative state of marriage in the bona fide belief that a valid marriage at all such times existed between her and Trueman Stansbury until the invalidity of such marriage was tendered by him in his complaint for annulment. These findings are supported by substantial evidence and appellants do not attack the sufficiency of the evidence to sustain them, although they claim that the matter was bitterly disputed.

[7] The rule in reference to the division of property accumulated during the cohabitation of a man and woman under a putative marriage relationship is stated in Vallera v. Vallera, 21 Cal.2d 681, 683, 684, 134 P.2d 761, 762, and it is there stated:

> "It is well settled that a woman who lives with a man as his wife in the belief that a valid marriage exists, is entitled upon termination of their relationship to share in the property acquired by them during its existence. Feig v. Bank of Italy, etc., Ass'n, 218 Cal. 54, 21 P.2d 421; Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844; see Knoll v. Knoll, 104 Wash. 110, 176 P. 22, 11 A.L.R. 1394. The proportionate contribution of each party to the property is immaterial in this state (Coats v. Coats, supra; Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143), for the property is divided as community property would be upon the dissolution of a valid marriage. Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; Feig v. Bank of America, etc., Ass'n, 5 Cal.2d 266, 54 P.2d 3; Schneider v. Schneider, supra; Coats v. Coats, supra; Macchi v. La Rocca, supra."

It is apparent that the trial court awarded the property of the parties herein in accordance with the rule announced in the Vallera case.

[8] It is claimed by appellants that the award of the Chevrolet automobile to Trueman and the household furniture and furnishings to Rae was unfair. They claim that the court will take judicial notice that the automobile does not exceed $3,000 in value and that since the furniture was insured for $10,000 it was therefore worth that amount. We are not in accord with this contention. There was evidence that the furniture cost $2,500 and at the time of the trial was approximately nine years old. We find no abuse of discretion in the division of the property made by the trial court.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

149 Cal.App.2d 802

Application of Donald L. CLARKE, for a Writ of Habeas Corpus.

Cr. 5882.

District Court of Appeal, Second District, Division 2, California.

April 5, 1957.

Proceeding on petition for writ of habeas corpus by defendant who was serving sentence imposed after conviction of failing to furnish, as father of unborn illegitimate child, the necessary food, clothing, shelter or remedial care for child. The District Court of Appeal, Richards, J. pro tem., held that statute providing that father who omits to furnish support for minor child, including child conceived but not born, is guilty of misdemeanor is not unconstitutional for uncertainty as to the scope of father's duty to unborn child in that it does not describe necessaries for unborn child or how they may be furnished.

Writ discharged and defendant remanded to custody of sheriff.

1. Bastards 🔑16
Parent and Child 🔑17(1)

Purpose of statute providing that father who omits to furnish necessary food, clothing, shelter, or remedial care for minor child, including child conceived but not born, is guilty of misdemeanor, is to place upon father of minor child, born or unborn, legitimate or illegitimate, responsibility of providing basic needs for preservation of life of child. West's Ann.Pen.Code, § 270.

2. Statutes 🔑183

When legislative intent of statute has been ascertained, it must be enforced as intended notwithstanding that derived meaning may be inconsistent with strict letter of statute as enacted.

3. Statutes 🔑47

A statute cannot be held void for uncertainty if any reasonable or practical construction can be given to its language.

4. Evidence 🔑66

One old enough to father a child may be presumed to know that the way by which the human embryo and fetus is nurtured during gestation is through the intermediary of the mother and that to sustain life of unborn child the mother herself must be sustained with food, clothing and shelter.

5. Criminal Law 🔑13

Statute providing that father who omits to furnish necessary food, clothing, shelter or remedial care for minor child, including child conceived but not born, is guilty of misdemeanor, contemplates, as to unborn children, indirect necessities, or those which are to be furnished through the mother, and merely because this biological fact may place a heavier burden on father of unborn child furnishes no ground for declaring statute uncertain. West's Ann.Pen.Code, § 270.

6. Criminal Law 🔑13

Detailed plans and specifications of means whereby father shall furnish necessaries for child are not required to be set forth in statute providing that father who omits to furnish necessary food, clothing, shelter or remedial care for minor child, including child conceived but not born, is guilty of misdemeanor, and father may adopt any appropriate method to accomplish objective of statute, which would include financial assistance to mother. West's Ann.Pen.Code, §§ 4, 270b.

7. Criminal Law 🔑13

While no one may be required at his peril to speculate as to meaning of a penal statute, yet where a statute contains a reasonably adequate disclosure of legislative intent, regarding an evil to be combatted, in language giving fair notice of practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced.

8. Criminal Law 🔑13

Reasonable certainty as to meaning of penal statute is all that is required to prevent statute from being too indefinite to be enforced, and liberal effect is always to be given to legislative intent when possible.

9. Constitutional Law 🔑48

A statute must be upheld unless its nullity clearly, positively and unmistakably appears.

10. Criminal Law 🔑13

In determining whether a penal statute is sufficiently explicit to inform those who are subject to it of what is required of them, the court must endeavor, if possible, to view statute from standpoint of a reasonable man who might be subject to its terms, and requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.

11. Criminal Law 🔑13

Statute providing that father who omits to furnish necessary food, clothing, shelter or remedial care for minor child, including child conceived but not born, is guilty of misdemeanor, is not unconstitutional for uncertainty as to what is required of father of unborn child. West's Ann.Pen.Code, §§ 4, 270, 270b.

12. Parent and Child ⚷17(1)

Statute providing that proof of omission by father to furnish necessary food, clothing, shelter or remedial care for his child, including child conceived but not born, is prima facie evidence that such omission is wilful and without lawful excuse, is not unreasonable, arbitrary or unconstitutional. West's Ann.Pen.Code, § 270.

13. Parent and Child ⚷17(6)

Statute providing that proof of omission by father to furnish necessary food, clothing, shelter or remedial care for his child is prima facie evidence that such omission is wilful and without lawful excuse does not set forth rule relating to proof, but merely declares rule of procedure that places upon defendant duty of going forward with evidence that his omission to provide was not wilful or was excusable. West's Ann.Pen.Code, §§ 270, 270b.

14. Parent and Child ⚷17(6)

Under statute making omission of father to provide necessary food, clothing, shelter, or remedial care for his child, including unborn child, a misdemeanor and making proof of such omission prima facie evidence that omission is wilful and without lawful excuse, conviction cannot be sustained in absence of proof, not only of accused's paternity of child, but also, if child is unborn, that he had knowledge or notice of existence of unborn child, and that some claim or assertion of his paternity of child had been made to him. West's Ann.Pen.Code, §§ 270, 270b.

15. Criminal Law ⚷93

Municipal courts are vested with exclusive jurisdiction over misdemeanors, except juvenile cases, and this includes power to hear and determine every issue of fact, including issue of paternity, involved in a prosecution for failure to provide for a minor child, irrespective of jurisdiction of superior court to determine issue of paternity of illegitimate child in a civil case. West's Ann.Civ.Code, §§ 196a, 231; West's Ann.Pen.Code, §§ 270, 1462.

Irmas, Rutter & Halper and William A. Rutter, Beverly Hills, for petitioner.

William B. McKesson, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., and Walter C. Foster, Deputy City Atty., Los Angeles, for respondent.

RICHARDS, Justice pro tem.

Petitioner was charged and convicted in the municipal court of a violation of section 270 of the Penal Code in failing to furnish, as the father of an unborn illegitimate child, the "necessary food, clothing, shelter or medical attendance or other remedial care" for said child. The conviction was affirmed by the appellate department of the Superior Court of Los Angeles County although the judgment imposed was reversed with instructions to rearraign the defendant for judgment. People v. Clarke, 146 Cal.App.2d Supp. 904, 304 P.2d 271. Thereafter the petitioner was rearraigned in the municipal court, at which time he and the mother of the child for whose non-support he had been convicted were husband and wife. The court granted probation, one of the conditions of which was that petitioner spend 240 days in the county jail. A subsequent motion for modification of probation having been denied, petitioner now seeks his discharge by habeas corpus. Petitioner attacks the constitutionality of section 270 of the Penal Code as applied to the facts in this case, contending that it is so vague and indefinite as to be violative of the constitutional requirement of due process. That section, omitting non-germane provisions, reads: "A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars ($1,000), or by both. * * * This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child nor because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so.

"Proof of abandonment or desertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is wilful and without lawful excuse.

"* * * A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

The duty of a father to furnish the necessary food, clothing, shelter or medical attendance for his minor child has long been the law and it does not appear to have been attacked for uncertainty as applied to children who have been born. The extension of the statute to an unborn child was by amendment in 1925, adding the last sentence of the statute as above quoted, and the statute as amended and as applied to an unborn child was held not void for uncertainty in People v. Yates, 114 Cal.App.Supp. 782, 298 P. 961, by the appellate department of the Superior Court of Los Angeles County. See Kyne v. Kyne, 38 Cal.App.2d 122, 127, 100 P.2d 806.

[1-6] It is contended that the act fails to delineate with adequate certainty the scope of a father's duty to an unborn child in that it does not describe the necessaries for an unborn child nor how they may be furnished to it. The manifest reason and purpose of this humane legislation is to place upon the father of a minor child, born or unborn, legitimate or illegitimate, the responsibility of providing the basic needs for the preservation of the life of the child; food, clothing, shelter, and medical care. When the legislative intent has been ascertained, it must be enforced as intended notwithstanding that the derived meaning may be inconsistent with the strict letter of the statute as enacted. People v. Villegas, 110 Cal.App.2d 354, 358, 242 P.2d 657. A statute cannot be held void for uncertainty if any reasonable or practical construction can be given to its language. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 676, 8 P.2d 140, 80 A.L.R. 1217; County of Tulare v. City of Dinuba, 188 Cal. 664, 677, 206 P. 983. "The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by over-refined inquiries into the meanings of words." People v. Deibert, 117 Cal.App.2d 410, 418, 256 P.2d 355, 360. One old enough to father a child may be presumed to know that the way by which the human embryo and fetus is nurtured during gestation is through the intermediary of the mother and that to sustain the life of an unborn child, the mother herself must be sustained with food, clothing and shelter. As to unborn children, the statute contemplates indirect necessities, or those which are to be furnished through the mother. People v. Yates, supra, 114 Cal.App.Supp. at page 786, 298 P. 961. Merely because this biological fact may place a heavier burden on the father of an unborn child furnishes no ground for declaring the statute uncertain. As to the method or means of furnishing the unborn child's necessaries, the statute does not require that they be furnished "to" the child, but "for" the child. Detailed plans and specifications of the means whereby the father shall furnish the necessaries for a child are not required to be set forth in the statute and he may

adopt any appropriate method to accomplish the objective of the statute, which would include financial assistance to the mother, a means contemplated as adequate under a companion statute, Penal Code, § 270b.

[7–11] Penal statutes are to be "construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Pen.Code, § 4. While no one may be required at his peril to speculate as to the meaning of a penal statute, People v. McCaughan, — Cal.App. —, 306 P.2d 61, yet "[w]here a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced." People v. Deibert, supra, 117 Cal.App.2d at page 418, 256 P.2d at page 360. Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible, People v. Hallner, 43 Cal.2d 715, 720, 277 P.2d 393; People v. Kennedy, 21 Cal.App.2d 185, 193, 69 P.2d 224; moreover, a statute must be upheld unless its nullity clearly, positively and unmistakably appears. People v. Darby, 114 Cal.App.2d 412, 428, 250 P.2d 743. In determining whether a penal statute is sufficiently explicit to inform those who are subject to it what is required of them, the court must endeavor, if possible, to view the statute from the standpoint of a reasonable man who might be subject to its terms, Pacific Coast Dairy v. Police Court, supra, 214 Cal. at page 676, 8 P.2d 140; and the requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. Smith v. Peterson, 131 Cal.App.2d 241, 246, 280 P.2d 522. In light of these principles of statutory construction we are unable to say that a reasonable man would not know what is required of him to furnish necessary food, clothing, shelter, medical attendance or other remedial care for an unborn child. The petitioner's contention of uncertainty is untenable.

[12–14] Petitioner next attacks the statutory presumption of wilfulness and inexcusability created by the omission of the father to furnish necessities for his child. Wilfulness, he argues, implies not only a purpose to commit an act but also that the act was committed with knowledge of the underlying facts, and that to presume from the omission to provide necessaries for a child that the accused wilfully failed to provide for his child, is unreasonable, arbitrary and unconstitutional. That his knowledge of his paternity of a child before birth is more difficult of ascertainment than after birth is a matter of degree. "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death". Nash v. United States, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232. The presumption does not set forth a rule relating to the burden of proof, but merely declares a rule of procedure that places upon the defendant a duty of going forward with evidence that his omission to provide was not wilful or was excusable. In re Bryant, 94 Cal. App. 791, 794, 271 P. 926. A conviction under this section cannot be sustained in the absence of proof, not only of the accused's paternity of the child, People v. Kovacevich, 19 Cal.App.2d 335, 338, 65 P.2d 807, but, also, that he had knowledge or notice of the existence of the unborn child and that some claim or assertion of his paternity of the child has been made to him. People v. Freitas, 34 Cal.App.2d 684, 687, 94 P.2d 397.

[15] Petitioner challenges the jurisdiction of the municipal court to determine the issue of paternity in a prosecution under Penal Code, § 270, which section explicitly provides that the offense is a misdemeanor. Municipal courts are vested with

exclusive jurisdiction over misdemeanors, except juvenile cases, Pen.Code, § 1462, and this includes power to hear and determine every issue of fact involved in a prosecution for failure to provide for a minor child irrespective of the jurisdiction of the superior court to determine the issue of the paternity of an illegitimate child in a civil case, Civ.Code, §§ 196a and 231. This contention is not meritorious and other matters urged by petitioner are not reviewable in this proceeding.

The writ is discharged and the petitioner is ordered remanded to the custody of the sheriff of Los Angeles County.

FOX, Acting P. J., and ASHBURN, J., concur.

149 Cal.App.2d 869

B. BLONDER, Plaintiff and Respondent,

v.

Phillip J. GENTILE, Defendant and Appellant.

Civ. 5384.

District Court of Appeal, Fourth District, California.

April 8, 1957.

Action by prospector for $10,000 allegedly due to him from one of his partners under provisions of mining partnership agreement. The Superior Court, Kern County, Gordon L. Howden, J., rendered judgment for prospector, and partner appealed. The District Court of Appeal, Mussell, J., held that where prospector's complaint alleged that one partner agreed to pay him $10,000 upon execution of agreement, in consideration of services previously rendered, and evidence was admitted without objection showing that prospector had located and marked claims, and turned them over to partners, partner waived objection to admission of testimony, and could not attack complaint for alleged failure to state cause of action for monies due under contract, on basis that it did not allege performance on prospector's part.

Affirmed.

1. Pleading 🔑427

Where prospector's complaint alleged that one partner agreed to pay $10,000 upon execution of partnership agreement, in consideration of services previously rendered, and evidence was admitted without objection showing that prospector located and marked claims, and turned them over to partners, objection to admission of testimony was waived, and complaint could not be attacked for alleged failure to state cause of action for monies due under contract on basis that it did not allege performance on prospector's part.

2. Mines and Minerals 🔑99(2)

Where prospector executed partnership contract which provided that he was to receive $10,000 from one of his two partners, and was to assign his mining claims to partnership, payment was for individual benefit of prospector, assignment was for benefit of partnership, neither the partnership nor the other partner was liable for the $10,000, and contract was severable.

3. Contracts 🔑79

The general rule is that a past consideration is not sufficient to support a contract.

4. Evidence 🔑419(11)

In action by prospector for $10,000 due to him under contract which recited that prospector was to receive sum for "services heretofore tendered", evidence that true consideration was prospector's transfer to partnership of claims which he had located and staked was admissible.

5. Contracts 🔑88

There is a statutory presumption that a written contract is supported by a good and sufficient consideration, this presumption is disputable, but burden of showing want of consideration lies with parties seeking to invalidate or avoid instrument.

6. Contracts ⚿88, 91

The presumption, that a written contract is supported by a good and sufficient consideration, is itself evidence and introduction of evidence showing want of consideration raises an issue of fact and it is for the trier of fact to determine whether evidence offered to overcome the presumption is sufficient.

7. Contracts ⚿54(1)

The validity of consideration for contract does not depend upon its value, and the law ordinarily does not weigh its quantum.

8. Contracts ⚿50, 71(1)

A consideration is sufficient to support contract if it is either beneficial to promisor or detrimental to promisee and the surrendering or foregoing of a legal right constitutes sufficient consideration for contract if the minds of parties meet on relinquishment of right as consideration.

9. Mines and Minerals ⚿99(2)

Prospector's relinquishment of his right to locate claims for his sole benefit, his furnishing of information enabling members of the partnership to locate the ground, benefits of his previous services in preliminary staking of ground, and his agreement to form a partnership with his partners was sufficient consideration to support partnership agreement which provided that prospector was to receive $10,000 from one partner.

10. Mines and Minerals ⚿99(2)

Partnership agreement, which provided that prospector was to receive $10,000 from one of his partners upon execution of partnership agreement, was not too uncertain or ambiguous to be enforced, and upon execution of agreement by prospector, partner owed him the money.

11. Partnership ⚿21

Agreement of one partner to pay $10,000 to another partner upon execution of partnership agreement was severable from other provisions of the partnership agreement.

12. Mines and Minerals ⚿99(2)

Where prospector brought action for $10,000 which one of his partners had agreed to pay him upon execution of mining partnership agreement, upon proof of failure of partner to pay prospector upon execution of agreement, prospector was entitled to recover $10,000, without other proof that he suffered damages in amount of $10,000 or in any other sum. West's Ann.Civ.Code, § 3302.

13. Mines and Minerals ⚿99(2)

In action by prospector for $10,000 allegedly due to him from one of his partners under provisions of mining partnership agreement, evidence sustained findings that partner agreed to pay prospector $10,000 upon execution of partnership agreement, and that partner failed to pay the same or execute a note therefor.

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Jerome Weber and David Hoffman, Los Angeles, for appellant.

Siemon & Siemon, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action to recover the sum of $10,000 due to plaintiff from defendant under the provisions of an agreement in writing, executed by the parties and one J. J. Satin on November 29, 1954. The action was tried by the court without a jury and defendant appeals from the judgment entered for the plaintiff.

The agreement was to form a mining partnership to develop some sixty-three claims in the Jawbone mining district in Kern county, and provided, in part, as follows:

> "3. Phillip J. Gentile hereby agrees to pay to B. Blonder, upon execution of this agreement, the sum of $10,000, payable by sixty-day secured note in consideration of the services heretofore rendered.

> "4. Phillip J. Gentile agrees to advance all money necessary to survey said claims and to perform the necessary location work within the time prescribed by law.
>
> "5. All moneys advanced by the said Gentile shall be repaid to him out of the first moneys received from the sale of the properties, or any portion thereof, or, in case said properties are mined, one-half of the net profits shall be paid to said Gentile until all moneys advanced by him have been repaid.
>
> * * *
>
> "Signatures.
>
> "Addendum: This agreement is to be replaced by a Nevada corporation interest reflected by stock."

The agreement, as previously prepared, provided for the payment of the $10,000 to plaintiff in cash and the clause "payable by sixty-day secured note" in paragraph 3 of the agreement, was interlined at the request of plaintiff. He had previously staked the claims involved and his work in this connection was shown by the evidence to constitute the "services heretofore rendered", referred to in said paragraph of the agreement.

Plaintiff testified that after he had located and staked out the claims, Mr. Gentile, Mr. Satin and a Mr. Linde made out the location papers in Los Angeles in all their names, stating that it would be easier that way than to file them in plaintiff's name and then obtain a quitclaim deed from him to the partnership; that he signed the papers with the understanding that he would get his $10,000 before they were recorded; that after the partnership agreement was signed and the parties were discussing it, the interlineation "payable by sixty-day secured note" was interlined in the agreement; that he, at that time, asked Gentile about the $10,000 payment and Gentile replied that he "was a little pressed" and would like a little time; that the parties wanted to form a corporation after the partnership transaction was over and they all agreed that "we would take and form a corporation after this was all settled and the $10,000 was paid to me. Well, that was put in here down at the bottom and then we would get stock for our interests in these claims. These claims would go in and then we would form a corporation, which I agreed to. Well, none of that ever took place"; that at the time he signed the typewritten agreement, as interlined, he asked Gentile for the note which he, Gentile, had agreed to execute, and Gentile said that he would "do it"; that on December 13, 1954, while at the Biltmore Hotel in Los Angeles, Gentile told him that he owed him $10,000 but that he was not going to pay it.

Defendant Phillip Gentile testified that he caused a corporation to be formed in Nevada; that after it was formed, plaintiff was supposed to go to Las Vegas to sign the corporate papers and receive stock and the note; that they had a conversation at the Biltmore Hotel in Los Angeles in which Blonder asked him for a personal note and that he told Blonder that it was not necessary as the corporation was already formed; that he went to Las Vegas and on or about December 15, 1954, the corporation executed its promissory note, payable to plaintiff for the sum of $10,000, and the note was mailed to plaintiff's attorney. Plaintiff and his counsel refused to accept this corporate note in place of the personal note which Gentile had agreed to execute, and this action followed.

[1, 2] Appellant's first argument is that plaintiff's complaint does not state a cause of action for moneys due under a contract since it does not allege performance of plaintiff's part of the agreement or excuse for nonperformance. This argument is without merit. It is alleged in the complaint that defendant Gentile agreed to pay plaintiff the sum of $10,000 upon the execution of the partnership agreement "in consideration of the services heretofore rendered." The evidence shows that plaintiff located the claims, marked them out on the ground and turned them over to Gentile and Satin and that the locations were then completed in the names of all

three parties. Appellant and Satin had accepted performance on behalf of the partnership before the agreement in its final form had been completed. These past services and performances by plaintiff were established by plaintiff's testimony in his deposition, which was read into evidence without objection, and by failing to object thereto, defendant waived the objection to its admission into evidence. In Re Estate of Brown, 54 Cal.App.2d 575, 584, 129 P.2d 713, 130 P.2d 188, the court said: "The settled rule is that when a party refuses to stand upon his demurrer, but goes to trial where the alleged deficiencies of the petition are cured by the proof, he will not be permitted to attack the pleading, unless he has been deceived, or prejudiced thereby." No demurrer was filed herein and the action was tried on the theory that the obligation to make the payment and the obligation to transfer the mining claims were divisible obligations. The former was for the individual benefit of the plaintiff and the latter was for the benefit of the partnership, of which plaintiff was a member. The contract was made by three parties, appellant, plaintiff and Satin. Satin was under no obligation to pay plaintiff the $10,000 in question nor was the partnership liable therefor. In Sweet v. Watson's Nursery, 23 Cal.App.2d 379, 382, 73 P.2d 284, 286 it is said: "'Where several things are to be done under a contract, if the money consideration is apportioned to each of the items to be performed, the covenants are ordinarily regarded as severable and independent.' * * * A contract will generally be held to be severable when the price is expressly apportioned by the contract."

In 12 Cal.Jur.2d, Contracts, Sec. 150, it is said:

> "Generally speaking, the test of whether a contract is divisible is that if the consideration is single, the contract is entire, but if the consideration is apportioned, or if apportionment is implied by law, the contract may be regarded as severable."

Appellant argues that there was no proof of performance by plaintiff or that he transferred the mining claims involved to the partnership. However, the evidence shows that plaintiff located and staked the claims on the ground and signed the location papers. These papers were recorded in the names of the three parties.

[3–6] Appellant next argues that a past consideration is not sufficient to support a contract and therefore is inadequate to support the promise to pay the $10,000 involved. The general rule is that a past consideration is not sufficient to support a contract. However, in the instant case the recital of the consideration in the agreement is not conclusive and evidence of the true consideration was properly admitted. (12 Cal.Jur.2d, Contracts, Sec. 42.) Furthermore, there is a statutory presumption that a written contract is supported by a good and sufficient consideration. (12 Cal.Jur.2d, Contracts, Sec. 43.) This presumption is disputable, but the burden of showing want of consideration lies with the parties seeking to invalidate or avoid the instrument. The presumption is itself evidence and the introduction of evidence showing want of consideration raises an issue of fact and it is for the trier of fact to determine whether evidence offered to overcome the presumption is sufficient. (12 Cal.Jur.2d, Contracts, Sec. 44.) There is substantial evidence in the instant case to show a consideration for the contract. Plaintiff found the claims, staked them preparatory to formally locating them as mining claims, and agreed to permit the claims to be located formally by himself, jointly with defendant Gentile and Satin. He agreed to enter into a partnership with them for the development and exploitation of the property. He thus surrendered his right to locate the property for his sole benefit. The actual consideration for the obligation to pay the $10,000 was plaintiff's relinquishment of his right to locate the claims for his sole benefit, his furnishing of information enabling the parties to locate the ground, together with the benefit of his previous services in the preliminary staking of the ground and his agreement to form a partnership with Gentile and Satin.

[7–9] The validity of the consideration does not depend upon its value, the law does not ordinarily weigh its quantum. A consideration is sufficient to support a contract if it is either beneficial to the promisor or detrimental to the promisee and the surrendering or foregoing of a legal right constitutes a sufficient consideration for a contract if the minds of the parties meet on the relinquishment of the right as a consideration. (12 Cal.Jur.2d, Contracts, pp. 224–227.)

[10, 11] The next argument is that the partnership agreement is too uncertain and ambiguous to be enforced. This argument is without merit. The agreement clearly provides for the payment by Gentile to plaintiff of the sum of $10,000 upon execution of the agreement. The agreement was executed and Gentile then owed the money to plaintiff and this agreement is severable from the other provisions of the partnership agreement.

[12] It is further contended by appellant that plaintiff wholly failed to prove that he suffered any damage in the amount of $10,000 or in any other sum. This argument is refuted by the provisions of section 3302 of the Civil Code which provides that the detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation. In this case, the amount due was $10,000.

[13] Finally, it is argued that several findings by the trial court are prejudicial to appellant and are unsupported by the evidence and inconsistent with the pleadings. This argument is likewise without merit. The court found that the allegations of the complaint were true; that defendant Gentile agreed to pay plaintiff the sum of $10,000 upon the execution of the partnership agreement; that defendant Gentile failed and refused to pay the same or to execute a note therefor and specifically found against allegations of the defenses set forth in the answer. The court further found there was consideration for the promise of the defendant to pay the sum of $10,000 to plaintiff. We conclude that the findings are sufficiently supported by the evidence.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

48 Cal.2d 320

The CITY OF LOS ANGELES, a municipal corporation, Plaintiff and Appellant,
v.
BELRIDGE OIL COMPANY, a California corporation, Defendant and Respondent.
L. A. 24129.

Supreme Court of California,
In Bank.
April 12, 1957.

Action by city against corporation to recover business license taxes. The Superior Court, Los Angeles County, Joseph W. Vickers, J., entered judgment against defendant and city appealed, contesting size of judgment. The Supreme Court, Carter, J., held that where it was stipulated that not more than 20% of corporation's total gross receipts for years in question were attributable to its selling activities in city of Los Angeles under any method of allocation fairly calculated to determine gross receipts derived from or attributable to sources within the city, trial court properly determined gross receipts tax due city based on stipulated percentage of corporation's selling activities directly attributable to Los Angeles part of its business.

Affirmed.

Opinion, 302 P.2d 854, vacated.

1. Licenses ⟹29

Los Angeles city tax ordinance on certain gross receipts of manufacturers and wholesalers applied to selling activities carried on within the city only, and the tax was to be measured by that portion of gross receipts directly attributable to a taxpayer's selling activities in the city.

2. Licenses ⟹29

Where it was stipulated that not more than 20% of a corporation's total gross receipts for years in question were attributable to its selling activities in city of Los Angeles under any method of allocation fairly calculated to determine gross receipts derived from or attributable to sources within the city, trial court properly determined gross receipts tax due city based on stipulated percentage of corporation's selling activities directly attributable to Los Angeles part of its business.

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Roger Arnebergh, City Atty., Bourke Jones and James A. Doherty, Asst. City Attys., Los Angeles, for appellant.

Wellborn, Barrett & Rodi, Vernon Barrett and F. C. Lowell Head, Los Angeles, for respondent.

CARTER, Justice.

This is an appeal by the city of Los Angeles from a judgment entered upon a retrial after a decision by this court, City of Los Angeles v. Belridge Oil Co., 42 Cal.2d 823, 271 P.2d 5, reversing a judgment in favor of defendant, Belridge Oil Company.

The only question involved here is whether the trial court properly applied the law as set forth in our decision * on the prior appeal.

Upon the retrial the parties stipulated that all of the gross receipts of the defendant "are attributable in part to its selling activities within the City of Los Angeles and in part to its selling activities without the City" and that "not more than 20% of defendant's total gross receipts for the years 1948 and 1949 are attributable to defendant's business [or selling activities] in the City of Los Angeles under any method of allocation which is fairly calculated to determine the defendant's gross receipts derived from or attributable to sources within the City of Los Angeles and to determine the defendant's gross receipts derived from or attributable to sources outside the City of Los Angeles" subject to plaintiff city's right to maintain on appeal that there should be no allocation of receipts for the purpose of determining the amount of the tax and that the tax should be measured by defendant's total gross receipts. Defendant agreed that 20% of its total gross receipts for the years 1948 and 1949 might be used to measure the tax to be imposed upon it under section 21.166 of plaintiff's license ordinance for the years 1949 and 1950.

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* The facts are fully set forth therein.

The trial court held, in accord with the stipulations entered into between the parties, that defendant was subject to the license tax (21.166) for such portion of its gross receipts "as is derived from or attributable to its business or selling activities in the City of Los Angeles; that such portion of such gross receipts should be determined under some method of allocation which is fairly calculated to determine the defendant's gross receipts derived from or attributable to sources within the City of Los Angeles and to determine the defendant's gross receipts derived from or attributable to sources outside the City of Los Angeles." And that "Not more than 20% of defendant's total gross receipts for the years 1948 and 1949 are derived from or attributable to defendant's business in the City of Los Angeles." And that "Not more than 20% of defendant's total gross receipts for the years 1948 and 1949 are derived from or attributable to defendant's selling activities in the City of Los Angeles."

In harmony with its conclusion, the trial court held that there remained due and owing to the plaintiff from the defendant the sum of $536.43, including both principal and interest.

The primary argument of the plaintiff is that this court did not, in its prior opinion, hold that there should be an allocation of the total gross receipts of defendant based upon the *selling* activities directly attributable to the Los Angeles part of defendant's business.

Section 21.166 of the Los Angeles City Tax Ordinance provides that "Every person manufacturing and selling any goods, wares or merchandise at wholesale, or selling goods, wares, or merchandise at wholesale, and not otherwise specifically licensed by other provisions of this Article, shall pay for each calendar year, or portion thereof, the sum of $8.00 for the first $20,000, or less, of gross receipts, and, in addition. * * *" We held (p. 830) that "defendant's Los Angeles office was engaged in the activity of 'selling goods, wares or merchandise at wholesale' within the city of Los Angeles and was therefore subject to the provisions of section 21.166 of the Los Angeles tax ordinance." We also specifically held (pp. 831, 832) that "There is, however, one important limitation which should be pointed out and that is this: even though the city can tax the activity of selling it can only base the tax on such selling activities as are carried out within its territorial limits. For this reason it is only those gross receipts which are attributable to selling activities within the city which should form the basis for the rate of tax. Gross receipts attributable to selling activities conducted outside the city should not be included. Such a construction necessarily follows from the fact that the business license tax is on the privilege of engaging in selling activities in the city of Los Angeles and as such should only be based on such activities."

Plaintiff argues that the controversy centers around the statement made by this court (p. 831) that "Defendant company also contends that even if section 21.166 is applicable, the city cannot constitutionally tax the total gross receipts of the company since such would be an attempt to impose a tax on business carried on outside the city. This argument is based on the ground that since the total gross receipts include the proceeds of products produced and delivered outside the city the effect would be to allow a city to tax transactions occurring outside its boundaries. This argument seems to lose sight of the nature of section 21.166." This statement was directed at defendant's argument that some of its gross receipts were attributable to extraterritorial elements such as the production and delivery of the goods. We held that there was no constitutional objection to resorting to extraterritorial elements in determining the rate of tax. Great Atlantic & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193; Maxwell v. Bugbee, 250 U.S. 525, 40 S.Ct. 2, 63 L.Ed. 1124; Cedar Hills Cemetery Corp. v. District of Columbia, 75 U.S.App.D.C. 84, 124 F.2d 286. We concluded that "The activity being taxed here is the activity of selling and such activity can be taxed by the city even though the goods never enter its territorial limits. (Keystone Metal Co. v. Pittsburgh, supra, [374 Pa. 323] 97 A.2d 797.)"

Plaintiff argues that the requirements of due process and equal protection do not compel an apportionment of receipts attributable to the business carried on within the city. This argument was answered adversely to plaintiff in our opinion on the prior appeal where we held that "To allow a city to levy a license tax based upon gross receipts attributable to selling activities outside the city would be an unreasonable discrimination and a denial of equal protection of the law. (See Ferran v. City of Palo Alto, 50 Cal.App.2d 374 [122 P.2d 965].) If such taxation were allowed it would unjustly discriminate against those firms whose selling activities in Los Angeles compose but a small fraction of the total sales effort and whose gross receipts are in large part attributable to selling activities in other areas. As stated in Franklin v. Peterson, 87 Cal.App.2d 727, 730 [197 P.2d 788], 'It is the rule that where a statute or ordinance is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, in whole or in part, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. The rule is based on the presumption that the legislative body intended not to violate the Constitution, but to make a valid statute or ordinance within the scope of its constitutional powers.' In the instant case a just and reasonable construction requires that the measure of the tax be limited to those gross receipts attributable to selling activities within the city of Los Angeles."

[1] Plaintiff's argument concerning the intent and meaning of the "Bradley-Burns Uniform Local Sales and Use Tax Law" enacted by the Legislature in 1955, Revenue and Taxation Code, § 7200 et seq., does not merit discussion. We are here concerned with a business license tax imposed by the city of Los Angeles, the applicable section of which we have heretofore held applied to selling activities carried on within the city, the tax to be measured by that portion of the gross receipts directly attributable to the defendant's selling activities in the city. 42 Cal.2d 823, 271 P.2d 5.

[2] Having heretofore held that only that portion of the gross receipts directly attributable to defendant's selling activities carried on in the city of Los Angeles may be taxed under section 21.166, and the parties having stipulated that by a method of allocation "fairly calculated to determine the defendant's gross receipts" 20% thereof was derived from selling activities in the city of Los Angeles, we conclude that the trial court was correct in applying the tax formula to 20% of defendant's gross receipts.

Plaintiff's other contentions are an attempt to reargue matters concluded on the former appeal and need no discussion here.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 325

Emily M. COLLINS, Plaintiff and Appellant,
v.
Robert F. COLLINS, Defendant and Respondent.
L. A. 24137.

Supreme Court of California,
In Bank.
April 12, 1957.

Rehearing Denied May 8, 1957.

Divorced wife's action against divorced husband to set aside property settlement agreement on ground that it was procured by breach of fiduciary relationship. The Superior Court, Los Angeles County, Maurice C. Sparling, J., rendered judgment adverse to plaintiff, and she appealed. The Supreme Court, Schauer, J., held that when parties to marriage are negotiating property settlement with recognition that their interests are adverse and are dealing at arm's length, neither spouse owes to other duty of disclosure which he or she would owe if their relation remained in fact a confidential one; and held that they need not be embittered toward each other to act at arm's length—temperate negotiation of adverse interests being much more likely than rancorous combat to produce a fair property settlement agreement.

Affirmed.

Opinion, 305 P.2d 155, vacated.

1. Husband and Wife ⚷278(1)

When parties to marriage are negotiating property settlement with recognition that their interests are adverse and are dealing at arm's length, neither spouse owes to other duty of disclosure which he or she would owe if their relation remained in fact a confidential one; and they need not be embittered toward each other to act at arm's length—temperate negotiation of adverse interests being much more likely than rancorous combat to produce a fair property settlement agreement. West's Ann.Civ. Code, §§ 158, 2228, 2230, 2231, 2234, 2235.

2. Husband and Wife ⚷278(1)

Property settlements between husband and wife are highly favored in law.

3. Husband and Wife ⚷279(2)

In divorced wife's action against divorced husband to set aside property settlement agreement on ground that it was procured by breach of fiduciary relationship, evidence sustained denial of relief sought.

Vaughan & Brandlin, Vincent E. Lumbleau and Robert P. Schifferman, for appellant.

McLaughlin & Casey and James A. McLaughlin, Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff appeals from a judgment against her in this action in which she unsuccessfully sued her former husband to set aside a property settlement agreement of the parties and deeds executed by plaintiff to defendant pursuant to such agreement. Plaintiff claims, contrary to the findings and conclusions of the trial court, that defendant induced her to execute the property settlement agreement and deeds by breach of a fiduciary relation to plaintiff. We have concluded that to reverse the judgment would entail usurpative interference with the function of the trier of fact.

Findings and conclusions of the trial court, supported by the evidence, are as follows: In December, 1952, plaintiff told defendant that she wished a divorce because she desired to marry one Blankenship. In June, 1953, plaintiff told defendant that she was going to Nevada to obtain a divorce. On her arrival in Nevada she employed an attorney to represent her in connection with the divorce and a property settlement agreement between plaintiff and defendant. About July 10, 1953, plaintiff's Nevada attorney wrote to defendant asking that a property settlement be prepared so that it could be approved in the Nevada divorce proceeding. After communications between plaintiff's attorney and defendant, plaintiff on August 13, 1953, went to Los Angeles and she and defendant executed a property settlement agreement; plaintiff executed deeds conveying her interest in properties to defendant and defendant executed a deed conveying the residence of the parties to plaintiff. On August 17, 1953, plaintiff, who had returned to Nevada, was granted a default divorce judgment which approved the property settlement agreement. On the same day she married Blankenship.

The trial court further determined as follows: Under the property settlement agreement plaintiff "waives the necessity of * * * [defendant] specifically listing" properties standing in his name; such properties, it is agreed, become defendant's separate property except for the residence which becomes plaintiff's property. Plaintiff and her attorney began an investigation of the community property of the parties before the execution of the property settlement agreement, but plaintiff did not pursue the investigation because she was satisfied with the terms of the agreement. Defendant did nothing to preclude plaintiff or her attorney from investigation of the property of the parties. Plaintiff when the property settlement was executed relied on the advice of her counsel, and not upon any statement of defendant. Plaintiff desired to obtain the property settlement agreement in order that she could have it approved in her Nevada decree and in order that she could obtain such decree and be free to marry Blankenship.

Further determinations of the trial court are as follows: Defendant was unwilling, when the property settlement agreement was executed, to make concessions to plaintiff other than those embodied in the agreement. Until she executed the property settlement plaintiff had the opportunity, if she was dissatisfied with it, to seek a divorce in California and have her rights to the property there determined. Plaintiff gained an advantage by obtaining the property settlement and a Nevada divorce at an early date. "[U]nder the facts existing in this case, it is immaterial whether the property settlement agreement resulted in the defendant's receiving more of the community assets than the plaintiff received."

Plaintiff relies on the code rule (Civ. Code, § 158) that "husband or wife may enter into any engagement or transaction with the other * * * respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." (See Civ. Code, §§ 2228, 2230, 2231, 2234, 2235.) Plaintiff urges that on August 13, 1953, when she executed the property settlement and deeds, defendant had a fiduciary duty to her and was required to fully disclose to her the value and character of their property.

Plaintiff, however, had ample oportunity to investigate, with the aid of independent counsel, the character and value of the property of the parties. Plaintiff had contemplated obtaining a divorce for some time before she made the property settlement agreement and obtained the divorce. Defendant did nothing to hinder her investigation of the property or to cause her to execute the agreement precipitately. Defendant owed plaintiff no duty to force her to investigate the properties when she announced that she was satisfied with the agreement prepared by defendant's counsel.

The situation is similar to that in Jorgensen v. Jorgensen (1948), 32 Cal.2d 13, 22–23, 193 P.2d 728.[1] It is there held that "A husband at the time of divorce or separation is entitled to take a position favorable to his own interest in claiming as his separate property assets that a court might hold to be community property. Confronted with the assertion by the husband that certain assets are his separate property the wife must take her own position and if necessary investigate the facts. [Citations.] If the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. * * * Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property."

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[1] In the Jorgensen case the former wife sought to set aside the provisions of a judgment in which a property settlement agreement was approved and accepted. Here, it is to be noted, it is not claimed that the property settlement agreement acquired any additional effect because of its approval in the Nevada decree.

The situation here is similar also to that in Cameron v. Cameron (1948), 88 Cal. App.2d 585, 593–595, 199 P.2d 443, where a judgment setting aside a property settlement agreement at the instance of plaintiff wife was reversed. It is there held that "[1] When one undertakes an investigation [as Mrs. Cameron did before she made the property settlement agreement] and proceeds with it without hindrance it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned. He cannot be heard to say that he relied on the representations of the other party. [Citation.] * * * [3] The decision of plaintiff's attorneys to accept defendant's proposal without a contest, although now claimed to have been ill-advised and unfair to her was her decision and she is bound thereby."

[1–3] We recognize, and it appears that the trial court here recognized, the principles, stated in such cases as In re Estate of Cover (1922), 188 Cal. 133, 144, 204 P. 583, that "in those transactions between husband and wife, where admittedly the husband secures an advantage over the wife, the confidential relation existing between them may be invoked to bring into operation the presumption of the use and abuse of the relation. In short, a husband, by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith and as a consequence is obligated in such dealings not to obtain and retain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, *or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice* as to her rights in the premises [Citations.]" (Italics added.) Here the parties were dealing with one another at arm's length—or at least the husband gave the wife every opportunity to deal at arm's length—when the settlement agreement was negotiated. The wife had independent advice. The fact that it appears that she was eager to secure a Nevada divorce and that therefore she did not obtain, or have her counsel obtain, a complete listing of the properties of the parties is not chargeable to the husband. As the Cover case, supra (at page 144 [6] of 188 Cal., at page 588 of 204 P.), recognizes, when the parties to a marriage are negotiating a property settlement with recognition that their interests are adverse and are dealing at arm's length, neither spouse owes to the other the duty of disclosure which he or she would owe if their relation remained in fact a confidential one. (See Migala v. Dakin (1929), 99 Cal.App. 60, 64, 277 P. 898; Chadwick v. Chadwick (1928), 95 Cal.App. 690, 700, 273 P. 86.) They do not need to be embittered toward each other to act at arm's length; temperate negotiation of adverse interests is much more likely than rancorous combat to produce a fair property settlement agreement. It is a long recognized rule that such settlements between husband and wife (of course in the absence of fraud) are highly favored in the law. (McClure v. McClure (1893), 100 Cal. 339, 343, 34 P. 822; Hensley v. Hensley (1918), 179 Cal. 284, 287–288, 183 P. 445; Hill v. Hill (1943), 23 Cal. 2d 82, 89, 142 P.2d 417; Adams v. Adams (1947), 29 Cal.2d 621, 624 [1], 177 P.2d 265; Patton v. Patton (1948), 32 Cal.2d 520, 523, 196 P.2d 909.)

Plaintiff complains that the findings of the trial court are fatally defective because they do not find specifically upon the issues stated in the margin;[2] these issues, plaintiff says, were presented by the pleadings and there was evidence upon them. The particular matters to which reference is made in the margin are necessarily and adequately determined against plaintiff, either as being completely immaterial to the conclusions of law in the light of the controlling findings, or as being favorable to defendant on the essential facts, by the following findings: "That defendant did not insist or demand that plaintiff sign or execute any property settlement agreement; that, on the contrary, prior to the time that said property settlement agreement had been signed, plaintiff was demanding that a property settlement agreement be prepared and signed by said two parties. That at the time the said property settlement agreement was signed, as hereinabove found, and for the purpose of completing said agreement, defendant did request that plaintiff sign the deeds which are hereinabove referred to.

"That plaintiff, at the time that she signed the said property settlement agreement and deeds and at the time she obtained her divorce on the 17th day of August, 1953, had knowledge of the contents of such documents and was satisfied with the disposition of the property of the said parties which had been made in said property settlement agreement and by the said deeds. That the failure of plaintiff and her said attorney to seek any different property settlement agreement than that evidenced by the agreement dated August 13, 1953, was not due to either plaintiff's lack of knowledge of the existence, nature or value of properties of the said parties but was due solely to the fact that plaintiff was as said time satisfied with the terms and provisions of said property settlement agreement and was desirous of having such agreement signed and in her possession for presentation to the court in Nevada at the hearing on her Nevada divorce proceeding against defendant."

As a "Second, Separate and Complete Cause of Action" plaintiff alleges that there was a dispute between the parties as to the above mentioned property settlement and conveyances pursuant thereto. Plaintiff objects that the trial court made no findings as to whether declaratory relief was necessary. The findings against plaintiff sufficiently show that the controversy was determined against her; such findings support the court's specifically enunciated conclusion "That plaintiff is not entitled to any relief as to the property settlement agreement, and the same is binding upon both plaintiff and defendant and is valid in all respects." It was not necessary, in the circumstances, for the trial court to "find" in terms that plaintiff was not entitled to declaratory relief.

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[2] The complaint alleges that during the marriage of the parties plaintiff signed documents concerning defendant's purchases and sales of real estate in reliance on his representations that they were in proper form and that she need not read them. Defendant in his answer alleges that plaintiff prided herself on her knowledge of real estate transactions, kept informed as to transactions of the parties, and signed any documents which she signed during the marriage of the parties in reliance on her own judgment. Plaintiff complains that the findings are simply that plaintiff signed documents and are silent as to "the vital inquiry of the means by which such signatures were obtained."

The complaint alleges that from the time when a divorce was first discussed between the parties, in December, 1952, relations between the parties remained amicable, and defendant represented to plaintiff that he would deal fairly with her. The answer alleges that defendant made no representations to plaintiff as to whether he would deal fairly with her. There is no express finding on the question whether defendant represented to plaintiff that he would deal fairly with her.

The complaint alleges that the interest of defendant in the family home, which is all that plaintiff received under the property settlement agreement, was worth less than $20,000; the answer alleges that the interest of defendant which plaintiff received was worth at least $32,500. The complaint alleges that the value of the interests received by defendant under the settlement agreement was $300,000; the answer denies this. The complaint alleges that on and since August 13, 1953, defendant's income exceeded $40,000 a year. The answer denies this. There are no findings specifically directed to the foregoing matters. Such findings are essential, plaintiff asserts, because they go to the heart of the fairness of the property settlement agreement.

As a "Third, Separate and Complete Cause of Action" plaintiff alleges that on December 5, 1952, plaintiff at defendant's insistence, without consideration, executed a grant deed to defendant of all her interest in described parcels of real property. These parcels are among the parcels which plaintiff again deeded to defendant in 1953 pursuant to the property settlement agreement. Under the general findings against plaintiff on the question of the property settlement, it is established that the real property which (together with its asserted 1952 conveyance) plaintiff attempts to make the subject of the "third cause of action" was (subsequently to the 1952 conveyance) a subject of negotiations which led to the property settlement. Plaintiff could have, had she been so advised, raised the question of the validity or effect of her 1952 conveyance during the 1953 negotiations which resulted in the property settlement, the conveyances pursuant to it, and the divorce. Plaintiff did not choose to do so. The findings against her necessarily and sufficiently determine that her attack on her 1952 conveyance to defendant is of no more merit than is her attack on the 1953 conveyances to defendant.

Plaintiff apparently has concluded that she made a mistake and that she would like to be re-established in the bargaining status which she occupied before she negotiated the property settlement agreement and divorced defendant. That she made a mistake can be inferred but that she is entitled to rescind, or is otherwise not bound by, the property settlement agreement cannot be. On the record before us, not only are the trial court's findings and conclusions tenable and hence binding on us, but as impellent to that court's resolution of the controversy it appears not inappropriate for us to adopt and to repeat here the language of Mr. Justice (now Presiding Justice) Shinn in Majors v. Majors (1945), 70 Cal.App.2d 619, 627 [10], 161 P.2d 494, holding, "It is not within the discretion of the court to refuse to give judgment declaring a right [under a property settlement agreement] which is properly pleaded and well established by the evidence," and "Where good grounds exist for the granting of legal or equitable relief, judgment is given to the party entitled thereto as a matter of right and not of grace."

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

48 Cal.2d 345

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
David J. HARDENBROOK, Defendant and Appellant.
Cr. 5939.

Supreme Court of California,
In Bank.
April 12, 1957.

Prosecution for first degree murder. The Superior Court, Imperial County, L. J. Mouser, J., entered judgment of conviction and defendant appealed. The Supreme Court, Carter, J., held that testimony by witness relating to conversation between defendant and another witness reported to first witness after conversation occurred was properly admitted under instruction to jury to effect that first witness' testimony was not being allowed to go in for purpose of proving truth of conversation but to prove that at a time prior to commission of offense other witness, whose word was contradicted, made a statement of conversation to third parties and that it could indicate that other witness did not fabricate the story after commission of offense.

Judgment affirmed.

1. Criminal Law ⚷673(2)

Testimony by witness relating to conversation between defendant and another witness reported to first witness after conversation occurred was properly admitted under instruction to jury to effect that first witness' testimony was not being allowed to go in for purpose of proving truth of conversation but to prove that at a time prior to commission of offense other witness, whose word was contradicted, made statement of conversation to third parties and that it could indicate that other did not fabricate story after commission of offense.

2. Witnesses ⚷395

Generally, where opposition has assailed testimony of a witness as being of recent fabrication, exception to hearsay rule allows admission of evidence of statements or conduct prior to claimed fabrication and consistent with testimony of witness at trial, not to prove facts of case, but as tending to show that witness has not been controlled by motives of interest and that he has not fabricated something for purpose of case.

3. Criminal Law ⚷1170(1)

In prosecution for first degree murder of defendant's adoptive mother, where no effort was made by defendant to call witness, sister of victim, after ruling by court that witness could testify to certain facts in connection with certain things that might have happened in past but not being an expert, witness could not testify as to any opinion held by her as to defendant's ability to premeditate, trial court did not commit prejudicial error in excluding opinion evidence by sister of victim.

4. Criminal Law ⚷1170(1)

In prosecution resulting in conviction of murder in first degree, trial court did not commit prejudicial error in refusing to permit lay witness to testify concerning defendant's conduct more than seven years prior to time of trial since such testimony would have been too remote.

5. Criminal Law ⚷1171(3)

In prosecution resulting in conviction of victim's adopted son, for murder in first degree where defendant considered adoptive mother as his mother and he had acted toward her as if he were her natural son from the time he was two months of age, references by district attorney to defendant as a "mother-killer," and "sneaky" mother-killer were not prejudicial.

6. Criminal Law ⚷1171(3)

In prosecution for first degree murder, where defendant had no money with exception of perhaps a dollar on night before he committed crime, and had not worked at any job for any length of time, State's references to defendant as never working and having no money and as being "no good", were not prejudicial and had foundation in record.

7. Criminal Law ⚷1144(15)

It must be presumed that jury followed law as given to it by instructions.

8. Criminal Law ⚷730(7)

Where jury had been fully and fairly instructed concerning both murder in first degree and second degree as well as manslaughter and jury had been admonished that its duty was to follow law as stated to it by court and that any instruction inapplicable to facts as found by jury was to be disregarded and that any statements made by counsel were not to be taken as evidence, district attorney's argument to jury concerning murder perpetrated in commission of robbery and by lying in wait was not prejudicially erroneous.

9. Criminal Law ⚷1171(1)

In prosecution for first degree murder, State's argument to jury to effect that jury need not all agree on same theory of first degree murder if they agreed defendant was guilty of first degree murder was not prejudicially erroneous.

10. Criminal Law ⚷730(8)

In prosecution for first degree murder, where jury had been instructed that statements and arguments of counsel were not evidence, State's misquote of evidence to effect that one witness had purportedly seen defendant with gun on two occasions, when in fact witness had seen the gun on one occasion and the sack in which gun was being carried on the other occasion, did not prejudice defendant.

11. Criminal Law ⚷728(2)

If defendant deems that any harmful effect might have attached to arguments to jury, defendant must make timely objection at trial so that any misunderstanding could be clarified by proper instruction to jury.

12. Homicide ⚷253(1)

Evidence supported conviction of defendant for first degree murder and therefore jury's determination would not be disturbed on appeal.

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Russell Yeager, Public Defender, Imperial County, El Centro, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

CARTER, Justice.

This is an automatic appeal from a judgment imposing the death penalty after a jury verdict finding the defendant guilty of first degree murder and fixing the penalty as death. Defendant was found sane by a jury after trial on his plea of not guilty by reason of insanity. The record does not disclose that a motion for a new trial was made by or on behalf of defendant.

Defendant, David J. Hardenbrook, was the adopted son of the victim of the homicide, Mrs. Eleanor Hardenbrook. Defendant admitted both prior to and during the trial that he shot his adoptive mother through the back of the head while he was visiting her at her home on Saturday, March 17, 1956. The major question involved concerns the degree of the crime—whether the evidence is sufficient to sustain a finding of murder in the first degree or whether it shows only second degree homicide. The admissibility of certain evidence from which the jury could have inferred that the crime was premeditated is questioned as being erroneous and prejudicial.

On Thursday, March 15, 1956, defendant borrowed a .22 caliber automatic pistol with the avowed purpose of using it for target practice. Scott, a witness for the People, testified that he saw the defendant on the night of March 15th, at the Tropics Bar and Cafe in Imperial at about 8 o'clock in the evening and that defendant was showing a .22 automatic pistol to some people sitting at the bar and that defendant said the gun was his. Scott testified that he, the defendant and three other persons left the cafe and bar after about an hour and went to Brawley; that defendant wanted to stop at his mother's house; that they stopped and defendant went in, had something to eat, came back out and they all proceeded to another bar just outside of Brawley. During this time the gun was in the back of Scott's car. After going to another bar Scott drove defendant back to the El Centro Hotel where he was living; defendant was "pretty sickening drunk" and left the gun in Scott's car.

On Friday, March 16th, Scott saw defendant leaving the Post parking lot on the outside of the naval air station base and stopped his car so that defendant could get in. Scott and defendant then drove to El Centro where Scott bought some bullets for the gun so that they could do some target practicing. They drove towards Imperial and then to a place called New River where they did some target shooting. Out of a box of 50 shells, nine were left and defendant wanted to save them. During the target shooting defendant asked Scott if he knew where a silencer could be bought and what it would cost. On their way back defendant said someone at the gate wanted a ride back into town and when they came back out again they picked up the hitchhiker, Potter, and went into town. At this time it was about dusk and around 7 o'clock. When defendant got out of the car at El Centro he took the gun out of the glove compartment and got a paper bag into which to put it. During the ride into El Centro the matter of a silencer was again discussed.

Potter, who was sitting in the back of the car during the ride into El Centro, testified that Scott, who was driving, looked "over to Hardenbrook and he said, 'Where are you going to kill your mother?' So Hardenbrook looked over at Scott and he says, 'In the bedroom, I guess.' They got to talking about how much a silencer cost, or where he could get one, and Scott said he didn't have any idea what they cost or where to get one." Potter testified that later that night when he got back to the base he stopped over where he worked and told the story to a "guy named Hum." This portion of Potter's testimony was denied by both defendant and Scott.

Defendant testified that he had been adopted by the deceased when he was about 2 months old; that he had lived with her up until "fairly recently" when he had moved to the El Centro Hotel where he lived alone. He testified to borrowing the gun and showing it to several people at the Tropics bar; to the target shooting and to discussing the matter of a silencer for the gun but said that he asked about it just out of curiosity. He told how he and Scott picked up Potter and gave him a ride into town. He testified that after he got out of the car with the gun he went into a grocery store and got a paper bag in which to carry the gun; that he then went back to the El Centro Hotel and "put up the gun" and hitchhiked from there to Brawley and went to his mother's home where he had dinner with her after which they listened to the radio and played canasta; that he then hitchhiked back to El Centro to his hotel. He said he did not take the gun with him on Friday night when he went to his mother's home. He testified that his mother told him that if he would come back in the morning she would launder his clothes for him; that he got up around 9:30 on the morning of Saturday, the 17th, and hitchhiked from El Centro to Brawley taking the laundry and the gun with him. He said that he took the gun with him so that he could clean it before returning it; that when he arrived at his mother's home he put the aluminum box containing his clothes and the gun on a table; that he waited until his mother was out of the room and then took the gun out of the box and put it between two pillows on the couch because his "mother doesn't approve of firearms of any type." After hiding the gun, defendant testified that he ate breakfast and sat around looking at books and listening to the Metropolitan opera on the radio and that "after my clothes had gone through the laundry, she brought them back in and was starching them, and I went over to the couch and reached under the pillow and got the gun and went back to the chair and shot her" in the back of the neck; that he didn't know why he did it; that "it just happened"; that he hadn't thought about killing his mother; that they had not had any harsh words at any time; that when he saw his mother fall down he realized what he had done; that he dragged the body from the kitchen to the bedroom. After that he testified that he tried to forge his mother's name to a check but was so nervous he spoiled the first one, but then wrote one for $75 payable to himself by forging his mother's name; that he took two of her small suitcases and her car keys from her bedroom dresser; went out and got his mother's car and drove to Brawley and cashed the check; that he then had gas put in the car and drove out to the base where he talked with Scott; that he then drove out to Seal Beach where he stayed overnight with some friends; that he and the friends went to the beach the next day; that he drove them to their home and went to a motel where he stayed overnight; that the next morning after reading about the crime in a newspaper, he went to a priest and confessed what he had done; that the priest called the police. On cross-examination defendant admitted that he had given his mother a great deal of trouble over money and the car and that she had suggested that he move out of her home and "go out on my own." Mrs. Hardenbrook's body was found by her landlord on March 18th.

[1, 2] Over objection by defense counsel, Patrick Hum testified that Potter had told him on the night of the 16th of the conversation he had overheard between Scott and the defendant as to the "planning" of killing "someone's mother." At the time the court admitted this testimony, the jury was admonished as follows: "Ladies and gentlemen of the jury, I wish to advise you at this time in reference to that —this answer by the witness is being admitted for a limited purpose only. As you know, testimony has been given here by one of the witnesses that when he was in the car with the defendant, there was certain conversation in regard to the shooting of one's mother. The defendant, when he took the stand, stated there was no such conversation. Now, then this answer is being allowed to go in not for the purpose of proving the truth of that conversation, but to prove, if it proves to you, for your consideration, to show that at the time prior to the commission of the offense that the witness whose word was contradicted, made a statement as to the conversation to third parties and therefore it could indicate he didn't fabricate the story after the commission of the offense. Now, do you know what I mean?" The record shows that the jury indicated its understanding in the affirmative.

It is contended by defendant that the trial court committed prejudicial error in permitting the witness Hum to testify concerning the conversation Potter had repeated to him on the night prior to the commission of the crime. "It is the rule generally and in this state that where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, 'not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated something for the purposes of the case.' People v. Kynette, 15 Cal.2d 731, 753–754, 104 P.2d 794, 806; see also Sweazey v. Valley Transport, Inc., 6 Wash.2d 324, 107 P.2d 567, 111 P.2d 1010 [140 A.L.R. 1], 140 A.L.R. 93." People v. Walsh, 47 Cal. 2d 36, 301 P.2d 247, 250. It is apparent that the court did not err in permitting the witness Hum to testify since the jury was clearly informed that such testimony was admitted only for the limited purpose set forth in the decided cases as an exception to the hearsay rule. See, also, People v. Doetschman, 69 Cal.App.2d 486, 491–492, 159 P.2d 418; Bickford v. Mauser, 53 Cal. App.2d 680, 686–687, 128 P.2d 79; Davis v. Tanner, 88 Cal.App. 67, 76–77, 262 P. 1106.

[3, 4] Defendant contends that the trial court committed prejudicial error in refusing to permit him to offer testimony of a "foster-aunt" (sister of the victim) to the effect that he was incapable of premeditation. The court ruled that the witness could testify to "certain facts in connection with certain things that have happened in the past for the limited purpose of the jury considering such evidence for whatever value it may have, if any, in considering whether this individual has the power of mind to premeditate" but that not being an expert the witness could not testify as to any opinion held by her as to defendant's ability to premeditate nor could she testify to acts and occurrences occurring during the time before defendant was 14 years of age. (It was admitted by counsel that at the time of the crime defendant was 20 years of age and that at the time of trial he was 21 years of age.) After the court's ruling, defense counsel said: "I am sorry for taking so much time, we might as well forget about it. It is too general under your ruling, Judge." No effort was made by defendant to call the witness for testi-

mony concerning conduct on the part of defendant during the seven years preceding the trial. Under the circumstances shown by the record it appears that the court did not err in excluding opinion evidence given by a lay person. In People v. Wells, 33 Cal.2d 330, 345, 202 P.2d 53, medical evidence of the defendant's state of mind was held to have been improperly excluded at the trial of the general issue. In the case at bar, the defense offered no medical testimony concerning the defendant's ability to form an intent to commit a crime although the defendant was permitted to testify that he usually acted on "impulse" and that he had spent some time in Camarillo State Hospital. There also appears to have been no error in the trial court's refusal to permit the lay witness to testify concerning defendant's conduct more than seven years prior to the time of trial since such testimony would be too remote in point of time to be of much aid to the jury.

[5, 6] The defendant contends that the district attorney committed prejudicial error in numerous instances during his argument to the jury. It is argued that the district attorney's references to the defendant as a "mother-killer" and "sneaky" mother-killer were intended to instill passion and prejudice against the defendant in the minds of the jurors; that the reference to the victim as the "mother" of the defendant had no basis in the record in that she was only his "foster-mother." It is also argued that the district attorney's references to defendant as never working and having no money and as being "no good" had no foundation in the record. Insofar as the references to the deceased as the defendant's mother are concerned, the record shows that the defendant considered her his mother and that she had acted toward him as if he were her natural son from the time he was 2 months of age. The record also shows that defendant at all times admitted having killed his "mother." The record shows that defendant had no money with the exception of perhaps a dollar on the night before he committed the crime; that he had worked once in awhile but not at one job for any length of time. These arguments therefore appear to be without merit.

[7, 8] Error is also predicated on the district attorney's argument to the jury concerning murder perpetrated in the commission of a robbery and by lying in wait. The record shows that the district attorney argued that the murder was of the first degree in that it was premeditated on the part of the defendant, or committed by him when lying in wait, or in the course of a robbery. The trial court refused an instruction on "lying-in-wait" and no instruction was given on the theory that murder committed during a robbery was first degree murder other than a mere statement to that effect. The jury was fully and fairly instructed concerning both murder of the first and second degree, as well as manslaughter, and the jury was admonished that its duty was to follow the law as stated to it by the court. The jury was also told that it was to be governed solely by the evidence introduced at the trial "and the law as stated to you by me"; that any instruction inapplicable to the facts as found by it was to be disregarded; that any statements made by counsel were not to be taken as evidence in the case. Under the circumstances it would appear that defendant suffered no prejudice from the remarks of the prosecution in its arguments when the evidence concerning defendant's conduct in his mother's home was commented upon as well as the comments upon the evidence as it related to defendant's taking of the deceased's car and traveling bags. These facts were in evidence and any comments by the prosecution concerning theories of the law inapplicable thereto could not have been considered by the jury in view of the admonition of the trial judge since it must be presumed that the jury followed the law as given to it by the court.

[9] Defendant argues that the People committed prejudicial error in arguing to the jury that they need not all agree on the same theory of first degree murder if

they agreed that defendant was guilty of first degree murder. In People v. Chavez, 37 Cal.2d 656, 671, 672, 234 P.2d 632, 642, where the same question was first raised in this court, we held "'* * * It was not necessary to require the jury to agree upon the theory. If, under any one of the theories set forth, they believed appellant had gained possession of and appropriated to his own use the moneys of Pacific, he was guilty of grand theft.' [Quotation from People v. Caldwell, 55 Cal.App.2d 238, 255, 256, 130 P.2d 495.] The same rule is applicable to the various grounds upon which the jury could have found Chavez guilty of murder in the first degree."

[10] Defendant also contends that the People committed prejudicial error in that the evidence was misquoted. It is argued that the prosecutng attorney argued to the jury that a witness, Heise, had testified to seeing the gun in defendant's possession on two different occasions prior to the commission of the crime. Defendant's argument is that the witness Heise saw the gun only once on the Thursday preceding the homicide. The record shows that Heise testified that he saw the gun on Thursday at the Waikiki Bar and that it was in a box inside a paper bag and that it was unloaded. He also testified that he saw defendant the following evening at the Waikiki again and that he had the same paper sack with him; that the witness asked defendant if he were still carrying "that" around with him and that defendant said "yes"; that defendant, on the second occasion, showed him the clip he had for the gun and that it had shells in it. The prosecuting attorney pointed out to the jury that on the second occasion Heise didn't see the gun but that he did see the paper bag and the clip with the shells in it. In his closing argument the prosecuting attorney argued to the jury that Heise saw the gun twice—once on Friday night. No objection was interposed by defense counsel and, in view of the evidence and the other correct references by the prosecution to the testimony of Heise it is difficult to see how any prejudice could have resulted to defendant from what was obviously a slip of the tongue. Further, the jury was instructed that the statements and arguments of counsel were not evidence in the case and, if contrary to the evidence, should be disregarded.

[11] A reading of the prosecution's arguments to the jury disproves defendant's contention that an appeal was made to the jury in order to arouse passion and prejudice against the defendant, and that the prosecution argued its personal belief as to defendant's guilt. The remarks made did not exceed the bounds of fair comment on the evidence and the so-called "personal belief" remarks were pleas to the jury to bring in a first degree verdict. It should also be noted that defense counsel made no objection during the arguments. "If appellant deemed that any harmful effect might attach to the statement in question, he should have made timely objection at the trial so that any misunderstanding could have been clarified by a proper instruction to the jury." People v. Amaya, 40 Cal.2d 70, 79, 251 P.2d 324, 329.

[12] There was substantial evidence in support of the jury's determination and its finding will not be disturbed. People v. Smith, 15 Cal.2d 640, 648, 104 P.2d 510; People v. Amaya, 40 Cal.2d 70, 81, 251 P.2d 324.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 301

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John E. CHEARY, Defendant and Appellant.

Cr. 5981.

Supreme Court of California.

April 9, 1957.

Rehearing Denied May 8, 1957.

Defendant was convicted in the Superior Court, Stanislaus County, David F. Bush, J., of murder in the first degree, and he appealed. The Supreme Court, Traynor, J., held that question as to whether defendant had been so intoxicated as to lack specific intent to rape had been for jury.

Affirmed.

Carter, J., dissented.

1. Homicide 🔑28

To prove defendant guilty of first degree murder on ground that killing had been committed in an attempt to perpetrate rape, prosecutor would have to prove that defendant had had specific intent to rape, and if defendant had been so intoxicated that he did not have specific intent to rape, he was not guilty of murder in first degree.

2. Homicide 🔑270

In homicide prosecution, wherein district attorney urged that defendant was guilty of first degree murder on ground that victim's death had resulted from injuries inflicted upon her by defendant in an attempt to rape her, question as to whether defendant had been so intoxicated as to lack specific intent to rape was for jury.

3. Jury 🔑108

Choice by jury between possible punishments for first degree murder is to be made during and not before jury's deliberation on that question, and it was not error for trial court to excuse prospective jurors who entertained conscientious opinions precluding their voting verdict carrying death penalty.

4. Criminal Law 🔑444

To authenticate photographs, person who took it need not testify or be identified; and, in homicide prosecution, photographs of decedent's body were properly authenticated by pathologist who looked at them and testified that they accurately portrayed what he had seen.

5. Criminal Law 🔑438

It is error to receive in evidence photographs of a homicide victim designed primarily to arouse the passions of jury, but such photographs are admissible when relevant to issues before court and their probative value is not outweighed by danger of prejudice to defendant.

6. Criminal Law 🔑438

Whether probative value of photograph of homicide victim outweighs possible prejudicial effect is question to be resolved by trial court in exercise of its judicial discretion.

7. Criminal Law 🔑829(3)
Homicide 🔑341

Trial court would not be put in error for refusing to give requested instructions on voluntary manslaughter and the difference between murder and manslaughter where such instructions were adequately covered by instructions given; but in any event defendant could not have been prejudiced by failure to give such instructions where only ground urged by district attorney for first degree murder conviction had been that victim's death had resulted from attempt to commit burglary or rape.

8. Homicide 🔑18(3, 4)

If, in perpetration of burglary or attempted rape, defendant inflicted injuries upon victim that caused her death, he would be guilty of first degree murder, even if he unintentionally inflicted those injuries on her; and it would be immaterial whether he used only his hands or something more inherently dangerous.

9. Criminal Law 🔑655(5)

Trial judge in homicide prosecution would not be put in error for admonishing defense counsel, where court's remarks were not inappropriate and could not have got counsel into disfavor with jury or have worked prejudice to defendant.

10. Criminal Law 🔑655(1), 722(2), 730(12)

In homicide prosecution, it was improper for District Attorney and trial judge to insinuate the defendant's military record was unsatisfactory; but in view of trial court's admonition to jury, no prejudice to defendant could have resulted.

11. Criminal Law 🔑1035(3)

A claim of misconduct on part of trial court will ordinarily not be considered on appeal unless party who complains has given trial court opportunity to correct error or false impression.

12. Criminal Law 🔑730(8)

In prosecution of twenty-three year old defendant for killing of eighty-four year old woman, district attorney's argument that pathologist had been "unable to determine" whether there had been any intercourse with decedent could not have been prejudicial, in view of fact that trial court had informed jury that district attorney's summary of pathologist's testimony might not be accurate and in view of defense counsel's quotation of pathologist's actual statement that he had found no injuries about the pelvic area and that the opening of the vagina had been rather narrow and that he had seen no evidence of any marks.

13. Criminal Law 🔑720(9)

In prosecution of twenty-three year old defendant for killing of eighty-four year old woman, inference, drawn by district attorney, that defendant had been pulling up his trousers when arresting officer entered victim's bedroom, and his inference that defendant had reached underneath the blankets and grabbed victim by leg, were reasonably drawn from evidence.

14. Criminal Law 🔑720(6)

District attorney could present jury his theory of case based upon inferences reasonably drawn from evidence.

15. Criminal Law 🔑720(9)

In prosecution of twenty-three year old defendant for killing of eighty-four year old woman, district attorney's inference, that defendant didn't care who his victim was as long as he satisfied "that monstrous lust of his", could reasonably have been drawn from evidence.

16. Criminal Law 🔑730(5)

In prosecution of twenty-three year old defendant for killing of eighty-four year old woman, district attorney's erroneous implication that one could not intend sexual intercourse without intending rape could not have been prejudicial in view of court's ruling that district attorney's remark was improper and that his statements as to law were not to be relied upon by jury.

17. Criminal Law 🔑730(1)

In prosecution of twenty-three year old defendant for killing of eighty-four year old woman, district attorney's argument to effect that counsel for defendant had not requested an acquittal because he did not wish to insult the intelligence of the jury, could not have been prejudicial in view of vigorous objection by defense counsel and admonition by court.

Jack B. Lamb, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., Thomas W. Martin, Chief Asst. Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

A jury returned a verdict that defendant was guilty of murder in the first degree and fixed the punishment at death. The trial court denied a motion for new trial and sentenced defendant to death. The appeal is automatic. Pen.Code, § 1239(b).

Defendant contends that the verdict is not supported by the evidence. He also assigns as prejudicial error the court's excusing four prospective jurors on the ground that they entertained conscientious opinions that would preclude their voting for the death penalty, the admission into evidence of certain photographs, the refusal of the trial court to give requested instructions, and certain allegedly improper statements of the court and the district attorney.

Defendant is twenty-three years old and at the time of the crime was home on leave from service in the army. The deceased, Mrs. Minnie McDonald lived with her daughter, Mrs. Nora Inglet, in Modesto, California. Mrs. Inglet is fifty-four years old. Mrs. McDonald was eighty-four years old and was in good health for her age. Mrs. Inglet met defendant in a tavern in December, 1955 or January, 1956. The two were introduced by defendant's sister. Thereafter Mrs. Inglet saw defendant on various occasions, usually in the company of friends, but several times defendant and Mrs. Inglet were alone in defendant's car. Defendant testified that he had been intimate with Mrs. Inglet, but she denied that and testified that the last time she was alone with him, defendant attempted to force her to commit an unnatural sex act and that she left him and took a taxi home.

On the afternoon of March 19, 1956, defendant and his brother, Lester Cheary, left their mother's home in Modesto and made a tour of several taverns. They traveled in defendant's car, and defendant did the driving. They drank beer at each of the taverns they visited, and defendant testified that he also drank whiskey. They had nothing to eat. Some time during the afternoon or evening defendant made a remark about going to see a girl. At about 1 a. m. on the morning of March 20, defendant and his brother left Jim's Place, a tavern on highway 99, and drove to the home of Mrs. Iris McCurdy. Mrs. McCurdy was acquainted with defendant and was a friend and neighbor of Mrs. Inglet. Defendant stopped his car at a point across the street from Mrs. McCurdy's residence. Lester Cheary remained in the car. Defendant got out of the car and went to Mrs. McCurdy's residence. He knocked on the door, and when Mrs. McCurdy answered, he identified himself. He first asked for the address of J. Reynolds, a friend of Mrs. McCurdy. Mrs. McCurdy gave him Mr. Reynolds' address. Defendant then asked for Nora Inglet's address. Mrs. McCurdy refused to give him Mrs. Inglet's address. Defendant then went next door to the residence of Horace Smith. Mr. Smith told him that Mrs. Inglet lived farther down the street. Meanwhile, Mrs. McCurdy telephoned Mrs. Inglet and told her that defendant was looking for her and that he acted as if he had been drinking. After leaving the Smith residence, defendant proceeded to the next house on the block and started knocking on the door. This was the house in which Mrs. Inglet and Mrs. McDonald lived. Mrs. Inglet did not go to the door immediately, but when the knocking continued, she went to the door and asked defendant what he wanted. Defendant said that he wanted to talk to her and demanded entry. Mrs. Inglet refused to open the door and told defendant that if he did not go away she would call the police. Mrs. Inglet attempted to telephone the police, but before she could complete the call, defendant forced open the locked door and grabbed her by the arm. She dropped the telephone receiver, broke loose from defendant's grasp, and ran screaming out the rear door of her house to the home of Mrs. McCurdy. She could not telephone the police from there because the McCurdy phone was on her party line and she had not replaced her own telephone receiver. Mrs. McCurdy's son, Bob, ran to the Smith residence and telephoned the sheriff's office. Two officers in a patrol car arrived shortly thereafter, and one of the officers, Mrs. Inglet, and Mrs. McCurdy entered Mrs. Inglet's home.

They found Mrs. McDonald lying on her bed. Her face was bloody. Her bed covers were down to her waist, and her gown was open to below her breast. The spring of her bed had fallen to the floor. Defendant stood nearby. He was bent over toward Mrs. McDonald. His trousers were unbuttoned, and he held them with hands covered with blood. The front and upper back of his trousers and his shorts were stained with blood, which was later found to be of the same blood group as Mrs. McDonald's. Defendant's shoes were under one dresser, his jacket on another.

Defendant was taken into the living room, handcuffed, and seated on a chair. Another officer entered with Lester Cheary whom he had found across the street from Mrs. Inglet's home. When he saw his brother, defendant asked, "What are you doing here?" Defendant then said to the officers, "He didn't have anything to do with it, I did it." Bob McCurdy then entered the room. He said something to defendant, and defendant asked Bob who he was. Defendant had met Bob McCurdy on several occasions previously.

Defendant and his brother were then taken by the officers to the sheriff's office. En route defendant remarked that "According to military law, as long as the girl was over 16 years of age, there is nothing that could be done to him." Defendant testified that after he had been taken to the sheriff's office, he was told to wash his face with cold water and that one of the officers walked him up and down in front of the sheriff's office to keep him awake.

Mrs. McDonald was taken to a hospital. An examination revealed that her face was badly bruised, her nose and cheek bone were broken, and that her tongue was nearly severed from her mouth. After emergency treatment, she was placed in an oxygen tent.

At about 6:15 p. m. on March 21, Mrs. McDonald died. After embalmment her body was examined by a pathologist. He found many bruises about her face, head, and neck, a large bruise on her chest, three fractured ribs, a bruise on her groin, and three small semicircular depressions on her thigh. He found no evidence of rape. He concluded that her death was caused by hypostatic pneumonia resulting from her injuries.

Defendant testified that he was intoxicated and that he did not remember anything that happened between the time he left the tavern and the time he was handcuffed in Mrs. Inglet's living room. He further testified that he did not remember anything about the drive from Mrs. Inglet's residence to the sheriff's office. Lester Cheary testified that he had paid for the drinks for defendant and himself; that he had spent about $30 for drinks during the course of the evening; and that defendant had been drinking more heavily than he had. Bob McCurdy testified that defendant repeated himself and acted as if he were drunk or drugged. Mrs. McCurdy testified that defendant acted as if he had been drinking. The arresting officer testified that he thought defendant had been drinking but that defendant had no difficulty speaking and did not stagger or sway when he walked. Mr. Smith testified that defendant did not act drunk when he asked for Mrs. Inglet's address.

In his argument to the jury the district attorney explained that he did not contend that Mrs. McDonald's death was a deliberate and premeditated homicide. He urged that defendant was guilty of first degree murder on the grounds that Mrs. McDonald's death resulted from injuries inflicted upon her by defendant in an attempt to rape her or in the perpetration of a burglary, breaking and entering Mrs. Inglet's home with the intent to rape Mrs. Inglet.

[1] Defendant correctly points out that to prove him guilty of first degree murder on either of these grounds it was incumbent upon the prosecution to prove that he had the specific intent to rape when he entered Mrs. Inglet's home or that he had the specific intent to rape when he assaulted Mrs. McDonald.

Defendant contends that the evidence establishes that he did not have the intent to rape Mrs. Inglet when he went to her home. He points to his testimony that he had been intimate with Mrs. Inglet and asserts that that testimony shows that he had reason to expect that Mrs. Inglet would admit him to her home and that he had no felonious intent when he knocked at her door. Mrs. Inglet, however, denied having had intimate relations with defendant. Moreover, whatever was defendant's original intent, the jury could reasonably infer from his forcing open the door and grabbing Mrs. Inglet after having been informed by her that he was not welcome that defendant then had the specific intent to rape.

[2] Defendant contends that the evidence establishes that he was so intoxicated that he did not have the specific intent to rape either Mrs. Inglet or Mrs. McDonald. It is true that if defendant was so intoxicated that he did not have the specific intent to rape, he is not guilty of murder in the first degree. People v. Burkhart, 211 Cal. 726, 731, 297 P. 11; See State v. Vanasse, 42 R.I. 278, 107 A. 85. Whether defendant was so intoxicated, however, was a question for the jury. People v. Burkhart, supra. The testimony regarding the extent of defendant's intoxication is conflicting. It appears, however, that he decided to go to see Mrs. Inglet; that he drove his car from the tavern to the residence of Mrs. McCurdy; that he identified himself to Mrs. McCurdy, asked for the address of J. Reynolds, whom he knew to be a friend of Mrs. McCurdy, and asked for Mrs. Inglet's address; that he walked to Mr. Smith's residence and asked where Mrs. Inglet lived; that he recognized his brother when he saw him in Mrs. Inglet's living room; and that he had the presence of mind to attempt to absolve his brother of blame. Counsel for both sides argued the matter of intoxication at length, and the jury was properly instructed on the effect of intoxication. The jury's verdict necessarily implies that they found that defendant was not so intoxicated that he did not have the specific intent to rape. That determination is amply supported by the evidence.

[3] Defendant contends that the trial court committed prejudicial error in asking the prospective jurors whether they entertained conscientious opinions that would preclude their "voting for a verdict carrying the death penalty," in allowing extensive argument on this point in the presence of the jurors, and in excusing four jurors who answered that they did entertain such opinions. Defendant urges that the death penalty was thus overemphasized and that the trial court lent its authority to the propriety of the death penalty in this case. The choice by the jury between the possible punishments for first degree murder is to be made during and not before the jury's deliberation on that question. We recently held, therefore, that a juror who entertains views formulated before trial that compel him to vote for one of the two possible punishments regardless of what the evidence at the trial may reveal should be excused. People v. Riser, 47 Cal.2d 566, 305 P.2d 1. There was no error, therefore, in the court's excusing the prospective jurors in this case. Although there was some discussion of the propriety of the court's ruling, the tenor of the discussion affords no reason to believe that the death penalty was overemphasized or that the jurors thought that the court was endorsing the death penalty in this case. Moreover, the discussion was precipitated and prolonged by defendant's counsel, and he did not suggest that the discussion be conducted out of the jury's presence until it was nearly terminated.

[4-6] Defendant contends that the trial court erred in admitting into evidence three photographs of the decedent's body taken after embalmment, on the ground that they were designed to appeal to the emotions of the jury. The only objection made by defendant to the admission of these photographs at the trial was that no proper foundation for their admission had been laid on the ground that the person who took the photographs had not been identified. That objection was properly overruled. The photographs were properly authenticated by the pathologist who looked at them and testified that they accurately portrayed what he had seen. It is not necessary to authenticate a photograph that the person who took it testify or

be identified. Berkovitz v. American River Gravel Co., 191 Cal. 195, 201, 202, 215 P. 675; cf. People v. Ah Lee, 164 Cal. 350, 352, 128 P. 1035. Even if defendant had properly raised his present objection, the pictures were admissible. Although it is error to receive in evidence gruesome photographs of a homicide victim designed primarily to arouse the passions of the jury, People v. Burns, 109 Cal.App.2d 524, 541–542, 241 P.2d 308, 242 P.2d 9; People v. Redston, 139 Cal.App.2d 485, 490–491, 293 P.2d 880, such photographs are admissible when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant. People v. Reese, 47 Cal.2d 112, 301 P.2d 582. Whether the probative value of a particular photograph outweighs its possible prejudicial effect is a question to be resolved by the trial court in the exercise of its judicial discretion. People v. Reese, supra, 47 Cal.2d at page 112, 301 P.2d at page 587; People v. Burns, supra, 109 Cal.App.2d at page 542, 241 P.2d at page 319. The photographs in question were admitted in connection with the pathologist's testimony regarding the extent of the decedent's injuries and the cause of her death, the latter being a matter disputed by defendant. The photographs are corroborative of the pathologist's testimony and help to show the extent of the decedent's injuries. Admittedly they constitute cumulative evidence, for they show the same injuries to which the pathologist testified. That fact, however, was only one among the several to be considered by the trial court. (See 4 Stan.L.Rev. 589, 590.) The photographs are not pleasant to look at, but they are not ghastly. They show the body of the decedent resting on a table in the mortuary where the pathologist made his examination. The body is covered by a sheet except for the head, neck, and center of the chest. No incisions or marks made by the pathologist in his examination are visible. We conclude that there was no abuse of discretion in the admission of these pictures.

[7, 8] Defendant contends that the court erred in refusing to give the following instructions requested by him:

> "Normally, hitting a person with the hands or fist does not constitute murder in any degree. Therefore, in order to constitute murder, in any degree, there has to be either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate that they would cause death or serious bodily injury so as to indicate an abandoned and malignant heart." (Defendant's Instruction Number 31.)
>
> "Where death was caused by acts of violence the character of the weapon used is of particular significance in determining whether the crime was committed with malice aforethought. If the means employed are of such a nature that normally they would not be dangerous to life, as where death is caused by blows of the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought.
>
> "If the implement used is not likely to kill or maim, killing is manslaughter unless actual intent to kill is proved."
>
> (Defendant's Instruction Number 32.)
>
> "Manslaughter is the unlawful killing of a human being without malice. One kind of manslaughter, the definition of which is pertinent to this case, is voluntary manslaughter, being that which is committed upon a sudden quarrel or heat of passion." (Defendant's Instruction Number 33.)

The court did not err in refusing to give these instructions. Voluntary manslaughter, the subject of defendant's instruction 33, was fully covered by the court in its instructions (CALJIC 305, 311, 311A). Defendant's instructions 31 and 32 are directed at the difference between murder and manslaughter, particularly the element of malice aforethought. Those matters were also adequately covered in the court's instructions to the jury (CALJIC 301, 305, 308). Moreover, even if the court erred in refusing to give defendant's instructions 32 and 33, such error was not prejudicial. The jury found defendant guilty of first degree murder. As noted previously, the only ground urged by the district attorney for such a conviction was that Mrs. McDonald's death resulted from injuries inflicted upon her by defendant in an attempt to rape her or in the perpetration of a burglary, breaking and entering Mrs. Inglet's home with the intent to rape Mrs. Inglet. If in the perpetration of a burglary or attempted rape defendant inflicted injuries upon Mrs. McDonald that caused her death, he is guilty of first degree murder even if he unintentionally inflicted those injuries upon her. People v. Sutton, 17 Cal.App.2d 561, 567, 62 P.2d 397. It is immaterial whether he used his hands or fists or something more inherently dangerous.

[9] Defendant contends that the trial court committed prejudicial error in admonishing defendant's counsel in the presence of the jury. Counsel was cross-examining the pathologist. He asked whether it was not common for elderly people to be bedridden, apparently in an attempt to show that the decedent might have been suffering from hypostatic pneumonia before being injured by defendant. The district attorney objected to the question on the ground that it was irrelevant and immaterial. The court overruled the objection, commenting, however, that the question was "pretty broad." Counsel for defendant attempted several times to explain the reason for his question, but the court refused to permit the explanation, stating, "I've ruled in your favor, Mr. Hancock, but I will state that I think you are getting into a pretty broad field." Counsel said, "I don't think I am." The court then said, "Well, I'm giving you a little admonition here. I want to give you every chance to cross-question this witness, but there's some limit we can't go beyond." Counsel for defendant immediately replied that he did not appreciate admonishment from the court when he did not deserve it. The court then stated, "In the last analysis, I'm going—I'm the one that's going to run this court." Defendant contends that since the court criticized defense counsel, the jury, which looks to the court for guidance, must have looked with skepticism upon the further efforts of the defense counsel. The court's remarks, however, were not inappropriate, see People v. Knocke, 94 Cal.App. 55, 60, 270 P. 468, and we do not believe that they brought defense counsel into disfavor with the jury or worked to the prejudice of defendant. Indeed, before instructing the jury, the trial court explained to the jurors that in a case like this the attorneys are necessarily under great pressure and complimented both attorneys on the manner in which they tried the case.

[10, 11] Defendant contends that both the trial court and the district attorney were guilty of prejudicial misconduct in implying that defendant had an unsatisfactory military record. Defendant's counsel asked defendant, "How long have you been in the Army?" The district attorney objected that it was immaterial. The court commented that "strictly speaking it probably is." The district attorney then added, "His military record has nothing to do unless he wants to give his entire military record." Defense counsel replied that he thought "the jury might be interested in learning some of his background." The district attorney then made the following statement, which defendant cites as prejudicial misconduct, "Yes, *if you bring out his entire military background, yes.*" (Italics added.) Defendant's counsel immediately pursued the subject by asking the district attorney, "Do you know anything about his military background?" The court interrupted with the comment, "Just a moment." Defense counsel then stated, "I'll assign his last statement, the district attorney's, as prejudicial misconduct and instruct—and ask that the Court instruct the jury—" The court then instructed the jury to disregard the last statement by the district attorney, and added the comment to defendant's counsel that "I think it's true, that if this man's military

record is going to be put before the record, the district attorney would have an opportunity to cross-question him—to cross-examine him on it." Defense counsel did not claim that this was an incorrect statement of the law but stated that he would withdraw the question if the court wished. The court then made the following statement, which defendant now cites as prejudicial error, "Well, so there is no question about any of the rights of the defendant being infringed, I'll allow that question and the answer to that, but any further than that, why—as I say, *of course, the matter will be subject to cross-examination and can't help be brought out.*" (Italics added.) Defendant's counsel did not object or take exception to this statement, and defendant answered the question, saying, "Yes, I've been in the Army six years." There was no attempt to elicit any information concerning defendant's military record during cross-examination or to introduce such evidence at any other time.

The district attorney's insinuation that defendant's military record was unsatisfactory was improper, see People v. Anthony, 185 Cal. 152, 158, 196 P. 47, and the trial court correctly admonished the jury to disregard the district attorney's statement. In view of the court's admonition, we do not believe that defendant was prejudiced by the statement of the district attorney. Unfortunately, the later comment by the trial court contained an implication similar to that in the district attorney's statement and was therefore likewise improper. Coming such a short time after its admonition to disregard the district attorney's statement, however, the court's statement was almost certainly inadvertent, and as noted previously, the court's attention was not called to the implication in its statement. A claim of misconduct on the part of the trial court will ordinarily not be considered on appeal unless the party who complains has given the trial court an opportunity to correct the error or false impression. People v. Amaya, 40 Cal.2d 70, 78, 251 P.2d 324, and cases there cited. Nevertheless, in view of the serious nature of the offense of which defendant has been convicted we have considered the trial court's statement. Upon reviewing the whole record, however, we are convinced that the court's statement was not prejudicial to defendant.

[12] Defendant contends that the district attorney committed several acts of prejudicial misconduct during his argument to the jury. When he was summarizing the testimony of the pathologist regarding evidence of rape, the district attorney stated that the pathologist "was unable to determine whether there had been any intercourse with Minnie McDonald." Counsel for defendant objected and termed this statement a "deliberate misquotation." The court stated that any misquotation did not appear deliberate, although it was possible that the district attorney's summary of the testimony was not accurate. Then, after the district attorney urged that his remarks be struck from the record, the court ordered the remarks stricken and admonished the jury to pay no attention to them. The district attorney then said, "Well, ladies and gentlemen of the jury, your recollections are sufficient to recall what the doctor testified to, Dr. Purvis, in that regard." Defense counsel did not object and did not request an admonition concerning this last remark. Although this last statement of the district attorney might be interpreted as an attempt to have the jury disregard the court's admonition and accept his own misstatement as true, it is doubtful that the jury so interpreted it in view of the district attorney's previous request that his remark be struck from the record. In any event, neither this remark nor the original statement of the district attorney was prejudicial. The court informed the jury that the district attorney's summary of the pathologist's testimony might not be accurate, and later the defense counsel, during his own argument, quoted the actual statement of the pathologist, "I found no injuries about the pelvic area. The opening of the vagina was

rather narrow and I saw no evidence of any marks."

[13, 14] Defendant points out that the district attorney again misstated the evidence when he asserted that Mrs. McCurdy had testified that defendant was pulling up his trousers when she entered the bedroom. Mrs. McCurdy actually testified that "he was holding his pants." Mrs. McCurdy's testimony was fresh in the minds of the jurors, since the trial lasted only a few days. It is unlikely, therefore, that the district attorney's statement misled the jury. Moreover, defendant did not object to this statement at the trial.

Although he concedes that the district attorney could present to the jury his theory of the case based upon inferences reasonably drawn from the evidence, People v. Burwell, 44 Cal.2d 16, 39–40, 279 P.2d 744, defendant contends that, during his argument to the jury, the district attorney drew two inferences that find no support in the evidence. The first inference was that defendant was pulling up his trousers when Mrs. Inglet, Mrs. McCurdy, and the arresting officer entered the bedroom. This inference was a reasonable one. It was uncontroverted that defendant's trousers were unbuttoned; Mrs. McCurdy testified that he was holding his pants; and there were blood smears on the back and top of defendant's shorts and trousers, which could have been caused by defendant's pulling up his pants with his hands, which were covered with blood. The second inference was that defendant "reached over underneath the blankets and underneath her [Mrs. McDonald's] nightgown and grabbed her by the leg and at the same time crawling on the bed. * * *" This inference was also a reasonable one. There were marks on Mrs. McDonald's thigh that could have been made by defendant's fingernails, and her bed spring could have been knocked down by defendant in climbing onto the bed.

[15] Two statements made by the district attorney during his argument to the jury are cited as gross misconduct on the ground that they were inflammatory in nature. Although defendant did not object to either statement at the trial, we have examined them and find no error. One was the district attorney's reference to "the pure, killing horror of the situation." He was speaking of the situation when Mrs. Inglet found that the McCurdy telephone would not function and she could not summon the police to aid her mother because she had not replaced her own telephone receiver. The district attorney's description of this situation was not unreasonable. The other allegedly inflammatory statement was that defendant "didn't care who [his victim] was as long as he satisfied that monstrous lust of his." Such an inference could reasonably be drawn from the evidence.

[16] Defendant contends that the district attorney's summary of the requirements of rape was prejudicially erroneous. The district attorney stated that "the specific intent which is involved is the intent to have sexual intercourse." When defendant objected, the court stated that it would instruct the jury as to the elements of the offense at the proper time. The court added that the district attorney's statement was "not out of line," but when defense counsel pointed out that the district attorney implied that one cannot intend sexual intercourse without intending rape, the court ruled that the remark of the district attorney was improper. Later, the court charged the jury that counsels' statements as to the law were not to be relied upon by the jury, and the court gave correct instructions on the law of rape. In this light, the misstatement of the district attorney was not prejudicial misconduct.

Defendant also cites as prejudicial misconduct the district attorney's statement as to the law of burglary and felony murder. The district attorney argued: "If the defendant broke in that front door with the intent to rape Nora Inglet, he is guilty of Murder in the First Degree. If at the time he smashed in the front door, when he crossed that line, he had committed a burglary; and the killing was done in the perpetration of burglary, in carrying out the act, and he's guilty of Murder in the First Degree if you want to accept that." We find in this argument no misstatement of the law. Moreover, the court admonished the jury not to rely on the statements of counsel as to the law and gave appropriate instructions concerning burglary and murder.

[17] The final citation of misconduct concerns a statement of the district attorney during his argument to the jury that counsel for defendant had not requested an acquittal because he did not wish to insult the intelligence of the jury. Counsel for defendant immediately entered a vigorous objection. After first noting that some remarks of defense counsel could be interpreted as the district attorney argued, the court admonished the jury to disregard the district attorney's statement. In view of the vigorous objection by defense counsel and the admonition by the court, it is improbable that the jury was misled by the district attorney's statement into believing that defendant himself lacked faith in his defense to the charge of first degree murder.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that the evidence is sufficient on which to predicate a verdict of murder of the first degree under the law of this state. We are not here interpreting or applying the law of Moses—"Whoso sheddeth man's blood, by man shall his blood be shed." (Gen. IX.6.) "And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot." (Deu. XIX.21.)

We are interpreting and applying the law of California. Under our law every homicide is not murder and every murder is not of the first degree. First degree murder is defined in section 189 of the Penal Code as follows: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, * * * is murder of the first degree; and all other kinds of murders are of the second degree."

As correctly stated in the majority opinin the only theory upon which the homicide here could be held to be murder of the first degree is, that it was committed in an attempt to perpetrate burglary or rape. From an examination of the record there appears to be little doubt but that defendant was intoxicated beyond a point where he did not know or appreciate what he was doing. But conceding that the evidence was sufficient to support the implied finding of the jury that he was not intoxicated, I am convinced that the evidence was not sufficient to give rise to an inference that he intended to perpetrate rape on either Mrs. Inglet or Mrs. McDonald. In my opinion the only rational conclusion to be reached from the record in this case is that defendant while in a drunken stupor perpetrated the sordid acts which resulted in the death of Mrs. McDonald. It was a ghastly and terrible crime, unprovoked and unjustified from any point of view, but I am unable to reach the conclusion from the record before us that it falls within the definition of murder of the first degree as defined in the above quoted section of the Penal Code. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Tubby, 34 Cal.2d 72, 207 P.2d 51.

For the foregoing reasons I would reduce the degree of the crime to that of murder of the second degree.

Rehearing denied; CARTER, J., dissenting.

48 Cal.2d 259

Charles P. BRATNOBER, Plaintiff, Cross-Defendant and Respondent,

v.

Geraldine R. BRATNOBER, Defendant, Cross-Complainant and Appellant.

S. F. 19168.

Supreme Court of California,
In Bank.
April 9, 1957.

Rehearing Denied May 8, 1957.

Proceeding to modify an interlocutory and final judgment of divorce insofar as such judgment pertained to alimony and child support payments. The Superior Court, City and County of San Francisco, Orla St. Clair, J., entered order reducing payments and wife appealed. The Supreme Court, Spence, J., held that where provisions for support payments and alimony incorporated in final divorce judgments resulted from stipulation of the parties and husband's reasonable expectation of increased income did not materialize, there was no abuse of discretion in reducing the amount of alimony and support payments, notwithstanding fact that stipulation was not expressly based upon the happening of such reasonable expectations.

Affirmed.

Carter, J., dissented.

Opinion, 298 P.2d 138, vacated.

1. Divorce 🔑245(2), 309

Generally, trial court is without authority to reduce amount of alimony or support payments awarded in prior interlocutory or final decree of divorce in absence of a showing that there has been a change in conditions subsequent to entry of such decree. West's Ann.Civ.Code, § 139.

2. Divorce 🔑309

Upon a proper showing of change in condition subsequent to entry of interlocutory or final decree of divorce, court possesses power to modify a support order. West's Ann.Civ.Code, § 139.

3. Divorce 🔑309

Propriety of modification of support order in interlocutory or final decree of divorce because of changed circumstances, rests largely in the discretion of the trial court. West's Ann.Civ.Code, § 139.

4. Divorce 🔑309

A support award does not have the finality of an ordinary contract as it is subject to re-examination by the court at any time. West's Ann.Civ.Code, § 139.

5. Divorce 🔑240(2)

A court may make an alimony award based not on the husband's actual earnings but on ability to earn money in the future, and his reasonable expectations are an essential consideration.

6. Divorce 🔑308, 309

Whether support order rests upon agreement of the parties or is determined by the court upon evidence, question of reasonable expectations is material and a failure to realize them may constitute a change of circumstances justifying modification of the order. West's Ann.Civ.Code, § 139.

7. Divorce 🔑245(3), 309

Where provision for support and alimony payments incorporated in interlocutory and final divorce decree were by stipulation of the parties and husband's reasonable expectation of salary increases did not materialize, it was not an abuse of discretion by trial court to modify decrees insofar as it pertained to such payments, notwithstanding fact that stipulation was not expressly based upon husband's realization of his reasonable expectations. West's Ann.Civ.Code, § 139.

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Livingston & Feldman, Isabella H. Grant and Lawrence Livingston, San Francisco, for appellant.

Mervyn Schneider and Anthony E. O'Brien, San Francisco, for respondent.

SPENCE, Justice.

Defendant wife appeals from an order modifying interlocutory and final judgments of divorce insofar as that order reduces the amount of alimony and child support payments. She contends that the evidence presented to the trial court did not constitute a legal basis for such modification, but the record does not sustain her position.

The parties married in December, 1940, and separated in 1949. Two children were the issue of the marriage. At the time of separation the parties divided their community property, the wife's share netting her some $11,400. The wife then moved, with the children, to Illinois to live with her parents. The husband in 1951 went through bankruptcy. In 1952 he sued for divorce, and the wife cross-complained. During the trial of the case, the parties and counsel conferred with the trial judge in chambers as to the terms of a possible settlement. It was then orally agreed that the husband would make monthly support payments of $250–$100 per month for the support of each of the two children and $50 per month for the support of the wife—and that such provisions could be incorporated in any divorce decree. The trial then proceeded and an interlocutory decree of divorce was awarded to the wife on February 26, 1953. She was given custody of the two minor children, and the husband was ordered to make the above specified support payments.

On March 2, 1954, shortly before time for entry of the final decree of divorce, the husband moved to modify the interlocutory decree by reducing the support payments. By stipulation of the parties, the motion was thereafter made applicable to the final decree, which was entered on March 26, 1954. After a hearing, the court granted the husband's motion to modify on the "grounds of change in circumstances and [his] inability * * * to pay order." In its written order of modification the court found, in substance, that there had been a change in circumstances surrounding the husband's financial condition since the entry of the interlocutory decree in that the original provisions for support were based upon the husband's oral agreement at the time of the divorce trial to pay the specified sums, and that agreement was made the basis for the decree's provisions; that no evidence as to the husband's financial conditions, his earnings or earning capacity, nor of the needs of the wife and minor children was adduced at the divorce trial; that the husband made the agreement with the hope, expectation and understanding that his earnings and monthly income would be substantially increased following the entry of the interlocutory decree, either in the position in which he was then employed or in another position which he was expecting soon to take; that neither of these expectations was realized, and as a result he had not been able to make the payments required; that he was obliged to borrow money in order to make the payments up to and including February 26, 1954; and that he had no property or income of any kind, other than his earnings, which he might use to comply with the court's original support order. Accordingly, the court reduced the support payments for each child to $75 per month and the alimony payment for the wife to $1 per month.

The evidence indisputably shows that the husband's take-home pay at the time he agreed to the original payments was $338.62 per month, and that it remained the same thereafter, less $2 because of increased social security deductions; and that he was obliged to borrow $3,200 from his mother in order to make the support payments up to February 26, 1954.

[1–3] Defendant wife contends that there was no showing of changed circumstances to justify the modification. Since it "would be incongruous to allow an appealable order to become final and yet to concede the power of a court at a later date, upon the same state of facts, to issue an order nullifying it", Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403, it is generally held that the "trial court is without authority to make an order reducing the amount of alimony [or support payments] awarded in an interlocutory [or final] decree of divorce in the absence of a showing that there has been a change in conditions subsequent to the entry of [such] decree." Ralphs v. Ralphs, 86 Cal.App.2d 324, 325, 194 P.2d 592. However, upon a proper showing, "the court possesses power to modify [a support] order because of changed circumstances, § 139, Civ.Code"; the justification for such "order depends on the facts and circumstances of each case"; and the "propriety of [the] modification rests largely in the discretion of the trial court." Moore v. Moore, 133 Cal.App.2d 56, 58–59, 283 P.2d 338, 341; Triest v. Triest, 67 Cal. App.2d 320, 322, 154 P.2d 2.

[4] At the modification hearing, plaintiff husband testified that at the time of the divorce trial he had been working for a record firm about a year and a half; that he anticipated an increase in salary as of that time, and a further raise later; that he had also been negotiating with another company for a better position, with "substantially more" money; that neither of these expectations materialized and, in fact, his net monthly salary was $2 less because of additional social security deductions. Defendant wife argues that these expectations of plaintiff husband have no pertinency because it does not appear that they were communicated to her or the court at the divorce trial. She calls attention to the affidavit of the attorney who then represented her, stating that the original support payment "was not conditioned upon any increase in earnings." She relies on the rule pertaining to contracts that the undisclosed intentions of a party to a contract do not furnish a basis for its modification. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13; Bell v. Minor, 88 Cal.App. 2d 879, 882, 199 P.2d 718. However, a support award does not have the finality of the ordinary contract as it is subject to reexamination by the court at any time. Civ. Code, § 139; Woolams v. Woolams, 115 Cal.App.2d 1, 7, 251 P.2d 392; Dunning v. Dunning, 114 Cal.App.2d 110, 114, 249 P.2d 609. Plaintiff husband maintains that the disclosure was made at the divorce trial as appears from his own testimony at the modification hearing, but that if there is any uncertainty or ambiguity in the record on that point, such disclosure could reasonably have been inferred by the court at the modification hearing as a circumstance justifying the reduction in the support payments. Kossine v. Styliano, 40 Cal.App. 2d 721, 724, 105 P.2d 952. But the parties' conflicting views on this question of disclosure need not be resolved here, for the propriety of the modification order does not necessarily depend upon such disclosure.

[5] In line with his motion for modification, plaintiff husband testified that his expectations as to future salary increases constituted the basis for his agreement to make the support payments originally provided. These appear to have been reasonable expectations resting on reasonable prospects and since the original support order was based, in part at least, on his consent, the circumstances which motivated that consent were material to that order. An analogous situation is the case where the court may make an alimony award based not on the husband's actual earnings but on his ability to earn money, his future prospects. Webber v. Webber, 33 Cal.2d 153, 160, 199 P.2d 934; McGann v. McGann, 82 Cal.App.2d 382, 388–389, 186 P.2d 424; see also Pencovic v. Pencovic, 45 Cal.2d 97, 102, 287 P.2d 501. Defendant relies on certain Alabama cases holding that any anticipated increase in income on the part of the husband at the time of the divorce decree, which may not have materialized, cannot be considered as a ground for reducing alimony payments. Aiken v. Aiken, 221 Ala. 67, 127 So. 819, 820; Colton v. Colton, 252 Ala. 442, 41 So.2d 398, 399. But in the light of the rule in this state that "a court is entitled to make [support allowances] in view of a persons earning ability", Woolams v. Woolams, supra, 115 Cal.App. 2d 1, 7, 251 P.2d 392, 395, and his reasonable expectations are an essential consideration, Pencovic v. Pencovic, supra, 45 Cal.2d 97, 102, 287 P.2d 501, the contrary reasoning of the Alabama cases is not persuasive.

[6, 7] Whether the support order rests upon agreement of the parties, see Adams

v. Adams, 29 Cal.2d 621, 624–625, 177 P.2d 265; Hough v. Hough, 26 Cal.2d 605, 612, 160 P.2d 15, or is determined by the court upon evidence, Becker v. Becker, 64 Cal.App.2d 239, 242, 148 P.2d 381, the question of reasonable expectations is material and a failure to realize them may constitute a change of circumstances justifying modification of the order. As further indication of the need for modification of his support obligations, plaintiff cites the sizable sum he borrowed from his mother to meet the payments originally scheduled. Shulman v. Shulman, 125 Cal.App.2d 120, 121–122, 269 P.2d 923. Certainly, it cannot be disputed that "the trial court entering the decree still retains jurisdiction to modify its orders if circumstances warrant the change, and the proper procedure for a party who is unable to comply with an order for the payment of alimony or the support of his minor children is to seek a modification of the order—not to resist its enforcement, thereby subjecting himself to contempt proceedings." Bailey v. Superior Court, 215 Cal. 548, 555, 11 P.2d 865, 868; Woolams v. Woolams, supra, 115 Cal.App.2d 1, 7, 251 P.2d 392. Here upon the record disclosing the failure of plaintiff's reasonable expectations as a change of circumstances, there appears to be nothing inequitable in the amount of the reduced payments—$75 per month for each child and $1 per month alimony for defendant wife—and in the absence of a clear showing of the court's abuse of its discretion in making such modification, its order must be sustained. Leupe v. Leupe, 21 Cal.2d 145, 151, 130 P.2d 697; Reed v. Reed, 128 Cal.App.2d 786, 793–794, 276 P.2d 36.

The order appealed from is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The holding in the majority opinion is in direct conflict with the law of this state in two respects: First, it establishes a new rule of law in modification proceedings. Second, a trial court may now modify the support and maintenance provisions of interlocutory and final decrees of divorce without any showing whatsoever of changed circumstances on the part of the payor, and the *undisclosed expectations* of a party to a contract may be considered in absolving that party from an improvident contract. Both of these holdings will cause untold confusion in fields of law where confusion had not heretofore existed and where it should not exist. In the ensuing opinion I will set forth all of the testimony to be found in the record tending to show that there had been such a change of circumstances as the law contemplates should exist before support and maintenance provisions in a decree of divorce may be modified. I will also set forth all of the evidence in the record relative to the oral contract upon which the support provisions in the decree was based. It is entirely clear from the record that the majority opinion is based on something *other* than the law and the record in the case at bar.

In January, 1952, plaintiff husband, Charles, sued for divorce alleging desertion and extreme cruelty; Geraldine answered and cross-complained for separate maintenance alleging extreme cruelty. During the trial of the case a discussion of a financial settlement was had in the judge's chambers as a result of which Geraldine reluctantly agreed to seek a divorce rather than separate maintenance. After the conference the parties orally agreed that Charles would pay $50 per month for the support of Geraldine and $100 a month for the support of each of the two children. It was agreed that if a divorce were obtained the provisions of the oral agreement, which was orally approved by the court, would be incorporated in the decree.

The interlocutory decree awarded a divorce to Geraldine on the ground of Charles' extreme cruelty, and Geraldine was given sole custody of the two minor children. The decree ordered Charles to pay to Geraldine the sum of $200 per month for the maintenance and support of the minor children and the sum of $50 per month for her support and maintenance.*

On March 2, 1954, just prior to the entry of the final decree of divorce, Charles filed a motion for an order modifying the interlocutory decree to delete the provisions for support of the children and Geraldine and to substitute therefor a provision for $50 per month support for each of the children. It was stipulated by the parties, and ordered by the court, that Charles' motion to amend the provisions of the interlocutory decree would encompass the provisions of the final decree as well.

After a hearing, the court granted Charles' motion to modify on "grounds of change in circumstances and inability of [Charles] to pay order. [Charles] to pay $150 per month and $1.00 to wife for alimony until further order of Court. * *"

In his affidavit in support of his motion for modification Charles averred that the support provisions were "based upon an oral agreement between said parties at the time of the trial of said action, and that said oral agreement was approved by the court and made the basis for said judgment; that affiant entered into said agreement *upon the hope and expectation that his earnings and monthly income would be substantially increased, either in the position in which he was and is now employed or in another position which he was expecting to take shortly after the entry of said judgment; that neither of these expectations were realized;* that as a result affiant has never been able to make payment under said judgment; that his total take-home pay and income from all sources is $338.62 per month; that his personal and business expenses exceed $322 per month; that affiant has no property, goods or income of any kind which he may use to comply with said judgment, nor no prospects of any increase in his earnings in the immediate future. * * *" (Empasis added.)

It is Charles' position that the original award of $250 was agreed to by him because of his *disclosed* expectation that he would receive a raise in salary or be employed by another firm where he would receive a larger salary; that the failure of either expectation to materialize constituted such a change in circumstances as to warrant a modification of the support provisions. Geraldine's position is that there has been no change in Charles' financial circumstances in the period between the time of the original award and the motion for modification; that Charles' expectations had no bearing on the original agreement and were not disclosed at that time.

It is not disputed that Charles' income (with the exception of an additional deduction of $2.00 for increased social security payments) remained absolutely the same. During the period subsequent to the interlocutory decree and just prior to the time of his motion for modification Charles paid no part of the support and maintenance ordered by the interlocutory decree. Just prior to his motion for modification he borrowed the sum of $3,200 from his mother and fulfilled his obligation for that period of time.

Assuming for the moment that Charles' expectations of a higher salary or more lucrative position could form a legitimate basis for a support and maintenance award, the first question to be discussed is whether or not Charles' expectations were disclosed at the time of the original award. *All the evidence in the record as it relates to this point will be set forth herein.*

The affidavit of Edward L. Barry, the attorney for Geraldine at the time of the original award, contains this statement: "In aid of a settlement, there was a conversation between the attorneys and in the presence of Judge Wollenberg on the subject of custody of the children and financial support. Affiant [Barry] took the position that a total of somewhere between $400 and $500 per month should be paid for the support of defendant and the children but affiant does not remember the exact figure which he proposed. Counsel for plaintiff suggested a much lower figure, something less than $250 per month, saying that plaintiff could not pay the amount demanded by affiant.

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* There was no reference to any agreement between the parties; there was no reference to any termination date for the payment of child support and/or support and maintenance for Geraldine.

"Thereupon there was a discussion as to what amount plaintiff could and would pay, and the attorneys agreed that the sum of $250 per month was a proper amount to be paid as support money for defendant and the children and that this amount would be divided at $100 per month for each child and $50 per month for defendant. It was also agreed that current dental bills of the children and a bill of Best & Co. would be paid by defendant. The parties then and there agreed that defendant as cross-complainant would take a decree of divorce provided that she had evidence to support such decree, and that she would have the custody of the children and that plaintiff, as cross-defendant, would be required to pay the sum of $100 per month for the maintenance and support of each of the minor children and the sum of $50 per month for the maintenance and support of defendant and cross-complainant. It was also agreed that plaintiff would be required to pay the bill of Best & Co. in the sum of $189.45 and the current dental bills of the minor children of plaintiff. I do not know whether or not either the Best & Co. bill or the dental bills have been paid.

"The oral agreement made in the chambers of Judge Wollenberg, as set forth above, was approved by him verbally and it was agreed that if a divorce was obtained, all of the provisions of said oral agreement would be incorporated in the decree. Thereupon the case proceeded to trial and the court ordered judgment for divorce in favor of defendant and cross-complainant and also the other matters above mentioned and on February 26, 1953, the interlocutory decree of divorce was submitted to counsel for plaintiff and cross-defendant and approved by them and signed by Judge Wollenberg. Said interlocutory decree includes the matters above set forth plus an allowance for attorneys' fees and costs, which allowance has been paid.

"The sum of $250 per month was not conditioned upon any increase in earnings. Nothing was said about the provisions of the decree being based upon anything which was to take place in the future. Nothing was discussed or considered which involved any question as to future payments. * * *"

Mr. Barry's affidavit was not controverted. *Charles' affidavit, heretofore quoted, does not aver that he disclosed his expectations.*

The following testimony was adduced at the hearing on the motion for modification:

After testifying that he worked as a salesman at the time of the original award and that his salary was $338.62 a month, he was asked:

"Q. [By counsel for Charles]: Now, at that time, at the time the entering of this decree of divorce, did you have pending any negotiations for any other employment at that time?" Counsel for defendant objected on the ground that the question was "irrelevant, incompetent, and immaterial, as to what he was negotiating for.

"The Court: It might tend to show what his condition was, financially, at least. It might show hope, anyway.

"The Witness: I was at that time contemplating taking a position with another record firm, and had been interviewed for it, and, all things being equal, expected to take it; however, I would have had to start at a somewhat lower salary. However, in my years in the business I have watched this particular firm move their men up, and I expected that, had I taken the job, the same would have happened to me.

"Mr. O'Brien: Q. And what would you have been making with that firm, if you know at this time?" Counsel for defendant objected. The court then questioned the witness and ascertained that he was still working for the same firm; that he was making $2 per month less because of increased social security deductions; that if he had taken the other position he would now be making "substantially" more. His attorney then proceeded to question him:

"Q. At the time when this divorce was taken, on February 26, 1953, did you anticipate an increase in salary?

"A. Yes."

Counsel for defendant objected to the question and answer as "speculative. His expectations are of no consequence. The question is whether there is any difference now from what there was then." The court stated that he wanted to know "this man's frame of mind, what bearing that has on his financial condition—

"Mr. O'Brien: Q. May I ask you this: *Wasn't it a fact that the possibility of your raise—of a raise in your position—wasn't that discussed between us, including counsel for your wife?*" After this question follow three pages of objections and colloquy between court and counsel. Then the following occurred:

"Mr. O'Brien: Q. *Did you answer my last question, whether or not the expectancy of a raise on your salary was discussed by you and the attorneys for your wife?*

"Mr. Livingston [counsel for defendant]: That involves another question.

"The Court: You may reserve your same objection.

"Mr. Livingston: I don't see how anything that is merged into an agreement which, in turn, is merged into a judgment of the Court is admissible in evidence. That is an entirely different principal. [Sic.]

"The Court: I want to know this man's frame of mind, so that will be considered part of the same principal [sic].

"The Witness: *Yes.*

"Mr. O'Brien: Q. And in those discussions you stated that you expected a raise within 18 months of your employment?

"Mr. Livingston: Same objection.

"The Court: I don't think the agreement itself is pertinent. Did you expect a raise, *regardless of what you said to anybody?*

"The Witness: Yes.

"The Court: And was that expectation used by you as a basis for the payments—the proposal as to what you would pay?

"The Witness: Yes." (Emphasis added.)

I find no other evidence in the record concerning the disclosure, or non-disclosure, of Charles' expectations at the time of the original award. I find no answer by Charles to his attorney's question other than the equivocal "yes" which seems to be an erroneous answer to the question as to whether or not he had answered the question concerning disclosure. It appears, however, from the questions asked that the trial judge was of the opinion that the disclosure or non-disclosure of Charles' expectations at the time of the original agreement was immaterial. It will be recalled that he asked Charles if he expected a raise *"regardless of what you said to anybody?"*

If it were not for the uncontroverted affidavit of Mr. Barry, counsel for defendant at the trial of the divorce action, which the parties stipulated might be considered on appeal, we could assume, in line with the rule set forth in Russ v. Russ, 68 Cal.App.2d 400, 405, 156 P.2d 767; Leupe v. Leupe, 21 Cal.2d 145, 151–152, 130 P.2d 697, and Valentine v. Valentine, 47 Cal.App.2d 438, 440, 118 P.2d 17, that as the record of the former hearing is not before us, we cannot say that the proof was the same as that adduced at the original hearing and that we must assume that other and different facts were established at the second hearing. It has been here stipulated (Cl.T. 26) that no testimony was taken at the trial of the divorce action concerning the amount or source of Charles' income. This does not appear to be a case in which there is a conflict in the evidence so that we must resolve those conflicts in support of the order appealed from. Werner v. Werner, 120 Cal.App.2d 248, 251–252, 260 P.2d 961; McKee v. McKee, 108 Cal.App.2d 488, 490, 239 P.2d 37.

Since the record shows that Charles did not disclose his expectations of either a better position or an increase in salary at the time of the original award, and that the trial judge considered disclosure of those expectations immaterial, should the failure of those expectations to materialize constitute such a change of circumstances as to warrant a modification of the support award? Or did the trial court abuse its discretion in its order of modification?

No California case bearing upon this point has been called to our attention and independent research has revealed none. There is an Alabama case where the question was considered although it does not appear from the opinion whether or not the husband's anticipated increase in income was revealed at the time of the original award. In Colton v. Colton, 252 Ala. 442, 41 So.2d 398, 399, where the alimony awarded was based on agreement of the parties, it was held: "The wife was granted the divorce. We must proceed on the assumption that the decree rendered was equitable and fair. *Any anticipated increase in income on the part of the husband at that time, which may not have materialized, cannot be considered as a ground for reducing the alimony payments to the former wife.*" (Emphasis added.) See, also, Aiken v. Aiken, 221 Ala. 67, 127 So. 819. The rule in California is well established that there must be a showing of changed circumstances before an award of alimony may be modified. Simpson v. Simpson, 134 Cal.App.2d 219, 224, 285 P.2d 313; Ralphs v. Ralphs, 86 Cal.App.2d 324, 325, 194 P.2d 592; Moore v. Moore, 133 Cal.App.2d 56, 58, 283 P.2d 338. A brief summary of the facts presented here shows that Charles' income has remained the same as it was at the time of the interlocutory decree (with the exception of the increased $2.00 social security deduction heretofore mentioned); he is employed in the same position with the same company. Geraldine is living with her family in Illinois in a home she helped her father to purchase with the proceeds of sales of property received by her earlier from Charles; the minor children live with her; she is of necessity unemployed due to an agreement with her parents that she remain at home and care for the children; her parents and Charles' mother have assisted her financially. The Colton case appears to be in line with California cases holding that the undisclosed intentions of a party to a contract do not furnish a basis for its modification. Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13, 16; Bell v. Minor, 88 Cal.App.2d 879, 882, 199 P.2d 718. In the Brant case this court said: "But it is now a settled principle of the law of contract that the undisclosed intentions of the parties are, in the absence of mistake, fraud, etc., immaterial; and that the outward manifestation or expression of assent is controlling. This is the 'objective' standard, established by the modern decisions and approved by authoritative writers. See Zurich Gen. Acc., etc., Co. v. Industrial Acc. Comm., 132 Cal.App. 101, 22 P.(2d) 572; McConnell v. Lamontagne, 82 N.H. 423, 134 A. 718; 1 Williston, Contracts, § 21, p. 21; 4 Wigmore, Evidence, 2d Ed., p. 191; Restatement, Contracts, § 71." It was also held in Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal.App.2d 226, 230, 296 P.2d 368, 370, that "Both sides also agree that in determining whether there has been a mutual consent to contracts the *courts are not interested in the subjective intent of the parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestations of consent.* Brant v. California Dairies, Inc., 4 Cal.2d 128, 48

P.2d 13; Canavan v. College of Osteopathic P. & S., 73 Cal.App.2d 511, 166 P.2d 878." (Emphasis added.) Inasmuch as here there is *no* showing in the record that Charles ever disclosed his expectations of increased income at the time the agreement was made, and that the trial judge considered disclosure immaterial, it appears that there is no merit to his argument that the frustration of those expectations constituted a sufficient change of circumstances to warrant a modification of the alimony and support award.

The majority opinion states that "At the modification hearing, plaintiff husband testified that at the time of the divorce trial he had been working for a record firm about a year and a half; *that he anticipated an increase in salary as of that time, and a further raise later; that he had also been negotiating with another company for a better position with 'substantially more' money*; that neither of these expectations materialized and * * *." What Charles actually testified to has been heretofore set forth. He also said that he had been "contemplating" taking a job with another company where he would have had to start "at a somewhat lower salary" although he had seen that company "move their men up"; and that he thought if he had gone with the company we would have been making "substantially more" money; he also testified that he had, at the time of the divorce, been working for a year and a half with no raise in salary. There was absolutely no evidence that his hope of receiving a raise, or a better position, had ever been communicated to anyone, either prior to, or at the conference between the parties and their counsel in chambers.

The majority concludes that plaintiff husband's undisclosed "great expectations" constituted the basis for his agreement to make the support payments originally provided. "These appear to have been reasonable expectations resting on reasonable prospects and since the original support order was based, in part at least, on his consent, the circumstances which motivated that consent were material to that order." The majority opinion then cites Webber v. Webber, 33 Cal.2d 153, 160, 199 P.2d 934, McGann v. McGann, 82 Cal.App.2d 382, 186 P.2d 424, and Pencovic v. Pencovic, 45 Cal.2d 97, 287 P.2d 501, for the proposition that the court may make an alimony award based not on the husband's actual earnings but on his ability to earn money, "his future prospects."

The cases cited in the majority opinion are not authority for the situation prevailing in the case at bar. In Webber v. Webber, supra [33 Cal.2d 153, 199 P.2d 936], we reversed the trial court which had, we found, prejudged the case and had himself "waived" any support for the wife. The husband had testified that he had made from $40 to $47 per week "take-home-pay"; that he had not sought other employment "although he 'could have gone to work for $140 a month'" but had not done so because of the trial coming up, but stated he could get another job. We held, after discussing defendant husband's testimony concerning his ability to earn money and get another job, that not only his actual earnings but his ability to earn money affected the propriety of an alimony award. In the case at bar, Charles agreed to the monthly payments knowing that he was then earning a certain sum per month. If his expectations of a better position or more money entered into his calculations, they were not disclosed to anyone. The affidavit of Geraldine's attorney shows that at the time Charles agreed to the payments, there was a discussion as to "what amount plaintiff could and would pay"; that "the sum of $250 per month was not conditioned upon any increase in earnings. Nothing was said about the provisions of the decree being based upon anything which was to take place in the future. Nothing was discussed or considered which involved any question as to future payments."

In McGann v. McGann, supra [82 Cal.App.2d 382, 186 P.2d 428], the defendant was engaged in the practice of dentistry. The evidence adduced showed that defendant's income during the five months of his practice (after returning from the service) had increased substantially each month. The court reluctantly affirmed a very low support award but noted that the plaintiff wife had the right to apply again for a change in the allowance. It was concluded that "the court's error in failing to consider the matter of the defendant's earning ability is without prejudice, for to grant an award on future earning ability based on such a short actual experience of practice might be too speculative, especially as the amount awarded has no aspects of finality. If his earnings have continued at the same rate, or increased, the court, upon application, necessarily will be required to award a substantially larger sum." In the case at bar Charles' earnings were known at the time he agreed to make the payments. Any undisclosed expectation of a better position or more salary at his present job (especially in view of the fact that he had been working for a year and a half without an increase) would surely be much too speculative to consider even had such expectations been disclosed which they were not.

In Pencovic v. Pencovic, supra [45 Cal.2d 97, 287 P.2d 503], we specifically held that there was "ample evidence of changed circumstances and of defendant's financial ability to meet his children's needs and of his ability to earn money in the future." It will be recalled that the defendant was the founder of the "Wisdom, Knowledge, Faith, and Love Fountain"; that he as "Master" of this religion received large donations of money from the members and that we held that these donations were, as found by the trial court, in reality compensation for his services. We also noted that he was an "able-bodied man" and that the trial court could reasonably conclude that he had the earning capacity to support his ill wife and children. The record there showed that defendant had earned a good salary; that he had received, from the "Fountain" funds with which to support his family, etc.

The "earning ability" of the payor in the cases just discussed was based on past performance and evidence of what had been earned and what could be earned. *The conclusion reached by the court in each of the above cases was not based on the premise that the payor had an undisclosed expectation of making more money at the time he agreed to the support payments.*

As an alternative ground for urging the affirmance of the modification orders, Charles contends that the fact that he was forced to borrow money to pay the accumulated support payments is a sufficient showing of changed circumstances. Charles relies on Becker v. Becker, 64 Cal.App.2d 239, 148 P.2d 381, and Shulman v. Shulman, 125 Cal. App.2d 120, 269 P.2d 923, for the proposition that the incurrence of financial obligations to third parties is a proper subject for consideration on a motion to modify an alimony award.

In the Becker case, supra [64 Cal.App. 2d 239, 148 P.2d 383], the court noted that the record of the first hearing was not before the court and that, therefore, the rule set forth in Leupe v. Leupe, 21 Cal.2d 145, 151, 130 P.2d 697, was controlling. It was also stated that the wife owned her own home, "had the ability to do some work," and was able to meet her own needs at least in part; that the husband had remarried, earned $50 per week and was indebted in the sum of $150 which he had borrowed to pay on account of alimony. The court indulged in the presumption, in the absence of a record of the testimony taken at the time of the original award, that other and different facts were established at the time the alimony award was modified. As I have heretofore pointed out, the record here shows, without conflict, that Charles' circumstances have remained precisely the same as they were at the time of the original award. His indebtedness to his mother in order to pay arrearages in the support and maintenance ordered is the obvious result logically following from the fact that he had made no effort to pay any part of the alimony and support provisions of the interlocutory decree. Standing alone, it is my opinion that this indebtedness cannot be considered a sufficient change in circumstances to warrant a reduction in the support provisions of the interlocutory and final decrees of divorce. In Shulman v. Shulman, supra [125 Cal.App.2d 120, 269 P.2d 924], the court held that the "record affirmatively shows evidence of change in condition since the prior hearing. There is testimony that respondent's income for the year of 1951 was $3,156.43, and during that year respondent paid appellant $2,880, and that in 1951 defendant sold a diamond ring in order to realize $1,500. It also appears that appellant in October, 1951, transferred her home to her sister without consideration, although this house was worth $11,000 less an encumbrance of $2,500." The court also pointed out that the husband had paid to his former wife more than his taxable profit from his business; that he had borrowed $2,000 from a bank and $1,000 from a private individual; that he had mortgaged his truck and car to secure payment; that he had been in a wheel chair for the entire period and so required more money for his personal living expenses because he was so afflicted. It is quite obvious that the situation in the Shulman case is not at all similar to the one under consideration.

In the case at bar, Charles had never supported his wife and children since the divorce; she was living with her parents under an agreement which provided that she had to live at home and care for the children rather than seeking employment; her parents and Charles' mother had supported her and the children.

While it is quite true that a modification of an award of alimony pursuant to section 139 of the Civil Code rests within the discretion of the trial court and that its order may not be set aside without a clear showing of an abuse of discretion, it appears to me that the modification here involved was, in the absence of any showing in the record of a change of circumstances, an abuse of discretion. Ralphs v. Ralphs, 86 Cal.App. 2d 324, 194 P.2d 592; Molema v. Molema, 103 Cal.App. 79, 283 P. 956; Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403.

I would reverse the order appealed from.

Rehearing denied; CARTER, J., dissenting.

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48 Cal.2d 276

Italo RINALDI and Mary L. Rinaldi, Plaintiffs and Respondents,

v.

Ernest GOLLER, Defendant and Appellant.

S. F. 19254.

Supreme Court of California,
In Bank.
April 9, 1957.

Rehearing Denied May 8, 1957.

Action for determination of rights between landlords and chattel mortgagee of defaulting tenant with respect to mortgaged building which tenant had erected on leasehold under agreement with landlords providing that, at expiration of ten year lease, landlords had option to purchase improvements. The Superior Court, San Mateo County, Edmund Scott, J., rendered judgment for the landlords, and the chattel mortgagee appealed. The Supreme Court, Shenk, J., held that evidence sustained trial court's finding that such building erected on leasehold by tenant who subsequently defaulted was, as between landlords and tenants, realty.

Judgment affirmed.

Opinion, 300 P.2d 736, vacated.

1. Fixtures 🔑**35(2)**

In action for determination of rights between landlords and chattel mortgagee of tenant with respect to mortgaged building which tenant erected on leasehold, for automotive repair business, under agreement with landlords providing that, at expiration of ten year lease landlords had option to purchase improvements if lease had not been renewed, evidence sustained trial court's finding that such building, a structure 65 feet by 30 feet, erected on concrete foundation and having metal frame was, as between landlords and tenants, realty. West's Ann.Civ.Code, §§ 660, 1013, 1019.

2. Fixtures 🔑**7**

A building need not be physically anchored to land to be considered realty, but may be such though it is secured to ground by gravity alone. West's Ann.Civ. Code, §§ 660, 1013, 1019.

3. Fixtures ⚿4

One of the important criteria determining classification of objects as fixtures is intention of parties to the annexation.

4. Fixtures ⚿33

Even if lease contemplated that tenants might have right to remove building which was fixture as between landlords and tenants, where tenants defaulted in rent and abandoned premises, tenants forfeited any claim under lease to remove the building.

5. Chattel Mortgages ⚿138(3)

Rights of chattel mortgagee of tenants are derivative and he cannot assert a greater right against landlords than can tenants.

6. Fixtures ⚿14

Where tenants lost right to remove building which they erected on leasehold and which was fixture as between them and landlords by default and abandonment, rights of one to whom they had given chattel mortgage on building were similarly lost.

7. Chattel Mortgages ⚿138(1)

Where lease gave landlords option to buy improvements at end of term, removal of improvements before expiration of term would deprive them of benefit of their bargain, and one to whom tenants, who had subsequently abandoned premises and defaulted in their obligations to pay rent, had given chattel mortgage to such an improvement could not foreclose it and impair landlords' rights.

8. Landlord and Tenant ⚿161(1)

In absence of plain language in lease as to status of property placed on premises before expiration of term or wrongful termination of lease, general rules requiring removal during continuance of term as condition of right of removal should govern.

9. Fixtures ⚿33

The statute permitting tenant to remove trade fixtures during term of lease could not be invoked where lease had been terminated because tenants had broken covenant to pay rent and landlords had re-entered. West's Ann.Civ.Code, § 1019.

◆

Morris Oppenheim, San Francisco, for appellant.

J. Horton Beeman and Royal E. Handlos, San Francisco, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff, in an action for declaratory relief, for overdue rent, and to quiet title.

On July 27, 1948, the plaintiffs entered into a lease of three vacant lots to the defendants Hamilton and Grays who were engaged in an automobile repair business. The lease was for a term of ten years from that date. The lessees covenanted to pay rent at a monthly rate which was to increase in stated amounts and at specified intervals. The lease provided: "* * * if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein agreed to be kept by the lessees, then it shall be lawful for the said lessors, at their option, to terminate this lease and to re-enter the said premises and remove all persons therefrom."

On August 2, 1948, the lessees borrowed $4,000 from the defendant Goller to finance the construction of a garage on the leased premises. The loan was secured by a chattel mortgage on the building to be erected. The chattel mortgage was not recorded. The building was then constructed.

In 1951, the lessees left the premises. They did not return or repossess the property, nor were they ever seen again by the lessors. At the time they left they had paid only one year's rent under the lease.

On August 27, 1952, in an action in which the plaintiffs were not joined, the defendant Goller obtained a judgment of foreclosure on the chattel mortgage.

On October 3, 1952, the plaintiffs commenced the present action against Hamilton, Grays, and Goller. The complaint alleged three causes of action: the first for declaratory relief; the second for overdue rent from the lessees, and the third to quiet the plaintiffs' title to the premises. Hamilton and Grays defaulted, and their defaults were duly entered. Goller answered, denying, *inter alia,* that the plaintiff has "* * * any right, title or interest in or to the building which plaintiffs refer to and consider in said complaint as real property; and in that behalf this answering defendant alleges that as between all of the parties to this action was and is personal property." Goller further alleged that the chattel mortgage was a valid lien on the building apart from the realty and that the building was not a fixture.

The court found that the allegations of the plaintiffs' complaint were true and that the allegations and denials of Goller's answer were untrue. Judgment was entered for the plaintiffs on all three counts. Goller alone appealed and will be referred to as the defendant. The appeal is presented on a settled statement.

The defendant contends that the findings of the trial court do not support the judgment; that even if they are thus sufficient they are not supported by the evidence; that the judgment quieting the plaintiffs' title to the improvements is contrary to law, and that the chattel mortgage on the improvements and the judgment in the foreclosure action entitle the defendant to the improvements.

It is clear from a consideration of the record that the findings are supported by the evidence and that the findings in turn support the judgment. It remains to determine whether the judgment granting the plaintiffs title to the improvements is legally supported.

In Simms v. County of Los Angeles, 35 Cal.2d 303, 309, 217 P.2d 936, 940, this court said quoting from San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 149, 105 P.2d 94, 133 A.L.R. 416, "It is settled that three tests must be applied 'in determining whether or not an article is a fixture—namely: (1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation.'"

The statutory provisions are found in the Civil Code. Section 660 of that code provides: "A thing is deemed to be affixed to land when it is * * * permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws * * *." At the time of the transaction here involved section 1013 provided: "When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it." Section 1019 provides: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

[1, 2] It cannot be said that the trial court erred in its determination that the building is realty and that the defendant Goller has no interest therein. The building, a structure sixty-five feet by thirty feet was erected on a concrete foundation. The interior of the building was floored in concrete. The building is of metal frame construction and is enclosed in corrugated iron. It does not appear how this metal building is attached to the foundation. It is settled, however, that a building need not be physically anchored to the land to be considered realty. It may be found to be a fixture though it is secured to the realty by force of gravity alone. City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148; Southern California Tel. Co. v. State Board, 12 Cal.2d 127, 82 P.2d 422. "* * * in distinguishing permanence from transitoriness, it is not

necessary to identify it with perpetuality." Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 393, 175 P.2d 512, 518.

That the structure was necessary to the use of the property for the conduct of the automobile repair business may be readily implied from the facts. The trial court may reasonably have concluded that the building was essential to the use of the realty in the transaction of that business. See M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 38, 63 P.2d 818.

[3] Of the criteria which determine the classification of objects as fixtures the intention of the parties to the annexation is an important factor. In Gosliner v. Briones, 187 Cal. 557, 560, 204 P. 19, 20, this court said "* * * the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties."

The lease contains the following covenant relating to the intention of the parties: "At the expiration of said lease, and if there has not been and/or will not be another contract entered into, the Lessors have the option to purchase all improvements, provided the Lessees intend to sell."

The option clause contemplates purchase of the improvements by the lessor at the termination of the lease. By necessary implication, the alternative to the exercise of the option is the removal of the improvements at the end of the term.

[4] The plaintiffs contend that even if an intention that the fixtures should be removable were implied, the default in the payment of rent and the lessors' reentry for breach of condition forfeited any claim the lessees might have asserted under the lease. They argue that Lawrence v. Knight, 11 Cal. 298, and Toellner v. McGinnis, 55 Wash. 430, 104 P. 641, 24 L.R.A., N.S., 1082, conclude the case in their favor. Both of these cases involved an attempt by a defaulting lessee to enforce a covenant to purchase improvements against the lessor. Both held the covenant unenforceable in behalf of a defaulting lessee as against the innocent lessor. The present case is not an action by the lessee or chattel mortgagee who claims under him to enforce a covenant in the lease. The lease is here examined to determine the intention of the lessor and lessee with regard to the right of the removal of the improvements. The above cases are, therefore, not controlling. The plaintiffs' contention finds support in Glaser v. North's, 201 Or. 118, 266 P.2d 680. In that case, the Supreme Court of Oregon held that the abandonment of leasehold premises upon default by the sublessee in the payment of rent to the lessee and the re-entry by the sublessor forfeited the sublessee's right to remove the fixtures. The fixtures were encumbered by a chattel mortgage executed by the sublessee to a third party. The right to remove the fixtures at or before the expiration of the sublease was expressly reserved to the sublessee. It was held that the abandonment of the premises by the sublessee and re-entry by the sublessor terminated the right of the sublessee to remove the improvements and consequently defeated the lien of the chattel mortgagee on the improvements. The court pointed out that a contrary holding would work an undue hardship on the sublessor. The court relied upon Bush v. Havird, 12 Idaho 352, 86 P. 529, 530, where the problem was analyzed as follows: "* * * Did the mortgagee or his assignees acquire any greater or superior rights to those of the tenant or mortgagors? We think there can be but one answer to that question. When the mortgagee took a mortgage on this property he took it subject to all the restrictions placed by law upon the tenant, who was the mortgagor, and he could acquire no rights greater than or superior to those of his mortgagor [citing cases]. When the tenant abandoned his right of removing this property and lost the possession and right to re-enter, that disability extended to his mortgagee with equal force and effect. The law will neither impose upon the landlord a duty nor necessity of either housing or

taking care of the fixtures which his tenant leaves behind after his term has expired. Neither will the law permit the tenant nor anyone claiming under him, to re-enter the premises, for the reason that to do so would encourage breaches of the peace, and would in many cases hazard and impair the landlord's rights of leasing the premises to another tenant, and lessen the full and free enjoyment of those premises by such tenant."

[5] The rights of the chattel mortgagee are derivative. He cannot assert a greater right against the lessor than can the lessees. "A mortgagee from a tenant has no greater right to remove trade fixtures from the premises after the tenant has surrendered possession to the landlord than the tenant himself would have. Whatever right or title the mortgagee from the tenant may have cannot rise higher than its source, and is measured by what the rights of the tenant would be at the time the mortgagee asserts his claim." Donahue v. Hardman Estate, 91 Wash. 125, 128, 157 P. 478, 480.

[6] If the lessees have lost the right to remove the fixtures, it follows that the right of the defendant Goller in the present case is similarly affected. United Pacific Ins. Co. v. Cann, 129 Cal.App.2d 272, 276 P.2d 858; Glaser v. North's, supra, 201 Or. 118, 266 P.2d 680; Donahue v. Hardman Estate, supra, 91 Wash. 125; Shelton v. Jones, 66 Okl. 83, 167 P. 458, L.R.A. 1918 A, 830; 14 C.J.S., Chattel Mortgages, § 33, p. 642; 22 Am.Jur., Fixtures, § 43, p. 756; 11 R.C.L., Fixtures, § 16, p. 1072.

[7] Furthermore, the removal of the building would deprive the lessors of a part of the consideration for the lease. The lease gives the lessors an option to buy the improvements at the end of the term. Removal of the building years before the expiration of the term would, therefore, deprive the lessors of a benefit of their bargain. To require the lessors to exercise the option before the expiration of the term of the lease would force a new agreement upon the parties, and require the lessors, if they chose to exercise the option, to pay a price which would not reflect the substantial diminution in value which ten years' depreciation might produce.

In Whipley v. Dewey, 8 Cal. 36, 39, this court said: "It is well settled that a tenant cannot remove erections, made by him on the premises, after a forfeiture or reentry for covenant broken. Admitting the defendant had agreed to allow the plaintiff to remove, after expiration of the lease, the intention of the parties must be confined to the legal expiration thereof, by its own limitation, and not by the wrongful act of lessees terminating the same. The consideration of the contract * * * was the lease, and the plaintiff, having voluntarily or illegally terminated the same, ought not be allowed to set up a right under the contract."

[8] The cases which give the lessee a reasonable period of time after the termination of the lease to remove improvements have involved the exercise of express, bargained for, agreements relating to the right of removal. See Earle v. Kelly, 21 Cal.App. 480, 484, 132 P. 262; Cone v. Western Trust & Savings Bank, 21 Cal.App.2d 176, 68 P.2d 981; Clark v. Talmadge, 23 Cal. App.2d 703, 74 P.2d 825. In the absence of plain language in the lease as to the status of the property before the expiration of the term, or upon wrongful termination of the lease, general rules of law should govern. They require removal during the continuance of the term as a condition to the right of removal. 6 A.L.R.2d 322, 330 ff.

[9] The trade fixtures provision of Civil Code section 1019 is not here applicable. That section permits the tenant to remove trade fixtures during the term of the lease. Here the lease had been terminated because of covenant broken and the right of reentry had attached and had been exercised.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 394

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Clyde Robert MARSHALL, Defendant and
Appellant.
Cr. 6002.**

Supreme Court of California,
In Bank.
April 19, 1957.

Rehearing Denied May 15, 1957.

Prosecution for robbery. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction for violation of statute forbidding a person to take a vehicle without consent of owner with the intent to deprive owner of title or possession thereto and defendant appealed. The Supreme Court, Schauer, J., held that information charging robbery in violation of specific statute dealing with same and alleging that defendant unlawfully took from immediate presence of victim money and an automobile necessarily included statutory offense of taking vehicle without consent of owner with intent to permanently or temporarily deprive owner of possession and a conviction of second offense would be upheld.

Affirmed.

Opinion, 302 P.2d 681, vacated.

1. Criminal Law 🔑1081

Where defendant's counsel at oral argument before Supreme Court recognized that there was no verdict and if there had been a verdict under the circumstances it would not have been appealed from, his motion to strike word "verdict" from notice of appeal would be granted.

2. Indictment and Information 🔑191

If by commission of acts denounced by one statute defendant must always violate another, the one offense is necessarily included in the other.

3. Indictment and Information 🔑191(9)

Offense of robbery as defined by statute dealing specifically therewith does not include all the elements of statute making it an offense for any person to take a vehicle without consent of owner with intent to permanently or temporarily deprive owner of title to or possession thereof, and a person charged simply with robbery in the words of statute describing the offense would not be charged with and could not be properly convicted of offenses defined by second statute. West's Ann.Pen.Code, § 211; West's Ann.Vehicle Code, § 503.

4. Indictment and Information 🔑71

Accused is entitled to notice of offense of which he is charged but not as to particular circumstances thereof, and such details are furnished him by transcript of the testimony on which the indictment or information is founded. West's Ann.Pen. Code, §§ 870, 925, 951, 952.

5. Constitutional Law 🔑265

Due process of law requires that accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.

6. Criminal Law 🔑991

It is the offense specifically charged rather than the name applied to it which identifies and limits the judgment imposed on conviction of the charge.

7. Criminal Law 🔑814(1)

Where lesser offense was not included within the statutory definition of robbery, but information specifically pleaded but did not separately state lesser offense, instructions concerning lesser offense should be given if there was evidence to which instructions would be applicable but request for such instructions would be refused if there was no evidence of lesser offense.

8. Indictment and Information 🔑191(9)

Information charging robbery in violation of a specific statute dealing with the same and alleging that defendant unlawfully took from immediate person of victim an automobile necessarily included statutory offense of taking a vehicle without consent of owner with intent to permanently or temporarily deprive owner of title to or possession thereof and permitted conviction of defendant under second offense. West's Ann.Pen.Code, §§ 211, 1023, 1159; West's Ann.Vehicle Code, § 503.

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Robert W. Herrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

Roy A. Gustafson, Dist. Atty., Ventura, amicus curiae on behalf of respondent.

SCHAUER, Justice.

[1] Defendant pleaded not guilty to a charge alleged in the information in the following terms: "Robbery, in violation of section 211, Penal Code, * * * committed as follows: That [defendant] * * * did willfully, unlawfully, feloniously and forcibly take from the person and immediate presence of Jack J. Martens * * * Seventy Dollars * * * and an automobile * * *." Jury trial was waived. After trial, the court found defendant guilty of "Violation of 503 Vehicle Code, a felony, a lesser but necessarily included offense," and sentenced defendant to serve nine months in the county jail.[1] Defendant noticed an appeal "from the verdict and judgment of conviction."[2] Defendant contends that the offense of violation of section 503 of the Vehicle Code is not an offense necessarily included within the charge of robbery and that therefore his conviction cannot be upheld. We have concluded, for reasons hereinafter developed, that the trial court was correct in its express determination that violation of section 503 is "a lesser offense than that [specifically] charged in the information but necessarily included therein," and that therefore the conviction of violation of section 503 can be upheld even though violation of that statute does not come within the statutory definition of the crime of robbery.

Section 211 of the Penal Code defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 1159 of the same code provides that the defendant may be found "guilty of any offense, the commission of which is necessarily included in that with which he is charged." Section 503 of the Vehicle Code defines the offense of which this defendant was convicted as follows: "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, * * * is guilty of a felony * * *."

[2] Defendant and amicus curiae urge that (quoting from People v. Kerrick (1904), 144 Cal. 46, 47, 77 P. 711 and People v. McGrath (1928), 94 Cal.App. 520, 522, 271 P. 549) "to be 'necessarily included' in the offense charged [within the meaning of section 1159 of the Penal Code, *ante*], the lesser offense must not only be part of the greater in fact, but *it must be embraced within the legal definition* of the greater as a part thereof." (Italics added.) The "legal definition" of the greater of-

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[1] Section 503 refers to the offense thereby denounced as a "felony," but provides that the offense is punishable "by imprisonment in the state prison * * * or in the county jail * * * or by a fine * * *." Even though the judgment refers to defendant's conviction as a "felony," it appears that the imposition of the statutorily authorized lesser punishment of imprisonment in the county jail renders the conviction one of misdemeanor only. (Pen.Code, § 17; People v. Wilson (1943), 59 Cal.App.2d 610, 611 [1], 139 P.2d 673; People v. Rowland (1937), 19 Cal.App.2d 540, 541 [1], 65 P.2d 1333; People v. Trimble (1936), 18 Cal.App.2d 350, 351 [1], 63 P.2d 1173; People v. Pryor (1936), 17 Cal.App.2d 147, 152 [4, 5], 61 P.2d 773.)

[2] Defendant's counsel at oral argument before this court, recognizing that there was no "verdict" and that had there been a verdict it would not have been appealable (see Pen.Code, § 1237), moved to strike the word "verdict" from the notice of appeal. This motion will be granted.

fense, according to defendant and amicus curiae, is the statutory definition rather than the description of the crime specifically alleged in a particular accusatory pleading. But neither the Kerrick case nor the McGrath case discusses or implicitly decides the question whether the "legal definition" must be the statutory definition as opposed to the definition specifically selected and pleaded by the prosecutor.[3] We note also People v. Whitlow (1952), 113 Cal.App.2d 804, 806, 249 P.2d 35, and People v. Krupa (1944), 64 Cal.App.2d 592, 598, 149 P.2d 416. These last cited cases correctly hold that "If, in the commission of acts denounced by one statute, the offender must always violate another, the one offense is necessarily included in the other"; they do not consider whether the statutory definition is the exclusive measure of included offenses.

The People argue that from analysis of such cases as In re Hess (1955), 45 Cal.2d 171, 174, 288 P.2d 5, and People v. Greer (1947), 30 Cal.2d 589, 597, 184 P.2d 512, it appears that a lesser offense is "necessarily included" if it is within the offense specifically charged in the accusatory pleading, even though its elements are not necessarily within those of the statutory definition of the crime.

[3] The question argued by the parties and amicus curiae is directly presented by the record in this case and the statutes applicable to such record. The offense of robbery as defined by section 211 of the Penal Code does not include all the elements of violation of section 503 of the Vehicle Code. The property taken in robbery may be any kind of personal property, whereas only the taking of "a vehicle" is denounced by section 503 of the Vehicle Code. A person charged simply with robbery "in the words of the statute describing the offense"[4] would not be charged with and could not be properly convicted of the offense defined by section 503 because the accusatory pleading would not inform the defendant that he must be prepared, at the trial, to contravene evidence that he took a particular kind of personal property, a vehicle.[5]

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[3] Kerrick, convicted of defacing brands on cattle (former Pen.Code, § 357), contended that the trial court erroneously refused to let him prove, in support of his pleas of former acquittal and once in jeopardy, that he had been tried for larceny of the same cattle, that the jury had disagreed, and that the larceny charge had been dismissed on motion of the district attorney made on the ground that in his opinion the evidence which could be produced on retrial would be insufficient to show larceny. Kerrick's contention was rejected on the ground that (at page 47 of 144 Cal., 77 P. 711) "the two crimes were not only distinct in law but also in fact."

McGrath (at page 521 of 94 Cal.App., at page 549 of 271 P.) was specifically charged with driving while "under the influence of intoxicating liquor." This offense was denounced by section 112 of the former California Vehicle Act (Stats. 1927, p. 1436). The trial court (at page 522 of 94 Cal.App., at page 550 of 271 P.) erroneously took the view that "reckless driving" was a lesser offense included within the crime charged, and so instructed the jury that they found that defendant was guilty of driving "without precaution and in such a manner as to endanger the life and property of other persons." The offense of driving "without due caution * * * or in such manner as to endanger the life, limb, or property of any person" was denounced by section 121 of the former California Vehicle Act (Stats.1923, p. 557). The appellate court correctly holds that the offense of which defendant was convicted was not necessarily included in the offense charged, because a person can drive carefully even though he is under the influence of intoxicating liquor. The discussion of the appellate court (at pages 523–524 of 94 Cal.App., at page 550 of 271 P.) is directed, not to the specific accusatory pleading, but solely to the statutory definitions of the respective crimes.

[4] An accusatory pleading in such general terms is expressly permitted by section 952 of the Penal Code.

[5] This conclusion follows from the statutes and case law. It may be noted, however, that the following peculiar situation is presented by such law: A defendant charged with murder is entitled to no more specificity in the accusatory pleading than the statement that he "murdered C. D." (Pen.Code, § 951.) The People can prove at the trial that he

(See In re Hess (1955), supra, 45 Cal.2d 171, 174–175, 288 P. 5.)

[4] Although the statutory definition of robbery does not necessarily include the offense denounced by section 503 of the Vehicle Code, the particular robbery specifically pleaded in the information here includes all the elements of a violation of section 503. It is particularly alleged that the property taken was "an automobile." The allegations of the information that the automobile was taken by robbery necessarily import the elements of theft, including the taking of the personal property of one other than defendant, with intent to steal (People v. Rosen (1938), 11 Cal.2d 147, 149, 78 P.2d 727, 116 A.L.R. 991; People v. Ammerman (1897), 118 Cal. 23, 25–26, 50 P. 15; People v. Sheasbey (1927), 82 Cal.App. 459, 463, 255 P. 836; see Fricke (1951), California Criminal Law, p. 238). These elements of theft include the following elements of the offense denounced by section 503 of the Vehicle Code: The property (vehicle) taken or driven must be "not his [defendant's] own," and it must be taken "without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same."

The cases of People v. Kehoe (1949), 33 Cal.2d 711, 713–715, 204 P.2d 321, and People v. Crawford (1953), 115 Cal.App.2d 838, 841, 252 P.2d 963, tend to support the view that the theft of an automobile (which is included in the offense of robbery by the taking of an automobile) includes the lesser offense denounced by section 503 of the Vehicle Code, although neither of those cases concerns the aspect of the problem of included offenses which is now before us. The Kehoe case disapproves the view, previously taken by some District Courts of Appeal, to the effect that violation of section 503 is entirely different from the crime of theft of an automobile. The Crawford case (at page 841 of 115 Cal.App.2d, 252 P.2d 963) says that "The charge, being grand theft committed in the stealing of an automobile, included the offense of violation of section 503 of the Vehicle Code." Insofar as People v. O'Neal (1934), 2 Cal.App.2d 551, 561, 38 P.2d 430, is inconsistent with the statement last quoted from the Crawford case and with our conclusion that the intent to temporarily deprive the owner of the use of a vehicle is an element included in the intent to steal the vehicle, the O'Neal case is disapproved.

In People v. Pearson (1940), 41 Cal.App.2d 614, 618, 107 P.2d 463, it is said that "The crime of violating section 503 of the Vehicle Code is not included in the crime of robbery * * *, the elements to be proved being different in each offense." But this statement was made in the light of the statute as it was then worded and, of

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murdered C. D. in any one of the ways in which murder can be committed, and the People, in the proceeding before the grand jury or committing magistrate which leads to the accusatory pleading, need not have disclosed all their evidence as to the various manners in which they are prepared to prove that C. D. was murdered. This anomalous situation results form the 1927 legislation "liberalizing" the rules of pleading in favor of the state (Stats.1927, p. 1043, amending Pen.Code, §§ 951, 952).

As stated by Judge Fricke for the District Court of Appeal in People v. Beesly (1931), 119 Cal.App. 82, 85–86, 6 P.2d 114, 970, "Section 952 [*ante*, footnote 4], which formerly required the pleading to set forth the particular circumstances of the offense charged, as amended [in 1927], declares that it shall be sufficient if it be 'in any words sufficient to give the accused notice of the offense of which he is accused'. There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment or information is founded." (Pen.Code, §§ 870, 925, require that defendant be furnished a copy of such transcript.) (See also People v. Roberts (1953), 40 Cal.2d 483, 486 [2, 3], 254 P.2d 501; People v. Pierce (1939), 14 Cal.2d 639, 645–646, 96 P.2d 784; People v. Severino (1953), 122 Cal.App.2d 172, 181 [9], 264 P.2d 656.)

course, in respect to the problem then before the court. At that time section 503 (Stats. 1939, ch. 228, p. 1481) provided that it was violated only when the vehicle was taken or driven "in the absence of the owner." This provision made the section necessarily incompatible with robbery in those cases where the person robbed was the owner of the property taken, for an element of robbery is that the property be taken "from his person or immediate presence" (Pen.Code, § 211). The Pearson case is not authority for interpretation of present section 503 of the Vehicle Code. The "absence of the owner" as an element of the offense denounced by section 503 has been deleted (Stats.1947, ch. 813, p. 1926). Therefore, violation of that section is no longer incompatible with robbery.

It appears that the precise controversy here presented—whether the yardstick for measuring offenses "necessarily included" in a charge within the meaning of section 1159 of the Penal Code is the specific language of the accusatory pleading or whether such yardstick is the language of the statute defining the offense charged—has not been expressly decided by an appellate court of this state. The view urged by the People, however, has been expressly or impliedly accepted by some of the reported decisions (hereinafter cited) without discussion of the possible alternative of using statutory language as the exclusive measure of included offenses.

The Hess case (1955), supra, 45 Cal.2d 171, 288 P. 5, and the Greer case (1947), supra, 30 Cal.2d 589, 184 P.2d 512, upon which the People rely, concern the question whether a charge of rape includes a charge of contributing to the delinquency of a minor (Welf. & Inst.Code, § 702). The statutory and case law concerning what crimes are "included" in a charge of rape, as shown by the following summary, tends to support the position of the People in the present case, although such law furnishes no authority directly in point:

Rape, according to its statutory definition (Pen.Code, § 261), is "an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years"; 2. Where she is mentally incapable of consent; 3. Where her resistance is overcome by force; 4. Where she is prevented from resisting by threats of great and immediate bodily harm, or by drugs; 5. Where she is unconscious of the nature of the act and this is known to defendant; 6. Where she submits under the belief, intentionally induced by defendant's "artifice, pretense, or concealment," that the person committing the act is her husband.

Where a single act of intercourse is committed in such circumstances that more than one subdivision of section 261 is violated, there is but one offense of rape, "for the proof, though dual in character, necessarily crystallizes into one 'included' or identical offense." (People v. Craig (1941), 17 Cal.2d 453, 457, 110 P.2d 403.) Confirming the view that the six subdivisions of section 261 of the Penal Code do not proscribe six distinct offenses, but rather that they describe six different ways in which the one crime of rape can be committed, are cases which hold that where a defendant is charged with rape under the specific circumstances of one subdivision of section 261, he can be convicted upon a showing that he violated some other subdivision. (People v. Vann (1900), 129 Cal. 118, 121, 61 P. 776; People v. Snyder (1888), 75 Cal. 323, 324-325, 17 P. 208; People v. Tollack (1951), 105 Cal.App.2d 169, 172, 233 P.2d 121; People v. Blankenship (1951), 103 Cal.App.2d 60, 66, 228 P.2d 835; People v. Cassandras (1948), 83 Cal.App.2d 272, 276, 188 P.2d 546; see People v. Jailles (1905), 146 Cal. 301, 304, 79 P. 965.)

[5] We do not undertake in this opinion to consider whether the holdings of cases such as those last cited (that a defendant can be convicted of one kind of rape when he is specifically charged with another) have been affected in respect to the essen-

tials of pleading as related to the requirements of due process[6] by the decisions in Greer (1947), supra, 30 Cal.2d 589, 184 P.2d 512, and Hess (1955), supra, 45 Cal.2d 171, 288 P.2d 5. However, the cases which consider the question of *lesser* offenses included within a charge of rape, unlike the cases cited in the preceding paragraph, take the view that the specifically charged violation of a particular subdivision of section 261, rather than the statutory definition stated in the section as a whole, is controlling. In People v. Greer (1947), supra, 30 Cal.2d 589, 184 P.2d 512, defendant was charged in two counts with violation of two sections of the Penal Code, section 261 (rape) and section 288 (lewd and lascivious conduct). It was specifically alleged that these two offenses were committed against the same girl, aged 13 years, on the same day. It is held (at pages 595–598 of 30 Cal.2d, 184 P.2d 512) that the trial court erred in refusing to permit defendant to prove, in support of his plea of former jeopardy, that he had been previously convicted of contributing to the delinquency of this same child (Welf. & Inst.Code, § 702) by acts committed at the time that he allegedly committed statutory rape and lewd conduct against her. The court specifically concluded that (at pages 597–598 of 30 Cal.2d, 184 P.2d at page 517) "Since every violation of sections 261(1) and 288 is also a violation of section 702, the offense defined in the latter is an offense necessarily included in the offenses defined in sections 261(1) and 288."

The significance of the Greer decision here is that, for the purpose of determining what lesser offenses were included within the rape there charged, this court looked to the specific allegations of the pleading, not merely to the general statutory definition of rape.

In the case of In re Hess (1955), supra, 45 Cal.2d 171, 175, 288 P.2d 5, it is held that the offense of contributing to the delinquency of a minor is not included within a specific charge of forcible rape, because the charge of forcible rape does not inform the accused that he should be prepared to meet evidence that he did an act which would tend "to cause or encourage any person under the age of 21 years" to become delinquent (Welf. & Inst. Code, § 702). In Hess, therefore, as in Greer, this court considered, as the yardstick for measuring the offenses included within the rape charged, the specific allegations of the accusatory pleading rather than the general code definition of rape as a crime which can be committed in various ways. In accord is People v. Chester (1956), 138 Cal.App.2d 829, 830, 292 P.2d 573.

It is not unusual for a prosecutor to charge in one count the elements of two kinds of aggravated assault defined by two separate sections of the Penal Code, assault with intent to commit murder (Pen. Code, § 217) and assault with a deadly weapon (Pen.Code, § 245). In this situation, the appellate courts have expressly recognized that the yardstick for determining "included" offenses is the language of the accusatory pleading. (People v. Gordon (1893), 99 Cal. 227, 229, 33 P. 901 [an earlier opinion in this case, People v. Gordon (1891), 88 Cal. 422, 26 P. 502, shows that the defendant was specifically charged with an assault with a deadly weapon with intent to commit murder]; People v. Lightner (1874), 49 Cal. 226, 228; People v. Casserio (1936), 16 Cal.App.2d 223, 226, 60 P.2d 505; see People v. Arnett (1899), 126 Cal. 680, 681, 59 P. 204.) If a defendant were charged in statutory language with assault "with intent to commit murder" (Pen.Code, § 217) and, separately, with assault "with a deadly weapon" (Pen.Code, § 245), the essential legal elements of neither offense charged would be "necessarily included" in the elements of the other (although both offenses charged might in fact be committed by the same act and, hence, be subject to the provisions of section 654 of the Penal Code[7]); therefore, the term "included offense," as used in the foregoing cases which determine that assault with intent to commit murder or assault with a deadly weapon is "included" in a charge of assault "with a deadly weapon with intent to commit murder" must refer to offenses included in the language of the pleading, not to offenses necessarily included in the language of the statutes.

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[6] "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (People v. Hess (1955), supra, 45 Cal. 2d 171, 175 [6], 288 P.2d 5.)

The yardstick of the specific allegations of the accusatory pleading is suggested also in People v. Mendoza (1942), 55 Cal.App.2d 625, 628–629, 131 P.2d 622 [lesser offense of battery, even though it is not included in the code definition of attempted rape as such definition is interpreted by case law, may be "necessarily included" in a charge of attempted rape which specifically alleges the commission of tthe attempt "by force and violence"].

[6] Another type of decision (People v. Eppinger (1894), 105 Cal. 36, 38–39, 38 P. 538; People v. Martin (1954), 127 Cal.App.2d 777, 780–782, 274 P.2d 509; People v. Papayanis (1951), 101 Cal.App.2d Supp. 918, 926, 226 P.2d 91; People v. Adair (1934), 3 Cal.App.2d 323, 325, 39 P.2d 274; People v. Stanich (1928), 94 Cal.App. 738, 741, 271 P. 920; People v. Morley (1903), 8 Cal.App. 372, 374, 97 P. 84) tends to support the theoretical basis of the People's position that the specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what offenses are included in a charge. In the cases last cited, conviction of an offense pleaded by specific allegations is upheld, even though the pleading designates the offense by an incorrect name or citation of statute, on the theory that the specific allegations give the accused sufficient notice. The cases decided before and those decided since the 1927 "liberalization" of the rules of pleading in favor of the state (309 P.2d at page 458, footnote 5) make no differentiation as to theory. It may also be noted that it is the offense specifically charged rather than the name applied to it which identifies and delimits the judgment imposed on conviction of the charge. (In re Bramble (1947), 31 Cal.2d 43, 46–47, 187 P.2d 411.)

Some opinions which deal with the question whether an offense is "necessarily included" do not disclose whether their determination in that regard is based upon the elements specifically alleged in the accusatory pleading or upon the statutorily defined elements of the crime or, perhaps, upon some other factor. (People v. Watson (1899), 125 Cal. 342, 344, 57 P. 1071; People v. Bentley (1888), 75 Cal. 407, 410, 17 P. 436; People v. Crawford (1953), supra, 115 Cal.App.2d 838, 841, 252 P.2d 963.) Some cases suggest mistaken views that an offense may be "necessarily included" in another offense because it would be within the charge if the charge were stated in accord with common law rules of pleading (People v. De Foor (1893), 100 Cal. 150, 153–154, 34 P. 642) or because the two offenses have a "common root" or "common basis" (People v. Gossman (1949), 95 Cal.App.2d 293, 295, 296, 212 P.2d 585; People v. Babb (1951), 103 Cal.App.2d 326, 330, 229 P.2d 843) or because the evidence proves a "lesser" offense which insofar as the opinion discloses may or may not have been charged (People v. Duncan (1945), 72 Cal.App.2d 423, 426, 164 P.2d 510).

Since the decisions as to included offenses, so far as they relate to choice of a standard to measure what offenses are "necessarily included" within the meaning of section 1159 of the Penal Code, have not expressly considered or decided the question of selection as between the language of the accusatory pleading and the statutory definition, we base our choice of the specific language of the accusatory pleading upon considerations of fairness to both parties.

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[7] Section 654 provides, in pertinent part, that "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisons, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

The present situation well illustrates the fairness to both the defendant and the People of using the specific accusatory pleading as a yardstick. Because the information charged defendant with taking "an automobile," he was put on notice that he should be prepared to defend against a showing that he took that particular kind of personal property. Because the information charged that the automobile was taken by robbery, defendant was put on notice that he should be prepared to defend against evidence showing the elements of that crime.

At the trial the prosecutor was able to produce ample evidence that the automobile was taken without the victim's consent, but the evidence concerning the precise circumstances of its taking was somewhat uncertain. It appears that the prosecutor in the diligent and enlightened performance of his trust anticipated that the evidence at the trial might develop in this fashion, and that he was well advised to draw the information in the manner in which it is worded.

[7, 8] Had the trial been by jury, both parties could and should have been prepared to request instructions concerning the lesser offense of violating section 503 of the Vehicle Code, because violation of that section, even though it was not included in the statutory definition of robbery, was, by the language of the information, a specifically pleaded but not separately stated lesser offense. Such instructions would be given if the evidence were such (as it was here) that the instructions would be applicable (see People v. Carmen (1951), 36 Cal.2d 768, 772–774 [1–6], 228 P.2d 281); they would be refused if there were no evidence of the lesser offense (see People v. McCoy (1944), 25 Cal.2d 177, 187 [8a], 153 P.2d 315).

Amicus curiae argues that, although in this particular case defendant would benefit by our declaring a rule that the language "offense * * * with which he is charged," as used in section 1159 of the Penal Code, relates exclusively to and is limited by the basic statutory definition of robbery, and cannot be otherwise related to the crime as actually charged in the information, it would usually be unfair to the prosecutor to assume that by a pleading such as the present one (which is entitled "Robbery (Sec. 211 P.C.)") the prosecutor intended to charge any offense other than robbery as defined by statute and the offenses necessarily included in the basic statutory definition of robbery. Rather, it appears, fairness to the prosecutor requires that we recognize that he may wisely anticipate the very situation which developed at the trial here and may frame his pleading in specific terms to obviate such possibilities as a variance between pleading and proof and the running of the statute of limitations against the lesser offense of violating section 503 of the Vehicle Code. (Conceivably, the prosecutor in the present case could have been even more precise than he was; he could have pleaded, in separate counts, robbery and grand theft by the taking of an automobile and violation of section 503 of the Vehicle Code (see Pen. Code, § 954), in anticipation that the evidence would show one or another of those offenses, although defendant could be convicted of only one of them. In making such observation, however, we do not mean to suggest that a pleading drawn with the care shown in the present case *should* have been even more carefully drawn.)

Amicus curiae asserts that the view which we adopt will result in harmful consequences to the prosecution in situations where the defendant pleads once in jeopardy or a prior conviction or acquittal of an offense "necessarily included" in a former charge (Pen.Code, § 1023). Amicus curiae suggests a hypothetical situation in which a defendant is accused of murder by a pleading which specifically alleges that the murder was committed in the perpetration of rape, is tried under such accusation, and is acquitted of murder. In this situation, amicus curiae complains, "If rape is an included offense, he [defendant] cannot thereafter be charged with rape even though no instructions were given on rape and no discussion was had on this crime by the jury at the murder trial." Underlying this argument of amicus curiae appear to be assumptions that prosecuting attorneys often make mistakes in pleading and presenting cases and that trial courts are not diligent in giving instructions covering the issues, and the implied request that this court should recognize that such mistakes are common and should protect the People from the consequences of such mistakes. We prefer to assume, as we believe is the case, that the great majority of prosecuting attorneys are diligent and careful in their preparation and presentation of cases, and that trial judges are at least equally diligent and careful in the discharge of their duties.

Amicus curiae further argues that it is unfair to the defendant to require that he study the accusatory pleading to determine whether he is charged with offenses other than the greatest (most inclusive) crime alleged and offenses necessarily included in the statutory definition of such greatest crime. Manifestly, in our view, it does not appear unfair to give the accused notice of the general facts which the prosecution expects to prove by pleading details of the greatest offense charged. Rather, a pleading which forthrightly alleges not only the statutory language of the greatest offense charged but also known details as to the manner of its commission is more helpful to a defendant, particularly if he is innocent, and is more fair and, hence, more worthy of the proper stature of the state's attorney than a pleading which alleges the general statutory language and no more.

In connection with his argument concerning asserted unfairness to those accused of crime, amicus curiae refers to cases which hold that a defendant cannot by demurrer obtain a separate statement, in separate counts, of "lesser" offenses which are alleged not as distinct crimes but by specific description of the manner in which the "greatest" offense was committed. (People v. Casserio (1936), supra, 16 Cal.App.2d 223, 226, 60 P.2d 505; People v. Izlar (1908), 8 Cal.App. 600, 604, 97 P. 685.) A defendant is not put at any peculiar disadvantage in this respect by permitting the use of the accusatory pleading as the measure of included offenses, rather than limiting such measure solely to the statutory definition of the "greatest" offense charged. We know of no rule or practice which would permit a defendant charged in the language of the statute defining a crime to obtain a separate statement of all offenses necessarily included in the statutory definition.

Defendant's motion to strike from the notice of appeal the reference to a purported appeal from the "verdict" is granted. For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

Rehearing denied; SHENK, J., dissenting.

150 Cal.App.2d 218

Kenneth W. McMAHON, Plaintiff and Appellant,

v.

KERN COUNTY UNION HIGH SCHOOL AND COLLEGE DISTRICT and Jerry Dyer Horne, Defendants and Respondents.

Civ. 5386.

District Court of Appeal, Fourth District, California.

April 17, 1957.

Action by passenger of automobile against school district and driver of school bus for injuries sustained in collision of bus and automobile, at intersection of county road upon which bus had been traveling, and highway upon which automobile had been traveling. The Superior Court, Kern County, Norman F. Main, J., rendered judgment for school district and driver, and passenger appealed. The District Court of Appeal, Mussell, J., held that evidence sustained verdict that driver of bus was not negligent.

Affirmed.

1. Automobiles ⚷244(1)

In action by passenger of automobile against school district and driver of school bus for injuries sustained in collision of bus and automobile at intersection of county road, upon which bus had been traveling, and highway, upon which automobile had been traveling, evidence sustained verdict that driver of bus was not negligent.

2. Negligence ⚷136(8, 9)

It is only when facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts, that issue of negligence or contributory negligence becomes one of law and not of fact.

3. Automobiles ⚷246(57)

In action by passenger of automobile against school district and driver of school bus for injuries sustained in collision of bus and automobile at intersection of county road, upon which bus had been traveling, and highway, upon which automobile had been traveling, instruction to jury on doctrine of unavoidable accident was not precluded by the evidence, since bus driver was not negligent as a matter of law.

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Oscar F. Catalano, Bakersfield, Merle H. Jenkins, Oildale, and Herbert Chamberlain, San Francisco, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

MUSSELL, Justice.

This is an action to recover damages for personal injuries sustained by plaintiff as a result of a collision between an automobile in which he was riding and a school bus. The accident happened at the intersection of Wegis Road and Rosedale Highway in Kern county. A jury returned a verdict for defendants and plaintiff appeals from the judgment thereupon entered.

Rosedale Highway is an east-west state highway with two 12-foot traffic lanes, separated by a broken white line. Wegis Road runs north and south. It is a county road with two traffic lanes, each 7½ feet wide. There is a house occupied by the Hodel family 396 feet north of the north lane of Rosedale Highway and on the west side of Wegis Road. There were no stop signs at the intersection and there was a clear view diagonally across the northwest corner.

At about 7:00 a. m. on May 17, 1954, plaintiff, on his way to work, was a passenger in a 1941 Chrysler sedan owned and being driven easterly on Rosedale Highway by William J. Hampton when the automobile struck a school bus being driven south on Wegis Road by Jerry D. Horne, an employee of defendant school district. The point of impact was approximately 5 feet south of the center of Rosedale Highway and approximately even with a line projected south from west edge of Wegis Road on the north side of the highway. The initial point of collision between the vehicles took place between the left front fender of the Chrysler and the right front corner of the bus. The Chrysler was traveling so fast that it pivoted and drug the bus at right angles so that it was headed east after the accident and the left front wheel of the bus was pushed sideways a distance of 36 feet.

Horne was an experienced bus driver and on the morning of the accident was picking up students on his regular route for the school district. He had stopped at the Hodel home, 396 feet north of the intersection to pick up a student. Between that point and the point of collision his bus was in second gear and he did not reach a speed of over 20 or 25 miles per hour between these two points. He looked to the west on Rosedale Highway as he left the Hodel home and again when approximately 200 feet north of the intersection, but saw no eastbound traffic. As he was entering the intersection, he was traveling about 10 miles per hour and saw the Hampton car. It was then west of the intersection. When Horne saw it, he applied his brakes and skidded all four wheels of the bus to the point of impact.

Emmitt E. Worthen testified that at the time of the accident he was irrigating alfalfa on the northeast corner of the intersection involved and about 375 feet from it; that the bus stopped at the Hodel house and picked up the girl who lived there; "I watched the bus, and it picked up the girl, and it started on or going on south, and it sure wasn't driving very fast at all. I would say it never did get over 20 miles an hour from the time it picked up the Hodel girl until it entered the intersection; and, when it got there, why, it slowed down to almost a stop but didn't stop plumb still, and it drove on out into the intersection of Rosedale Highway, and it got up—I would say the front wheels was approximately 3 or 4 feet, the best I could see, from the white line in the center of the Rosedale Highway, and I looked up the highway, Rosedale Highway, west, and I seen this car coming, and it wasn't—I don't believe it was over 150 feet away when I seen it, and I said to myself, 'Oh, My God' next"; that he heard the crash and the car hit the bus on the right front fender and whirled it down the Rosedale Highway in the direction the automobile was headed; that the bus entered the intersection at a speed of 3 to 5 miles per hour; that at the time he first saw the automobile, the bus had entered the intersection and the front end of it was not over 3 feet from the white line; that at that time the automobile was about 150 feet west of the intersection; that it "was doing well over 50 miles per hour".

Plaintiff testified that he was around two blocks from the intersection when he first saw the bus and it was then about 3 blocks north of the intersection; that he did not see it again before the accident and that he was looking down the right-hand side of the road.

The first ground upon which appellant relies for reversal of the judgment is that the evidence established as a matter of law that the defendants were guilty of actionable negligence, and therefore the judgment against plaintiff should be reversed. There is no merit to this contention.

[1, 2] In Negra v. L. Lion & Sons Co., 102 Cal.App.2d 453, 458, 227 P.2d 916, 919 it is said:

> "Generally speaking, the degree of care required under any given circumstances and the question as to whether or not that degree was attained by one charged with negligence is a question of fact for the jury and not a question of law. Malone v. Clemow, 111 Cal. App. 13, 295 P. 70. Negligence of a defendant, like contributory negligence of a plaintiff, is generally a question of fact for the determination by the trier of fact whose finding will not be disturbed on appeal if there is substantial evidence to support it. McWane v. Hetherton, 51 Cal.App.2d 508, 511, 125 P.2d 85."

And as is said in Butcher v. Queen City Iron & Metal Co., 99 Cal.App.2d 25, 27, 221 P.2d 265, 267:

> "Whether defendant was negligent or plaintiff contributorily negligent are questions of fact for the deter-

> mination of the jury whose finding supported by substantial evidence will not be reversed on appeal. (Reinders v. Olsen, 60 Cal.App. 764, 767, 214 P. 268; McStay v. Citizens Nat. T. & S. Bank, 5 Cal.App.2d 595, 600, 43 P.2d 560.)"

It is only when the facts are clear and indisputable, and when no other inference than that of negligence or contributory negligence can be drawn from the facts that the issue becomes one of law and not of fact. McQuigg v. Childs, 213 Cal. 661, 663, 3 P.2d 309; Kazanjian v. Pacific Greyhound Lines, 92 Cal.App.2d 210, 213, 206 P.2d 887. The question of whether the defendants were guilty of actionable negligence was one of fact for the jury and there is substantial evidence to support the verdict of the jury.

Appellant argues that the conclusion is inescapable that the jury found that the collision of the school bus and automobile was the product of the negligence of both drivers because the jury in a companion action in which Hampton was plaintiff and the defendants were the same as in the instant action, the defendant school district filed a cross-complaint against Hampton for damages to the school bus and the verdict on the cross-complaint was in favor of Hampton. However, the pleadings in the Hampton action are not before us and are not included in the record. There was no appeal from the judgment in that case and we are unable to determine upon what basis the jury returned its verdict in favor of Hampton and against the school district on the cross-complaint.

[3] Appellant further claims that the judgment against the plaintiff should be reversed for the reason that the jury was misdirected to his prejudice. The claimed error in this connection is that the court gave an instruction on the doctrine of unavoidable accident and that the state of the evidence precluded any application of the doctrine. The instruction given was as follows:

> "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.
>
> "Bear in mind, however, that if the defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained."

There is no contention here that the instruction was an incorrect statement of the law. In Parker v. Womack, 37 Cal.2d 116, 122, 230 P.2d 823, 826, the court, in discussing an instruction on the doctrine of unavoidable accident, said:

> "Mrs. Parker asserts that the challenged instruction should not have been given because no evidence of any kind was offered by Womack tending to prove that something happened to cause the collision which he could not have avoided by the exercise of reasonable care. The argument erroneously assumes that the law imposed upon him the burden of defending a charge of negligence with affirmative proof of an unavoidable accident. The contrary is true. Polk v. City of Los Angeles, supra, 26 Cal.2d [519], at page 542, 159 P.2d 931.
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> "It is also suggested that where the evidence is such as that shown by the record in this case, an instruction upon the doctrine of unavoidable accident is improper because it may tend to divert the minds of the jurors from the decisive issues of the case; the defendant may escape liability because of

some reason other than [his] freedom from negligence or the contributory negligence of the plaintiff. This contention might have some merit if the term 'unavoidable accident' were limited to include only one cause by *vis major*. But a determination that an accident was unavoidable is also proper where the evidence merely shows '* * * that the plaintiff has failed in his proof'. Jolley v. Clemens, supra, 28 Cal.App.2d at p. 73, 82 P.2d 51. Where an instruction defining such an accident is given at the request of the defendant, it cannot be said to have been harmful to the plaintiff 'who in any event had the burden of proving that the collision was occasioned solely by the negligence of the (defendant) which, of course, would exclude unavoidable accident.' Pearce v. Elbe, supra, 98 Cal.App. [101], at page 106, 276 P. at page 391.

"In Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, and Scandalis v. Jenney, 132 Cal.App. 307, 22 P.2d 545, it was held that the giving of an instruction concerning the rule of unavoidable accident was prejudicially erroneous. However, in each of these cases, the evidence established the negligence of the defendant as a matter of law. Under the evidence there was no question of negligence for the jury to decide. Here no claim is made that Womack was negligent as a matter of law. Upon the evidence it was the duty of the jury to decide which, if either, of the drivers failed to use due care in entering the intersection and the Womacks were entitled to have the jury instructed in regard to the rule of unavoidable accident."

In Driver v. Norman, 106 Cal.App.2d 725, 726, 236 P.2d 6, it is again held, citing Parker v. Womack, supra, that the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law. And in McMillen v. Southern Pac. Co., 146 Cal.App.2d 216, 303 P.2d 788, 791, the court said:

> "Appellant asserts that it was also prejudicial error to instruct on unavoidable accident because there was no evidence from which such a finding could be made. This question was settled by the Supreme Court in Parker v. Womack, 37 Cal.2d 116, at page 122, 230 P.2d 823, at page 826, where it held that a determination that an accident was unavoidable is proper where the evidence merely shows that a plaintiff has failed in his proof. In Driver v. Norman, 106 Cal.App.2d 725, 727, 236 P.2d 6, 8; Parker v. Womack, supra, is cited as authority for the rule that 'the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law.'" (Citing cases.)

It appears from the record herein that all the elements of defendants' liability under the evidence presented are covered by the instructions, and since we have concluded that the defendants were not negligent as a matter of law, we find no error in the giving of the criticized instruction.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

150 Cal.App.2d 304

George RONDOS, Petitioner,

v.

SUPERIOR COURT, of the State of California, In and for The COUNTY OF SOLANO, Edward Essy and Marvin F. Caesar, Respondents.

Civ. 9265.

District Court of Appeal, Third District, California.

April 18, 1957.

Proceeding in mandate. Respondent court refused to fix amount of a bond to be given to stay, during appeal, execution of an order appointing a receiver in an action for dissolution of an alleged partnership and an accounting, and District Court of Appeal issued its alternative writ. The District Court of Appeal, Van Dyke, P. J., held that mere fact that application for bond in question asserted that it was based, among other grounds, on ground plaintiff was not entitled to appointment of receiver, did not constitute proper ground for court's refusal to perform duty cast upon it by law to fix amount of bond on any theory that granting of a bond on such application would be an admission on part of such court that it had erred, and therefore, court's refusal warranted issuance of a peremptory writ by District Court of Appeal directing court, upon such application, to make an order fixing amount of stay bond.

Order in accordance with opinion.

Appeal and Error ⚷465(2)
Mandamus ⚷57(2)

Mere fact that application for a bond staying appointment of a receiver pending appeal of order of appointment, asserted that it was based, among other grounds, on ground that plaintiff was not entitled to appointment of receiver, did not constitute proper ground for court's refusal to perform duty cast upon it by law to fix amount of bond on any theory that granting of a bond on such application would be an admission on part of such court that it had erred, and therefore, court's refusal warranted issuance of a peremptory writ by District Court of Appeal directing court, upon such application, to make an order fixing amount of stay bond. West's Ann. Code Civ.Proc., § 943.

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Millard Smith, J. R. Traub, Jack B. Burstein, Vallejo, for petitioner.

Thomas O'Hara, Vallejo, for real party in interest.

VAN DYKE, Presiding Justice.

This is a proceeding in mandate. The petition sets forth that one Edward Essy instituted an action against petitioner in the respondent court seeking the dissolution of an alleged partnership and an accounting of partnership affairs; that the plaintiff therein initiated proceedings for the appointment of a receiver; that respondent court, after a hearing, appointed a receiver over the objection of petitioner herein; that petitioner appealed from said order and thereafter applied to the respondent court, pursuant to Section 943 of the Code of Civil Procedure, for an order fixing the amount of a bond to be given to stay, during the appeal, the execution of the order appointing a receiver; that the application was heard and the court refused to fix the amount of the bond. This court issued its alternative writ and the matter has been heard and submitted for decision.

It appears that the court refused to fix the stay bond because the application asserted that it was based, among other grounds, on the ground that the plaintiff was not entitled to the appointment of a receiver. The reaction of the trial court was that if it fixed the bond with the assertion in the application that the plaintiff was not entitled to the appointment of a receiver it would be an admission on the part of the court that it had erred. We can ascribe no such effect to the assertion made. It is not, of course, an assertion of fact, but is the conclusion of the applicant in line with the taking of the appeal. It was wholly immaterial and need not have been made, but its presence in the application, even coupled with what appears to have been the refusal of counsel for the applicant to consent to its being stricken from the application, afforded no ground for the court to refuse to fix the bond. That refusal amounted to refusal to perform a duty cast upon the respondent court by the law and warrants the issuance of this court's peremptory writ.

It is ordered that a peremptory writ issue directing the respondent court, upon the application aforesaid, to make its order fixing the amount of the stay bond.

SCHOTTKY and PEEK, JJ., concur.

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150 Cal.App.2d 80

Daniel F. SAFINA, Plaintiff and Respondent,

v.

SAFEWAY STORES, Inc., Defendant and Appellant.

Civ. 5377.

District Court of Appeal, Fourth District, California.

April 11, 1957.

Action by store patron against store operator for injuries sustained in fall over carton on floor of store. The Superior Court, Fresno County, Philip Conley, J., entered judgment on verdict for patron and denied motion for new trial, and operator appealed. The District Court of Appeal, Barnard, P. J., held that the award of $25,000 damages was not excessive.

Judgment affirmed.

1. Negligence 🔑136(22, 26)

In action by store patron against store operator for injuries sustained in fall in store over empty carton on floor, questions of operator's negligence and patron's contributory negligence were for jury.

2. Appeal and Error 🔑1004(1)

Even though award of damages may seem large to the reviewing court, such court will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts that the sense of justice is shocked and presumption raised that the award was result of passion and prejudice.

3. Damages 🔑130(2)

Award of $25,000 damages to man, whose hip joint, prior to accident, had become sufficiently fused, although not in proper condition due to prior accident, to enable him to carry on normal activities without pain, who sustained a breaking or damaging of such fusion to extent that he could not thereafter carry on his normal activities without pain, who sustained $2,000 hospital expenses up to time of trial, who would have to undergo further hospitalization and another operation, who had lost six months' income to trial and would probably lose more, and who had been confined in hospital for 70 days, was not excessive.

4. Damages 🔑208(1)

Upon issue of damages in personal injury action, jury could believe one part of the evidence and reject other part.

5. Appeal and Error 🔑989

A reviewing court cannot weigh the evidence beyond the point of ascertaining whether there is any substantial evidence to support the verdict.

6. Negligence 🔑139(6)
Trial 🔑296(3)

In action by store patron against store operator for injuries sustained in fall over carton on floor of store, giving of instructions that operator had duty to keep store and passageways reasonably safe for business visitors and that, in absence of contributory negligence, operator would be liable for business visitor's injuries proximately caused by any unsafe condition in store and passageways if operator or its employees knew of such condition or could have discovered such condition by reasonable care, did not mislead jury and was not reversible error, in view of other instructions given.

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Ray W. Hays, James N. Hays, Fresno, for appellant.

C. Ray Robinson, Robert T. McCartney, Charles F. Sells, Merced, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries suffered by this plaintiff when he fell in a store operated by the defendant. A jury awarded him $25,000, the court denied a motion for a new trial, and the defendant has appealed from the judgment.

In 1945, the plaintiff sustained a severe injury to his left hip joint in an automobile accident near Long Beach. He was then in a hospital for about six months, and he walked on crutches a large part of the time until 1948. It appears, without dispute, that a large part of the acetabulum or socket bone of the hip was broken off in that accident; that thereafter the end of the femur, instead of resting in the proper socket, came to rest in a different position against a "shelf" which nature built up, and that about 1947 or 1948 the left hip joint thus formed had become fused or ankylosed, forming a stiff or nearly stiff joint. As a result his left leg was about three inches shorter than his right, and he wore a three-inch heel on his left shoe. After 1948, he walked with a cane but did not use crutches except for a short period in 1951 following another automobile accident in San Francisco.

He learned watch repairing and from 1949 or 1950 until October 4, 1955, he operated a watch repair shop in Fresno. During that period his yearly income averaged from $2,000 to $3,000. While in the shop he occasionally took a step or two without the cane, with the cane hanging in his hip pocket. While he had walked with a cane and with a considerable limp for years, he was without pain and was able to carry on most of the activities of a normal person. He went fishing and hunting and swimming, and played croquet and pool. He drove a car and could go up and down stairs. He mowed his lawn with a power mower, milked and took care of some goats, and polished his own shoes.

On October 4, 1955, the plaintiff drove his car to this Safeway store and went in to do some shopping. He was unable to find what he wanted and decided to buy some gum, which he knew was at some place near the front of the store. While he was walking along an aisle, looking at various goods which were displayed for sale, he bumped into an empty carton on the floor and fell. He felt immediate pain and heard a snapping noise in his hip. He was unable to rise and remained on the floor until he was taken to a hospital in an ambulance.

There was evidence that this carton was of the type that canned goods usually are shipped in, and that it was 2½ feet long, 2 feet wide and 2 feet deep. It was cut open smoothly at the top indicating that canned goods had been removed from it, after which it had been left in the aisle. It was the custom in this store to move such empty boxes to the front of the store near the check stand for use in packing groceries for customers. Two clerks who were then checking stated that they checked only occasionally during busy hours, and that they had seen boxes on the floor at times shortly before the plaintiff fell. There were numerous displays in the store at the time, which were made by stacking boxes of canned goods on top of one another with a sign on them at eye level reading "Specials."

The plaintiff was taken to the Community Hospital where he was treated by his own doctor, who administered narcotics to ease the pain. The next day he was taken to the Veterans' Hospital in Fresno, where he spent a total of 70 days prior to the trial. From the time of the fall to the time of the trial in April, 1956, he was unable to bear his weight on this leg and was on crutches during all times when he was not confined to the hospital. During this period he did no work at his place of business and was able to earn only about $40 by doing some minor repair jobs at his home.

Three hospital records were introduced in evidence. The first referred to the previous injury at Long Beach, and stated that although surgery of the left acetabulum had been contemplated this surgery was never done and plaintiff was allowed to ambulate with his left leg three inches shorter than the right; that the x-ray revealed that the relationship of the bones in the left hip joint was the same as it was in 1951, at which time the patient was hospitalized for another purpose; that the head of the femur is not dislocated from the hip joint any more than it was before, but is not in the original hip joint and appears to be in a reconstructed one formed by a shelf above the acetabulum; that it was agreed by all of the staff that there was no change in the boney relationship from two years ago, when he was admitted for another purpose; that the diagnosis was "Strain of left hip joint, treated, improved" and that there was some traumatic arthritis which was untreated and unchanged; that he was ambulating satisfactorily on crutches; and that on October 13 he was given a two-weeks' leave of absence. The second record states that he was readmitted to the orthopedic service on October 31; that he was prepared for insertion of a prosthesis in his left hip, "for his traumatic arthritis, secondary to fracture of the left acetabulum, old"; and that because of the patient's anxiety over the surgery the surgery was cancelled and he was given a leave of absence from November 9 to December 1. The third record states that the patient was again admitted on December 5; that on December 12 the x-ray of the hip was explained to the patient and because of his difficulty and pain in the hip he then consented to have an exploration made for correction of the dislocation, and for the insertion of the prosthesis "if indicated"; that on December 14 an operation was performed and the prosthesis was inserted; that on January 15, 1956, the range of abduction and the range of flexion of the hip were markedly improved, but the patient was not yet able to lift the leg off the bed with his own power; that on January 23, it was found that the new metal head which had been put on the femur had dislocated and the patient was informed that it would be necessary to correct this under anaesthesia; that the patient stated that he had some very important business to attend to and requested a two-weeks' leave of absence; and that the leave of absence was granted "because a decision has to be made as to whether or not a closed reduction would be necessary or an open reduction."

Four doctors testified, two being called by the plaintiff and two by the defendant. The plaintiff's family doctor was asked whether he had a medical opinion to a reasonable certainty as to what happened to this joint at the time of the fall. He replied "Yes, I feel that this man had an ankylosed joint which was stiffened and fused prior to the fall; that as a result of his fall that joint was torn loose, and that the hip bone was then dislocated posteriorly." The chief orthopedic surgeon at the Veterans' Hospital testified that after the fall the fusion was broken; that they performed the operation for the insertion of the prosthesis to cure the old fractured acetabulum; that a prosthesis is an artificial metal head which is substituted for the bone head of the femur; that you could see that this patient's ankylosis had been broken or destroyed at the time of the fall; that this patient had not yet been discharged from the hospital and that he will require further treatment; that it was discovered in January that the artificial head which had been inserted in December had dislocated and would have to be fixed so that it could not redislocate; that there were two things that could be done; that one way was to re-fuse the bone, which would take from six months to a year; that the other way was to give him an artificial head on the femur, which is what they decided to do here; that in this way they could make him ambulatory so he could walk around with a stable hip in about three months; that after that there would be a period of rehabilitation to enable the patient to learn to use muscles which had been atrophied; that these muscles would have to be developed so they could do the work they were supposed to do; that this "will take an intelligent handling" and an excellent cooperation from the patient; that after that he would be able to resume his occupation and do such things as walking and climbing stairs; that the atrophy of the muscles had occurred between 1945 and 1955 and not after this fall; that the operation which he proposed would give the patient a moveable hip instead of a fixed hip, and three months after they operated he would have a better hip than he had before; that he could not say how long a period of rehabilitation would be necessary; that while the hip was fused before it had not fused in the proper joint, but the femur had attached itself to a shelf formed above the regular socket; and that the relationship of the hip bones is as it was in 1951. A doctor for the defendant testified that the ball end of the femur was completely out of the socket in 1947, there was a dislocation of the hip joint and a large piece had broken out of the socket bone; that the fall did not cause any disturbance of the boney situation in that hip; that the patient had had a strain which had caused pain because of an arthritic condition there; that except for arthritis the condition was the same now as it was in 1947 and 1948; and that he had recommended surgery in 1947 and would have recommended it after October 4, 1955. Another doctor for the defendant testified that the x-rays taken in 1955 showed the same situation with respect to the bones as those taken in 1951. In effect, the testimony of the doctors was that the bones had fused after the accident in 1945 although not in the proper position, that this fusion was broken by the fall in defendant's store, and that the position and relationship of the bones was the same after the fall as it was before. One doctor thought that the plaintiff's present condition could be relieved or cured by another operation, the primary purpose of which would be to correct the situation which had existed for many years, with the result that the patient would have a better hip than he had before this fall. If any of the other doctors had an opinion as to the possibility of restoring the plaintiff to as good a condition as before the fall, or how long this would take, it was not brought out in their testimony.

[1] The appellant contends that the evidence is insufficient to support the judgment. It is argued that there was no evidence of negligence on its part since its two clerks, who testified, did not remember seeing any empty box in that area, and since no unreasonable risk was to be anticipated because it would have no reason to believe that customers would fail to see the box or realize any risk involved. It is also argued that it conclusively appears that the respondent was guilty of contributory negligence in failing to see a box of this size, and since he testified that he was walking along looking at the displays and without paying any attention to whether or not there were boxes in the aisle. Whether or not the appellant was guilty of negligence was a question of fact, under the evidence. It might well have been found as a factual matter, especially in view of his handicapped condition, that the respondent was guilty of contributory negligence in allowing himself to stumble over a box of that size. However, this issue was also one of fact and it cannot be held as a matter of law that he was guilty of contributory negligence.

The main point raised on this appeal is that the amount allowed to the respondent is excessive. It is argued that the respondent suffered only a strain, that nothing was broken or torn loose, and everything remained in exactly the same place as before the fall; that the hospital reports and one of the doctors agreed that respondent's condition was unchanged except for a strain and the pain caused by an arthritic condition; that most of the special damages were the result of the respondent's delay in having the condition repaired, and the existence of a prior condition which was sought to be corrected; and that there was evidence that as a result of another operation the respondent would have a better hip than he had before.

[2] What is adequate compensation in such a case as this is a question of fact, and as said in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 195 P.2d 427, 434: "[i]t is well settled that even though the award may seem large to a reviewing court, it will not interfere unless the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice."

[3, 4] While the respondent was badly handicapped as a result of the accident in 1945, it clearly appeared that his hip joint had become sufficiently fused to enable him to carry on normal activities without pain for a number of years. It also clearly appears that his condition was seriously and adversely affected by the fall, that this fusion was broken or damaged by the fall to the extent that he could not thereafter carry on his normal activities, that he continued to suffer pain, and that he could walk only by the use of crutches. One doctor testified that he could have carried on his former activities for the rest of his life in the absence of the Safeway injury, and that he would have to favor that hip the rest of his life. There was evidence that his hospital expenses were about $2,000 up to the time of the trial, that further hospitalization and another operation at least would be required, and the future expense in that connection was problematical. He had lost about six months' income at the time of the trial and from the evidence it would appear that a considerable loss of income would thereafter occur. He had already been in the hospital for 70 days, and at the best would require considerable further hospitalization and an indefinite amount of time to complete such recovery as was possible. He had suffered complete disability up to the time of the trial and the evidence indicates that he would, without doubt, suffer total disability for a considerable time in the future. It had taken about three years, after 1945, for his bones to fuse to an extent enabling him to walk without crutches and without pain, and it was problematical as to whether or not he would ever be in as good condition as he was before this fall, or if so how long it would take. While one doctor expressed the opinion that with another operation he could be given a better hip than he had before, it was glaringly apparent that the same sort of operation had already been performed by this same doctor without success, and with the patient still practically helpless four months later. All of these factors, together with the patient's pain and suffering and present condition six months after the accident, and including the present cost of living and decreased value of the dollar were elements which the jury were entitled to take into consideration. While good arguments may be made to the contrary, as the appellant has done, it cannot be said that there was no substantial evidence to support the amount of the award. While the evidence as to the extent of future disability, and the time it would last, is not too satisfactory, the evidence indicated that these elements were not inconsiderable. The question as to the amount of damages was primarily a factual matter for the jury, which could believe one part of the evidence and reject other portions, and the weight of the evidence was again reviewed by the trial judge on a motion for a new trial.

[5] So far as can be gleaned from the written record, we feel that we would have held the amount of damages to be excessive had we been passing on the motion for a new trial. However, the rules governing a trial judge on ruling on such a motion and those governing an appellate court on an appeal from a judgment are very different, and an appellate court cannot weigh the evidence beyond the point of ascertaining whether or not there is any substantial evidence to support the verdict. Holmes v. Southern Cal. Edison Co., 78 Cal.App.2d

43, 177 P.2d 32; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672. It may be said here as was said in Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645, 658:

> "The verdict is undoubtedly high. Nevertheless, it is not the function of a reviewing court to interfere with a jury's award of damages unless it is so grossly disproportionate to any reasonable limit of compensation warranted by the facts that it shocks the court's sense of justice and raises a presumption that it was the result of passion and prejudice. (Zibbell v. Southern Pacific Co., 160 Cal. 237, 255, 116 P. 513.) The amount of the verdict must be viewed in the light of the evidence before the trial court. (Zibbell v. Southern Pacific Co., supra, 160 Cal. at page 254, 116 P. at page 513.) The trial court, in denying a motion for new trial, found that the verdict was not excessive. This decision lends weight to the jury's award. (Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, 585, 203 P. 768; McSweeney v. East Bay Transit Co., 60 Cal.App.2d 807, 814, 141 P.2d 787.)"

[6] It is further contended that the court erroneously instructed the jury that it is the duty of the owners of a grocery store to keep the store and passageways reasonably safe for business visitors, and in further instructing the jury that, in the absence of contributory negligence, the owner of a grocery store is liable for injuries to a business visitor which is proximately caused by any unsafe condition in the store and its passageways if the owner or its employees knew of such condition, or if they could have discovered such condition by the use of reasonable care. It is argued that the first of these instructions omitted the requirement that the owner must exercise reasonable care in keeping the premises reasonably safe, and that the second instruction referred to "any unsafe condition" whereas the duty owed to the business visitor is to keep the premises in a "reasonably safe condition." It cannot be held that these instructions in any way misled the jury, and in five other instructions the jury was told that the duty of a store keeper is to exercise reasonable and ordinary care to keep the aisles and passageways in the store in a reasonably safe condition, and in a condition reasonably safe for the invitee.

Under established rules, we feel compelled to hold that there was sufficient evidence to sustain the verdict and that no reversible error appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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150 Cal.App.2d 287

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Milton SHAFFER, Defendant and Appellant.
Cr. 5716.

District Court of Appeal, Second District, Division 3, California.
April 18, 1957.

Hearing Denied June 12, 1957.

Defendant was convicted of making sale of heroin. The Superior Court of Los Angeles County, Charles W. Fricke, J., rendered judgment and order denying new trial. Defendant appealed. The District Court of Appeal, Parker Wood, J., held that prosecutor's argument inferring that defendant was a narcotics peddler, though there was no evidence that he was in business of selling narcotics, and stating that prosecutor sincerely believed him guilty constituted prejudicial misconduct depriving defendant of fair trial.

Reversed.

1. Poisons 🔑9

Evidence on issue of whether defendant made unlawful sale of heroin was for jury. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⟜719(1, 3), 1171(3)

In prosecution on information charging isolated sale of heroin, in view of sharp conflict of evidence, prosecutor's remarks in argument, that, inter alia, defendant was a narcotics peddler and inferring that, since he was a peddler, it was likely that he had sold the heroin as charged, though there was no evidence that defendant was in business of selling narcotics, and that prosecutor sincerely believed that defendant was guilty constituted prejudicial misconduct depriving defendant of a fair trial.

3. Criminal Law ⟜1171(1)

Where case is closely balanced and guilt has not been so clearly established as to render it improbable that harmful effect of misconduct may have turned scales against accused, misconduct is ground for reversal.

◆

A. Brigham Rose, Los Angeles, for defendant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

By indictment defendant was accused of violating section 11500 of the Health and Safety Code in that he unlawfully sold heroin. An amendment to the indictment alleged that defendant had been previously convicted (1) of illegally concealing and purchasing narcotics (federal offense), a felony; and (2) violating section 11500 of the Health and Safety Code, a misdemeanor. Defendant admitted the allegations as to prior convictions. In a trial by jury he was convicted. He appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to support the conviction; and that the deputy district attorney was guilty of misconduct.

[1] Deputy Sheriff Velasquez testified that on February 27, 1956, while he was in the narcotic detail office of the sheriff, a man by the name of Tucker was brought into the office by an officer from the Whittier Police Department; that was the first time he (witness) had seen Tucker; then, in the presence of the witness (Velasquez), Tucker called telephone number Madison 5–2938. Deputy Velasquez also testified that he (Velasquez) dialed the number; by the use of earphones, which were in the office, a person could listen to the telephone conversation; Deputy Sheriff Kehoe monitored the telephone conversation.

Deputy Sheriff Kehoe testified that on February 27, 1956, about 8 p. m., one Tucker, who was accompanied by two police officers from Whittier, came into the narcotic detail office of the sheriff; then telephone number Madison 5–2938 was called; he (Kehoe) monitored that call by use of an earphone extension; he heard a telephone conversation between Tucker and another person; in the opinion of the witness (Kehoe), the voice he heard on the other end of the conversation was defendant Shafer's voice; in that conversation the voice at the other end of the line said, "Hello"; Tucker said, "Milt? Bill. I would like to pick up six drop cords." The other voice said, "OK, come by in front of the house."

Deputy Velasquez testified further that after the telephone conversation he and Tucker went in a Studebaker automobile, which Tucker was driving, to 210 North Belmont Street in Los Angeles and stopped six or eight feet "past" that location—facing north, on the east side of Belmont; they arrived there about 8:50 p. m., and defendant was standing in front of the location; at that time Deputy Kehoe, Police Officer Gutierrez of the Los Angeles Police Department, and a police officer from Whittier were in a red automobile (referred to as an undercover automobile) on Belmont Street about half a block from the location—facing south, on the west side of Belmont; other automobiles were parked near 210 North Belmont; when Tucker stopped the Studebaker, defendant went to the driver's side of the automobile and, upon seeing Velasquez, said to Tucker: "Who is this [that]? I told you never to bring anyone around here"; Tucker said that Velasquez was all right, that Velasquez had been out hustling with him and they had done time together, and there was no heat behind Velasquez; defendant moved away from the driver's side of the automobile and went around the rear of the automobile to the sidewalk at a place about six feet from the rear fender of the automobile; when Tucker went to the rear of the Studebaker, Velasquez remained in the front seat (on the right side) of the Studebaker, but he opened the door and put his feet outside; before leaving the sheriff's office, Velasquez gave Tucker a $10 bill, and Tucker put it in his jacket pocket; while Tucker and defendant were at said place on the sidewalk, Velasquez heard part of their conversation; he heard defendant say, "I told you never to bring anyone around here, that I am just dealing with you"; Tucker returned to Velasquez and said, "How much will we pick up?" Velasquez said, "Here's five," and then handed a $5 bill to Tucker; then Tucker returned to defendant but Velasquez could not hear their conversation; Velasquez saw Tucker hold the $5 bill in his right hand and "he exchanged something, and he got something in return"; Velasquez did not see Tucker hand the $5 bill to anyone, and he did not see the $10 bill after he gave it to Tucker (at the sheriff's office); Tucker returned to the automobile and handed a "little package wrapped in a partial balloon" to Velasquez; then he and Tucker left the location and returned to the sheriff's office, where Velasquez examined the package and found that it contained six capsules and piece of a balloon; he placed those things in an envelope and delivered the envelope and contents to the sheriff's crime laboratory; defendant was arrested, by Deputy Velasquez, about a month or two thereafter, on Sunday about 6 a. m.

On redirect examination, Deputy Velasquez testified that he and Deputy Kehoe searched Tucker at the sheriff's office, prior to going to defendant's home at 210 North Belmont, and Tucker did not have any capsules on him at that time; they searched Tucker again after they returned to the sheriff's office, and they did not find anything.

The capsules contained heroin.

Deputy Kehoe testified further that Tucker and his automobile were searched prior to the time Tucker and Deputy Velasquez went to Belmont Street; Tucker was in the driver's seat, and Velasquez was in the passenger's seat, when they drove away from the sheriff's office; then Deputy Kehoe, accompanied by Officer Gutierrez and other officers, went in a red station wagon to Belmont Street; as Deputy Kehoe drove north on Belmont, passing 210 North Belmont, he saw defendant standing on the sidewalk in front of that address; Deputy Kehoe made a "U-turn" on Belmont; Officer Gutierrez got out of the automobile (about a block and a half north of defendant's house) and started to walk south on the west side of Belmont; Kehoe parked his automobile on Belmont about 500 feet from 210 North Belmont and then saw a Studebaker pull up in front of 210 North Belmont; he saw defendant walk to the passenger's side of the Studebaker, hesitate there, go around the car to the driver's side, stand there a few moments, then return to the sidewalk near the rear fender of the car; the driver of the car went to the place on the sidewalk where defendant was standing; they stood there "a matter of minutes"; the driver returned to the car, then returned to defendant, then returned to the passenger's side of the car; thereafter the driver entered the car and drove north on Belmont and passed Kehoe; then Kehoe drove south on Belmont, picked up Officer Gutierrez, and returned to the sheriff's office.

Officer Gutierrez testified that on said February 27 he was in a station wagon which was driven by Deputy Kehoe north on Belmont Street to a place about a block and a half north of 210 North Belmont; at that place he (witness) alighted from the car and walked south, on the west side of the street, to a place across the street from 210 North Belmont; he saw defendant standing in front of that address; he saw Deputy Velasquez in the passenger's seat of the Studebaker, and he saw the other person (who was with Velasquez) get in the car and drive away; he (witness) continued to walk south after he passed defendant's house.

Defendant testified that he is in the business of selling electric skillets, cook ware, trouble lights, and drop cords; he operates the business under the name of National Wholesale Company, and he uses a station wagon in making sales trips in various states; George Bennett, who is associated with him in the business, is a half-brother of Tucker, referred to herein; Exhibit C (a drop cord) is a drop cord of the type that defendant sells; on February 27 he had two or three cartons of drop cords in his house; he owns a Studebaker coupe; on February 27 he ascertained that Tucker had taken the Studebaker without defendant's permission; on said date, about 7:30 p. m., Tucker telephoned him and said that he had some canned hams and asked if defendant wanted some of them; defendant said that he did not want them; Tucker also said he had sold drill sets and the few drop cords that he had, and he would like to pick up some more drill sets and drop cords; defendant told him that he (defendant) wanted the car and that Tucker did not have permission to drive it; Tucker said that he would be right out; defendant replied that he would be out in front waiting for him; Tucker came out and parked the Studebaker in front of 218 North Belmont, which was the only available place for parking; Tucker got out of the car and approached the defendant, who was walking toward the driver's side of the car; defendant did not receive anything from, or hand anything to, Tucker on said February 27; defendant did not see Velasquez that night; the first time defendant saw him was on the 25th (March) about 6 a. m. when defendant was arrested; at the time of the arrest, Velasquez and another officer searched defendant's house; there were two cartons of drop cords in the house at that time.

On cross-examination, defendant testified that he had been convicted of a felony, —illegally concealing and purchasing narcotics in violation of the Jones-Miller Act; on February 27, when Tucker arrived in the Studebaker, defendant said that he wanted his automobile; Tucker said that he had an officer with him, that he (Tucker) had had some trouble but he thought he could work it out, and if defendant would let him take the car he would return it that evening; Tucker was there about three minutes; he drove the car away; defendant noticed that someone was in the car with Tucker; defendant's telephone number was Madison 5–2938, and it was not listed.

Mr. Campion, a witness on behalf of defendant, testified that he (witness) was a wholesale jobber of electrical appliances; that during the past two years defendant had purchased cook ware, drop cords, and tools from him; that once or twice a week defendant purchased drop cords, and during the two years had purchased between 500 and 750 cords.

Appellant's first contention, regarding insufficiency of the evidence, is not sustainable. The evidence was legally sufficient to support the verdict.

[2] Appellant's second contention is, as above indicated, that the deputy district attorney was guilty of misconduct in his argument to the jury, and in asking certain questions. The evidence presented a close question of fact. No witness said that he saw Tucker hand money to appellant, and no witness said he saw appellant deliver heroin to Tucker. Tucker, who allegedly made the purchase, was not called as a witness. Deputy Velasquez said that he saw Tucker with the $5 bill in his hand and saw him exchange something and get something in return, but he did not see Tucker hand the $5 bill to anyone; that when Tucker returned to the car he handed six capsules to Velasquez. Appellant was not searched

immediately after the alleged sale to ascertain if he had a $10 bill or $5 bill on his person. The attorney general's brief states: "*The transaction* was also witnessed by Police Officer Manuel Gutierrez and Deputy Sheriff Kehoe." (Italics added.) It appears that that statement is inaccurate. Police Officer Gutierrez, who was walking on the opposite side of the street, saw appellant in front of 210 North Belmont, and he saw the person, who was with Velasquez, drive the Studebaker away. Deputy Kehoe, who was in a parked car about 500 feet away, saw appellant walk to the driver's side of the Studebaker, saw appellant and Tucker standing on the sidewalk, and saw Tucker return to the car and then return to appellant. Tucker and his automobile were searched before the alleged sale and no narcotic was found. Tucker was not searched, immediately after he returned to the Studebaker, to ascertain if he then had the $10 bill or $5 bill—he was searched after returning to the sheriff's office. There was evidence that appellant was, and for approximately two years had been, engaged in the business of selling drop cords. Appellant was not arrested until approximately a month after the alleged sale herein. One assignment, by appellant, of misconduct on the part of the deputy district attorney is certain argument of the deputy to the jury, as follows: "Have you often wondered what a narcotic peddler looks like? There he is, right over there." The person referred to therein was appellant. Thereupon, counsel for appellant stated that he assigned the statement as misconduct. The judge said, "Objection overruled, you may proceed." Then the deputy said that he (deputy) had more sympathy for a narcotic addict who "peddles" narcotics because he has got "to peddle" to keep up his habit; there is no evidence that appellant is an addict, and "I think from the evidence here" that appellant "is really a true narcotic peddler." The deputy then said to counsel for appellant: "Do you want to assign that as error, too, counsel?" Counsel for appellant replied, "I certainly do." The judge said, "You [referring to deputy] may proceed." The question before the jury was whether appellant sold heroin on said February 27. When the deputy said that appellant was a "narcotic peddler" he implied that appellant was in the business of selling narcotics and that the alleged sale on February 27 was not the only sale made by appellant but that he had made several other sales. There was no evidence that would justify such an implication. The prior conviction in the federal court of illegally concealing and purchasing narcotics was not a basis for such an argument. That was not a conviction of selling narcotics. Later in his argument, the deputy said that the jurors were going to believe the officers or they were going to believe appellant "who has previously been convicted of the same type of offense." The offense charged herein was selling heroin, and the jurors might well have understood from the deputy's words, "convicted of the same type of offense," that he meant that appellant had been previously convicted of selling narcotics. Such argument that appellant had been convicted of "the same type of offense," when considered in connection with the words "narcotic peddler," tended to add verity and emphasis to the deputy's positive declaration that appellant was a "narcotic peddler" and to his implied declaration that appellant was in the business of selling narcotics. When the deputy first said that appellant was a narcotic peddler, he did not qualify or explain the declaration in any manner. It is true that the second time the deputy said that appellant was a narcotic peddler, he prefaced his declaration with the words, "I think from the evidence here" etc. Such a preface, however, under the circumstances here, is not a sufficient answer to the assignment of misconduct. The evidence "here" did not pertain to any alleged sale other than the one of February 27. There was no evidence, with reference to that alleged sale, from which an inference could be drawn that appellant had made other sales. The deputy did not restrict his argument to a statement that in his opinion, based on the evidence, the appellant sold heroin to Tucker on February 27. The practical effect of his argument was to expand the evidence by adding thereto his own "testimony," to the effect that appellant was in the business of selling narcotics. It is apparent that the argument was intended to mean that since the appellant was a narcotic peddler or in the business of selling narcotics, it is quite likely that he sold the heroin to Tucker on February 27, as charged. In People v. Kirkes, 39 Cal.2d 719, at page 724, 249 P.2d 1, at page 4, it was said, that the rule is well settled "that statements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct."

Toward the close of his argument the deputy district attorney re-emphasized his personal opinion in another form, as follows: "I say this, and I say this sincerely from the bottom of my heart: I am absolutely satisfied from the evidence here presented this defendant is guilty beyond a reasonable doubt." In view of his previous argument, heretofore referred to, it seems that his statement that he was "absolutely satisfied" that appellant was guilty was based upon evidence which included the additional evidence previously announced by him that appellant was a narcotic peddler.

There were other instances of misconduct on the part of the deputy district attorney, but they will not be discussed in detail. They are referred to for the purpose of indicating the over-all unfairness of the argument. In his argument, the deputy said: "Mr. Rose asked why Mr. Tucker wasn't produced. * * * He knows where Mr. Tucker is." Mr. Rose, counsel for appellant, assigned the remark as misconduct. The judge instructed the jury to disregard the remark. The deputy also said: "Mr. Shafer, who was prepared to set himself up as a paragon of virtue in this community, suddenly had the bomb dropped on him. Perhaps he didn't think that it could be brought out that he had previously been convicted of a felony involving narcotics." Counsel for appellant asserted that the argument was improper for the reason he (counsel for appellant) had said in his opening statement that appellant had been convicted in the federal court; and it was improper for the further reason that he (counsel for appellant) had asked the judge, while the deputy was present, if counsel for appellant would be permitted to bring out the fact of prior conviction as a part of the defense. Thereupon, the judge instructed the jury to disregard the statement of the deputy. The judge stated further that counsel for appellant was correct as to what had occurred. The judge also stated that counsel for appellant had asked his opinion as to whether he would be permitted to bring out the fact of prior conviction; that the judge told him he would not have that right, but the right would be on the part of the cross-examiner.

Another instance of misconduct was when the deputy asked appellant if he knew whether Tucker was a narcotic addict. Counsel for appellant assigned the asking of the question as misconduct. The judge instructed the jury to disregard the question.

[3] "[W]here the case is closely balanced and guilt has not been so clearly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against the accused, such misconduct has consistently been deemed ground for reversal. [Citations.]" People v. Ford, 89 Cal.App.2d 467, 471, 200 P.2d 867, 870.

By reason of prejudicial misconduct of the deputy district attorney, the appellant was deprived of a fair trial.

The judgment and the order denying the motion for a new trial are reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

150 Cal.App.2d 1

William B. ACTON, Petitioner,

v.

William L. HENDERSON, as Secretary to the Civil Service Commission and as Personnel Director of the City and County of San Francisco, and Harry D. Ross, as Controller of the City and County of San Francisco, Respondents.

Walter HEIL, Petitioner,

v.

William L. HENDERSON, as Personnel Director of the City and County of San Francisco, State of California, and Harry D. Ross, as Controller of the City and County of San Francisco, State of California, Respondents.

Thomas A. BROOKS, Petitioner,

v.

William L. HENDERSON, as Secretary to the Civil Service Commission and as Personnel Director of the City and County of San Francisco, and Harry D. Ross, as Controller of the City and County of San Francisco, Respondents.

Gertrude H. Downing, Intervener.

Civ. 17629, 17654, 17642.

District Court of Appeal, First District,
Division 1, California.

April 9, 1957.

Rehearing Denied May 9, 1957.

Hearing Denied June 4, 1957.

Mandamus proceedings by city and county employees to compel payment of salary claimed to have been earned by each petitioner. The District Court of Appeal, Peters, P. J., held that charter section providing for compulsory retirement at age of 65 did not expressly or impliedly repeal prior retirement system provided in charter under which board of supervisors had wide discretion in determining to what offices the system applied.

Writ issued as prayed for.

1. Mandamus 🔑4(1), 107

Rules that mandamus will not lie where there is a speedy and adequate remedy by way of appeal in the taxpayer's suit or will not lie to enforce a claim for wages by a municipal employee, are not absolute or jurisdictional.

2. Mandamus 🔑7

District Court of Appeal has considerable discretion in determining whether to entertain mandamus proceedings.

3. Mandamus 🔑107

District Court of Appeal will not ordinarily entertain an original mandamus proceeding to determine validity of wage claims, but rule has no application where the public interest is such as to require a speedy determination of controversy.

4. Mandamus 🔑105

Where ordinance was enacted providing a scheme whereby certain county and city employees could be exempted from retirement system which required retirement at age of 65, the validity of such ordinance presented a question of public interest which required a speedy determination of controversy and mandamus was a proper remedy.

5. Counties 🔑69(3)
Municipal Corporations 🔑162(1)

San Francisco charter provision respecting retirement system and providing that it should be applicable to such offices, departments, bureaus or classes of officers or employees as supervisors shall determine, by necessary and inevitable implication, includes the power of exclusion by supervisors.

6. Municipal Corporations 🔑111(2)

Ordinances are invalid if they conflict with the charter. West's Ann.Const. art. 11, § 6.

7. Municipal Corporations 🔑57

A city under home rule charter has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter.

8. Municipal Corporations 🔑63(1)

Where ordinances or by-laws have been enacted pursuant to competent authority, they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor; courts are to uphold municipal ordinances and by-laws unless they manifestly transcend the power of the enacting body.

9. Counties ⚷3
Municipal Corporations ⚷49

Where recently enacted section of San Francisco charter providing for a new retirement system which required compulsory retirement at the age of 65 and which referred to definition of employees in previously enacted charter section respecting retirement system under which board of supervisors was given wide discretion in determining to whom system was applicable, recent section was not necessarily incompatible with older section and there was no express or implied repeal.

10. Municipal Corporations ⚷49

Where there are two possible constructions of charter section, one that it repeals another section by implication and one that it does not, there is an ambiguity and court must indulge in an interpretation against claim of implied repeal.

11. Municipal Corporations ⚷162(1)

Ordinance providing a scheme whereby attorneys and physicians in noncivil service position, director of any art gallery or museum, and chief administrative officer when reaching retirement age, may exempt themselves from compulsory retirement system established by charter, was not unconstitutional as an arbitrary classification. West's Ann.Const. art. 1, § 21.

12. Statutes ⚷77(1)

A law is not special legislation merely because it is not applicable to all persons and the legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people.

◆

J. Joseph Sullivan, San Francisco, for petitioner Acton.

Steinhart, Goldberg, Feigenbaum & Ladar, San Francisco, for petitioner Brooks.

McEnerney & Jacobs, Garrett McEnerney II, Justin M. Jacobs, E. John Kleines, San Francisco, for petitioner Heil.

Dion R. Holm, City Atty. of City and County of San Francisco, Norman Sanford Wolff, Deputy City Atty., William F. Bourne, Deputy City Atty., Jerome Cohen, Deputy City Atty., San Francisco, for respondents.

John J. Fahey, Jr., Daly City, for Gertrude H. Downing, intervener.

John J. Fahey, Jr., Daly City, H. Ward Dawson, Jr., J. Edward Fleishell, San Francisco, M. Mitchell Bourquin, San Francisco, amici curiae in support of respondents.

PETERS, Presiding Justice.

These three petitions for mandamus have been consolidated for consideration. Each prays that this court compel respondents, who are the appropriate officials of the city and county, to take the steps necessary to pay the salary claimed to have been earned by each petitioner as an employee of the city and county. The petitioners are Thomas A. Brooks, the chief administrative officer of the city and county, Williams B. Acton, principal attorney in the office of the district attorney, and Walter Heil, director of the M. H. de Young Memorial Museum. The respondents are William L. Henderson, personnel director and secretary to the Civil Service Commission who must approve all payrolls, and Harry D. Ross, controller of the city and county, who pays only those payrolls approved by Henderson. Gertrude H. Downing, a taxpayer, has been permitted to intervene in the Brooks case, and to appear as an *amicus curiae* in the other two proceedings. Also appearing as an *amicus curiae* is Local 747 of the American Federation of State, County and Municipal Employees, who appears in opposition to petitioner Brooks, and in opposition to petitioners Acton and

Heil appears the Civil Service Association of San Francisco. It was stipulated at the oral argument that the *amici curiae* could be considered as interveners in all of the actions so as to permit them to raise any legal questions that could be raised only by the parties to the actions.

The controversy is simple to state. Under the terms of several ordinances passed by the supervisors of the city and county, the three petitioners, just prior to the dates they would have been compelled to retire under the charter, resigned from the positions they then occupied, withdrew their contributions from the local retirement system, and were then reappointed by the proper authorities to the positions they formerly occupied. As such reappointed officials they did not become members of the retirement system. In July of 1956 Gertrude H. Downing, the taxpayer who appears here as an intervener and *amicus curiae,* brought an action in the local Superior Court against the supervisors, Brooks, Henderson and Ross, challenging the validity of the ordinances in general and the reappointment of Brooks in particular. Henderson and Ross, who, under the provisions of the charter are personally liable for authorizing improper payments of salary, took the position that they should not approve and pay the salaries of any of the three petitioners until the validity of the ordinances involved was determined. In January of 1957, the trial court in the Downing case rendered an opinion adverse to petitioners holding the challenged ordinances to be in violation of the charter. The findings and judgment in that case have not, as yet, been entered. Petitioners then individually instituted these three mandamus proceedings.

In these mandamus proceedings the petitioners and respondents agree and urge that the ordinances involved do not violate the charter, and so are in agreement that the writs should issue. The respondents resist payment only to protect themselves in the event the ordinances are invalid. The intervener and *amici curiae,* however, vigorously contest the validity of the ordinances in question, so that the proceedings are adversary in nature.

All three petitioners assert that the ordinances involved are valid. If so, the writs should issue in all three cases. Petitioner Heil raises another point applicable only to himself, but this point need not be considered because of our conclusion that the challenged ordinances are valid.

[1-3] At the inception of these proceedings we are met by the contention of intervener that mandamus is not a proper remedy. It is claimed that there is a speedy and adequate remedy by way of appeal in the taxpayer's suit, and that mandamus will not lie to enforce a claim for wages by a municipal employee. Coombs v. Smith, 17 Cal.App.2d 454, 62 P.2d 380. But these rules are not absolute, and not jurisdictional. The appellate court has considerable discretion in determining whether to entertain such proceedings. The appeal from the Superior Court judgment, once it is entered, would be neither speedy nor adequate. It involves only petitioner Brooks. Neither Acton nor Heil is a party to that action, and both differ from Brooks in certain respects in employment status and relationship to the retirement systems. An appeal in the Brooks case would not necessarily determine their rights, and would require one or two more lower court actions before the controversy could be finally settled. In these consolidated proceedings in mandamus all relevant questions can be settled, thus preventing a multiplicity of actions. But even of greater importance is the public interest involved. While the appellate court will not ordinarily entertain an original proceeding in mandamus to determine the validity of wage claims, that rule has no application where the public interest is such as to require a speedy determination of the controversy. Hollman v. Warren, 32 Cal.2d 351, 196 P.2d 562. Directly in point is Tevis v. City & County of San Francisco, 43 Cal.2d 190, 272 P.2d 757, which, while recognizing the general rule

that wage claims should normally be litigated in an action at law, held that such rule should not be applied when the public interest required a speedy determination by an appellate court. At page 198 of 43 Cal.2d at page 762 of 272 P.2d, the court stated: "In a few situations involving claims by state or municipal employees for wages the general rule has been relaxed. For the most part, these cases concern disputes as to the proper construction of a statute or ordinance defining or giving rise to the exercise of official duty, and, although recognizing that the ultimate effect of a decision may be to adjudicate a money claim, they emphasize the necessity of official cooperation and the ministerial nature of the official acts involved." See also City and County of San Francisco v. Boyd, 22 Cal.2d 685, 140 P.2d 666; Scannell v. Murphy, 82 Cal.App.2d 844, 187 P.2d 790.

In the instant cases the public welfare requires that the dispute here involved be speedily determined. This being so, in the exercise of our discretion, and in the interests of justice, we have decided to entertain these proceedings.

As already pointed out, the primary point involved is the validity of certain ordinances adopted by the Board of Supervisors of the city and county of San Francisco. The effect of these ordinances was to amend section 221 of the local Municipal Code to read as follows:

> "Sec. 221. With the exception of those employees who are excluded from membership as provided in Section 222, of this Article, all employees shall become members of the Retirement System as follows:
>
> * * * * * *
>
> "(c) * * * provided that attorneys and physicians in non-Civil Service positions who resign and withdraw their contributions from the Retirement System within sixty (60) days of the date upon which they would normally be required to retire because of age, shall not become members of the Retirement System at any later date if they are subsequently appointed to non-Civil Service positions for employment in their professional capacity to perform duties included within their professions, but exclusive of any administrative or executive positions for which such professional status constitutes only part of the qualifications therefor; and further provided that any persons occupying the position of director of any art gallery or memorial museum of the city and county who resign and withdraw their contributions from the Retirement System within sixty (60) days of the date upon which they would normally be required to retire because of age, shall not become members of the Retirement System at any later date if they are subsequently appointed to the position of director of any art gallery or memorial museum of the city and county; and further provided that any person occupying the office of Chief Administrative Officer who resigns and withdraws his contributions from the Retirement System within sixty (60) days of the date upon which such person would normally be required to retire because of age, shall not become a member of the Retirement System at any later date if such person is subsequently appointed to the Office of Chief Administrative Officer, but thereafter such person shall not occupy that office for a period longer than two years after reaching the age at which he would normally have been required to retire because of age; * * *."

The first "provided" clause applicable to persons in the status of Acton was added by ordinance in September, 1952. The date of Acton's compulsory retirement would have been January 1, 1954. The second "provided" clause applicable to directors of art museums was added in August of 1955. The date of Heil's compulsory retirement would have been December 1, 1955. The third "provided" clause applicable to the chief administrative officer was added in December of 1955. Petitioner Brooks would have been compelled to retire on August 1, 1956.

It is quite clear that in the absence of these amendments to section 221, subd. (c), of the Municipal Code, the reappointment of the petitioners after their resignations from the retirement system would have been illegal because in violation of various charter provisions. The San Francisco charter contains two different retirement plans, one provided for by section 165, and the other, later in time, by section 165.2. Under section 165 retirement is compulsory at age 70, while under section 165.2 retirement, after June 30, 1952, is made compulsory at age 65. The plan provided by section 165.2 will eventually replace the plan set up by section 165 as the members under this last section die, resign or retire. Subdivision (J) of section 165.2 provides: "No person retired under this section * * * *entitled to receive a retirement allowance under the retirement system* shall serve in any elective or appointive position in the city and county service, including membership on boards and commissions, nor shall such persons receive any payment for service rendered to the city and county after retirement * * *."

Both plans require "miscellaneous officers and employees," who are defined as all employees except members of the police and fire departments, to be members of the retirement system. There is no provision in either charter provision permitting overage persons to become members of the retirement system. It follows, of course, that such over-age employees, in the absence of such a provision as 221, subd. (c), are not eligible for city and county employment. Section 163(a) of the charter also prohibits persons who have been retired for service and who are in receipt of a retirement allowance from receiving payment for any services rendered after retirement.

Thus, the real question involved in these proceedings is whether the amendments to section 221, subd.(c), of the Municipal Code were lawfully adopted. If so, the writs should issue. If not, the applications for the writs should be denied.

The claimed authority for the passage of the ordinances is to be found in section 165 of the charter. That section provides, in part:

> "Section 165. Officers and employees of the city and county, except members of the police and the fire departments, shall become members of the retirement system subject only to the following provisions, in addition to the provisions contained in sections 158 to 164, of this charter, both inclusive:
>
> "(a) *The system shall be applied to such offices, departments, bureaus, or classes of officers or employees of the city and county,* * * * *as the supervisors shall determine.* * * *
>
> "(b) * * * retirement shall be compulsory at the age of seventy years * * *." (Italics added.)

[4] This section confers on the board of supervisors the power to include within the retirement system such "offices, departments, bureaus, or classes of officers or employees" as the "supervisors shall determine." This power of inclusion, by necessary and inevitable implication, includes the power of exclusion. The provision making the retirement of "members" compulsory at age 70 is clearly qualified by the discretion vested in the board.

The intervener in the Brooks case admits that section 165(a) (subject to his later arguments in reference to section 165.2), permits the board to exclude the office of chief administrative officer entirely from the retirement system, but claims that by Municipal Code section 221, subd. (c), the board has attempted to exclude only administrative officers who have reached retirement age, and contends that this cannot be done. Intervener has misinterpreted section 165(a). That section refers not only to offices, departments and bureaus, but also to "classes of officers and employees." Thus, section 165(a) expressly confers the power to classify officers, departments and bureaus, and expressly confers the power to classify as was done in section 221, subd. (c), of the Municipal Code. That such classification was reasonable and is based on distinctive factors is obvious.

There can be no reasonable doubt that employees who are members of the retirement plan provided by section 165 may be taken out of the plan by appropriate exercise of the board's discretion. Being no longer members of the plan, section 165(a) permits their reemployment if the supervisors so decide. This is precisely what section 221, subd. (c), of the Municipal Code provides. Thus, if section 165 were the only section to be interpreted there would be no doubt at all that that section expressly confers on the board the power to do exactly what it did do when it amended section 221, subd. (c), of the Municipal Code.

The difficulty is that there is no comparable power expressly conferred on the board as to employees retired under section 165.2. That section provides, in part:

> "Section 165.2 Miscellaneous officers and employees, as defined in this section, who are members of the retirement system under section 165 of the charter on the effective date hereof, hereby designated as the first day of July, 1947, and persons who become miscellaneous officers and employees after said effective date, shall be members of the retirement system on and after said date, subject to the following provisions of this section, in addition to the provisions contained in sections 158 to 161, both inclusive, of this charter notwithstanding the provisions of any other section of the charter, provided that the retirement system shall be applied to persons employed on a part-time, temporary or substitute basis only as the board of supervisors shall determine by ordinance enacted by three-fourths vote of all members of the board. Miscellaneous officers and employees of the said departments who are members of the retirement system under section 165 of the charter on said effective date, however, shall have the option to be exercised in writing on a form furnished by the retirement system and to be filed at the office of said system not later than ninety days after the effective date hereof, of being members of the system under section 165 instead of this section, the election under said option to be effective on said effective date. * * * On and after said date, the persons who affirmatively exercise said option, shall continue to be members of the system under section 165 and shall not be subject to any of the provisions of this section.
>
> "(A) The following words and phrases as used in this section, unless a different meaning is plainly required by the context, shall have the following meaning: * * *
>
> "For the purposes of the retirement system and of this section, the terms 'miscellaneous officer or employee,' or 'member,' as used in this section shall mean any officer or employee who is not a member of the fire or police departments as defined in the charter for the purpose of the retirement system, under section 165 of the charter. * * *
>
> "(B) * * * Members shall be retired on the first day of the month next following the attainment by them of the age of * * * sixty-five years [after June 30, 1952]."

Section 158 of the charter also has some bearing on the power of the board of supervisors with respect to the retirement system. It reads, in part, as follows:

> "* * * Ordinance No. 5561 (New Series) and amendments thereto, now establishing the employees' retirement system, shall continue in force until amended or revoked by the board of supervisors as provided in this section. The board of supervisors is hereby empowered to enact, by a vote of three-fourths of its members,

> any and all ordinances necessary to carry into effect the provisions of sections 158 to 172, both inclusive, of this charter; provided that the board of supervisors shall secure, through the retirement board, an actuarial report of the cost and effect of any proposed change in the benefits under the retirement system, before enacting an ordinance or before voting to submit any proposed charter amendment providing for such change."

It is an understatement to point out that section 165.2, added to the charter in 1947, is not a model of draftsmanship. It does not spell out with clarity the relationship between it and section 165. Certainly it did not expressly or impliedly repeal all of the provisions of section 165. In fact, it expressly recognizes the continuance of the retirement plan set up by section 165. It will also be noted that there is no unambiguous specification of the supervisor's powers regarding who shall be members of the retirement plan set up by section 165.2. There is no provision comparable to that in section 165(a), above quoted, expressly conferring on the supervisors the power of determining who shall be, and who shall not be, members of the plan.

The intervener and the *amici curiae* strenuously contend that in this respect the provisions of section 165.2 are totally inconsistent with section 165(a), and that section 165.2, in this respect, necessarily repealed section 165(a). The petitioners contend, with equal vehemence, and on this point are supported by respondents, that section 165.2 did not repeal by implication or otherwise section 165(a), and that, under proper rules of construction, the power conferred by section 165(a) remains unimpaired and exists as to both retirement plans. Thus, the problem presented is one of construction, and can be simply stated: Did section 165.2 repeal by implication, or otherwise, the provisions of section 165(a)?

[5–7] Before this question can be answered, the proper rules of construction applicable to charters, ordinances, and the power of boards of supervisors must be set forth. We start with the premise that the ordinances embodied in section 221, subd. (c), of the Municipal Code are invalid if they conflict with the charter. Section 2 of the charter and section 6 of Article XI of the state Constitution so provide, and the cases are in accord. Marculeseu v. City Planning Comm., 7 Cal.App.2d 371, 46 P.2d 308. But in determining such validity or invalidity it is a fundamental rule that in construing a city home rule charter "the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter." City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598, 212 P.2d 894, 896. As was also stated in that case on the same page: "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. [Citations.] * * * All rules of statutory construction as applied to charter provisions [citations] are subordinate to this controlling principle. The former guide—that municipalities have only the powers conferred and those necessarily incident thereto [citation]—is inapplicable. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied."

Section 2 of the charter expressly recognizes this rule. It provides, in part: "The city and county may make and enforce all laws, ordinances and regulations necessary, convenient or incidental to the exercise of all rights and powers in respect to its affairs, officers and employees, and shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and limitations provided in this charter. * * * The specific or enumeration in this charter of particular powers shall not be exclusive. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors."

In Hanley v. Murphy, 40 Cal.2d 572, 576, 255 P.2d 1, 3, the court stated: "Under settled rules of statutory interpretation, these several sections [of the San Francisco charter] must be construed together, giving effect and meaning so far as possible to all parts thereof, with the purpose of harmonizing them and effectuating the legislative intention as therein expressed."

In California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 292, 140 P.2d 657, 660, 147 A.L.R. 1028, the court, in quoting from an earlier case, stated: "The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together."

[8] Another important rule of construction was stated in Glass v. City of Fresno, 17 Cal.App.2d 555, 560, 62 P.2d 765, 768, in the following language: "Where ordinances or by-laws have been enacted pursuant to competent authority they will be supported by every reasonable intendment, and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances and by-laws unless they manifestly transcend the powers of the enacting body."

These rules were reaffirmed by the Supreme Court in the recent case of City of Glendale v. Trondsen, 48 Cal.2d 93, 308 P.2d 1 reaffirmed the rules set forth in City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894, supra. See also Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838.

[9] With these rules of construction in mind, and paying deference to them as we must, the problem here involved becomes relatively simple. There is no express repeal of section 165(a), of the charter in section 165.2. The two sections are not necessarily incompatible. Moreover, there are internal indications in section 165.2 that it was intended to keep section 165(a) in full force and effect. In the first paragraph of section 165.2 reference is made to section 158 of the charter, a section which confers considerable discretion on the board of supervisors. The same paragraph purports to define, somewhat ambiguously, "miscellaneous officer or employee" covered by the plan as "any officer or employee who is not a member of the fire or police departments as defined in the charter for the purpose of the retirement system, under section 165 of the charter." What does this mean? A fair and reasonable interpretation is that by this cross-reference the definition of the employees in section 165.2 was intended to be the same as the term is defined in section 165, and that section 165.2 was intended to be subject to section 165(a), insofar as the power of the supervisors to determine who shall be members of the system is concerned. The fact that section 165.2 sets up a different retirement system, with a different age as to compulsory retirement, should not and cannot be considered as an implied repeal of section 165(a).

Another internal evidence of the ambiguous nature of section 165.2, and particularly of its first paragraph, is found in the fact that it deals with those individuals who "shall" become members of the retirement system. But section 165(a) grants discretionary power to the board of supervisors to determine what "offices, departments, bureaus, or classes of officers or employees" shall be included in or excluded from the system. Thus, section 165.2 relates to what *individuals* shall become members of the system, while section 165(a) relates to what *"classes"* of employees shall be included or excluded. It is a possible and reasonable interpretation that section 165.2 affects all individuals who have not been made, constitutionally, a member of an exempt class under the power conferred by section 165(a).

The intervenor and *amici curiae* present many arguments as to why section 221, subd. (c), of the Municipal Code contravenes section 165.2 of the charter. They are supported in this contention by a memorandum opinion written by Judge J. F. Good of Butte County, sitting in San Francisco pro tem., who held that the ordinances were invalid. In this opinion he made no mention of the applicable rules of construction to which reference has been made. The basic premise of all of these arguments is that the first paragraph of section 165.2 provides that the new section affects "miscellaneous officers and employees" who are members of the retirement system under section 165 on July 1, 1947, and persons who become such officers and employees thereafter "notwithstanding the provisions of any other section of the charter." This refers to all miscellaneous officers and employees except part-time, temporary and substitute employees, and persons under the plan provided by section 165 who elect to continue under the old plan. Retirement is made mandatory under both plans. It is argued that the specific provision giving the supervisors discretion over the retirement of part-time, temporary, or substitute employees necessarily implies that the board retains no discretion regarding other employees, regardless of which plan they elect. It is argued that the reference to section 165 in section 165.2 in the provision defining "miscellaneous officers and employees" cannot be construed as continuing the discretion conferred on the board by section 165(a), because such a construction would be inconsistent with the specific designation in section 165.2 as to who shall be members of the plan. The provision abrogating any provision of the charter in conflict with section 165.2 compels the conclusion, so it is argued, that the powers vested in the supervisors by section 165(a) were abrogated by section 165.2.

Other less forceful arguments are made by intervenor and *amici curiae.* Counsel point out in detail various provisions of section 165.2 that are inconsistent with provisions of section 165. But none of these provisions are necessarily inconsistent with the power conferred by section 165(a). To hold that these ambiguous provisions repealed section 165(a) would require this court to disregard the rules of construction, and the public policy upon which they are based, above set forth. This we cannot do.

It is undoubtedly true that portions of the first paragraph of section 165.2, and other portions of section 165.2, can be interpreted as being inconsistent with the continued existence of the power conferred by section 165(a). But in order to so construe the section it must be found that section 165.2 clearly and explicitly curtailed section 165(a); that section 165.2 is irreconcilable, clearly repugnant and so inconsistent that the two sections cannot have concurrent operation. Tested by these standards the arguments in favor of the implied repeal of section 165(a) all fail.

[10] It is to be remembered that under the rules of construction already discussed it must be held that the board of supervisors had the power to pass section 221, subd. (e), of the Municipal Code unless that power has been denied to the board, expressly or by necessary implication. It may be that, if section 165.2 of the charter were to be considered alone, it could be interpreted to negative the existence of the claimed power. That is the most that the arguments of intervener and *amici curiae* establish. But section 165.2 does not stand alone. The power to pass section 221, subd. (c), does not depend upon an interpretation that it exists because of a failure of the

charter to deny its existence. As already pointed out, the power to pass the ordinance is conferred expressly by section 165(a) of the charter. That grant of power has not been expressly repealed. Before it can be held to have been repealed by implication by section 165.2 it must be held that that section is so inconsistent with section 165(a) that the two cannot stand together. To say the least (as the arguments of able counsel on both sides of this litigation illustrate), section 165.2 is ambiguous in this respect. There are two possible constructions of section 165.2—one that it repeals section 165(a) by implication, and one that it does not. It may be conceded that either interpretation is a reasonable one, perhaps even equally so. But once it is determined that there is an ambiguity, and that a possible and reasonable interpretation against repeal exists, then our task is done, and our duty is clear. We must indulge in the interpretation against the claimed implied repeal.

We have discussed this problem of construction at some length. This is partly due to the fact that able counsel argue with such obvious sincerity that section 165.2 is so inconsistent with section 165(a), that the power to pass section 221, subd. (c), of the Municipal Code does not exist. In order to be fair to all concerned we have carefully considered and appraised all of the arguments of the intervener and *amici curiae*. But the length of the discussion should not be taken as an indication that the legal problem involved is complex or difficult, or that the court has any mental reservations about its solution. Actually, the legal problem involved is a relatively simple one. Once the two charter provisions are quoted, and the rules of construction established, the solution is clear, obvious and inevitable. The power to pass section 221, subd. (c), existed.

[11] The other major contention of intervener and of *amici curiae* is that, even if it be assumed that the charter permits the board to enact legislation permitting certain classes of employees to work beyond retirement age, section 221, subd. (c), of the Municipal Code is an invalid exercise of that power because the classifications contained in that section are discriminatory and so in violation of the federal and state Constitutions.

Article One of section 21 of the state Constitution provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

[12] The second clause of this provision is applicable to and constitutes a restraint upon boards of supervisors and municipal legislative bodies. In re Blois, 179 Cal. 291, 176 P. 449. But neither the state nor the federal Constitution prohibits proper legislative classification. Home Ins. Co. of New York v. State of New York, 134 U.S. 594, 10 S.Ct. 593, 33 L.Ed. 1025. The proper rule was stated in Martin v. Superior Court, 194 Cal. 93, at page 100, 227 P. 762, at page 765, in the following language: "A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the Legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people. If the law is to bear equally upon all persons, the Legislature must classify whenever there exists a reason which may rationally be held to justify a diversity of legislation. In other words, different persons, different localities, and different governmental organizations and agencies may justly be found by the legislature to stand in different relations to the law and if the same law were, in such a situation, to be applied to all alike, it would not bear equally upon each of them."

On the same page the court outlined the nature of the inquiry that must be made in passing on a legislative classification as follows: "The classification, however, must not be arbitrarily made for the mere purpose of classification, but must be based upon some distinction, natural, intrinsic or constitutional, which suggests a reason for and justifies the particular legislation. That is to say, not only must the class itself be germane to the purpose of the law but the individual components of the class must be characterized by some substantial qualities or attributes which suggest the need for and the propriety of the legislation. Subject to these limitations a law is general despite the fact that it operates only upon a class of individuals or things, if it applies equally to all persons or things within the class to which it is addressed."

The Supreme Court, in the Martin case, also emphasized the rule of deference that must be applied by the judiciary in passing upon a legislative classification. The court stated, 194 Cal. at page 101, 227 P. at page 765: "The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. [Citation.] It follows that in any given case if the existence of a state of facts of which the court may take judicial notice seems to have been made the basis of a particular piece of legislation and if it may be reasonably said that such facts afford good ground for the making of a particular classification the legislative enactment will be upheld although the reason therefor does not appear *prima facie* in the law itself." See also In re Herrera, 23 Cal.2d 206, 143 P.2d 345; Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939. In California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 300, 140 P.2d 657, 664, 147 A.L.R. 1028, the court quoted with approval the following statement appearing in American Jurisprudence:

> "The relation of employer and employee has long been the basis for specific legislation, and statutes applicable only to such relation are not subject to the objection that they constitute class legislation. Moreover, the equal protection of the laws is not denied by the classification of occupations if such classification has a reasonable basis. Such classification may be based upon matters which are personal to the individuals who are acting as employees. For example, statutory regulations with reference to labor of women or children or both may be sustained as against the objection that they constitute an arbitrary discrimination because they do not extend to men. Moreover, the classification may be based not only on the character of the employees but upon the nature of the employer's business, since the character of the work may largely depend upon the nature and the incidents of the business in connection with which the work is done. A statute dealing with employees in a particular line of business does not create an arbitrary discrimination merely because the operation of the statute is not extended to other lines of business having their own circumstances and conditions, or to domestic service."

Tested by these standards it is too clear to require extended discussion that the classification contained in section 221, subd. (c), of the Municipal Code is not "palpably arbitrary in its nature," but is reasonable and within the proper sphere of legislative discretion.

Each of the three amendments to the section is made applicable to persons within the class affected only when they have reached retirement age. Thus, the ordinances classify between employees below retirement age and those over it. As already pointed out, section 165(a) of the charter grants the power to the board of supervisors of inclusion and exclusion not only as to such "offices, departments, bureaus" as the board shall determine, but also to determine what "classes of officers or employees of the city and county" the retirement system will include. Obviously, a reasonable basis exists for classifying between those above and below retirement age. All those below must belong to the system and must retire at retirement age unless the board decides, as it did by passing section 221, subd. (c), of the Municipal Code providing that the classes of employees mentioned may resign and be reappointed. This classification was a reasonable one.

It is contended by the intervener and by *amici curiae* that placing the "chief administrative officer" in a separate class from other employees or from other heads of departments is arbitrary. The contention is unsound. Under the charter the chief administrative officer is the head of the entire administrative department of government and is granted extraordinary powers not granted to other public employees or officers. The electorate in approving the charter clearly provided for three branches of city and county government—the executive, headed by the mayor, the legislative, headed by the board of supervisors, and the administrative, headed by the chief administrative officer. Thus the electorate placed the chief administrative officer in a special class when it adopted the charter. The position is unique, different and distinguishable from all other positions in city and county government. This uniqueness of position alone justifies the classification.

The classification is which petitioner Acton is found is equally reasonable. One of the amendments to section 221, subd. (c), grants to "attorneys and physicians in non-Civil Service positions" the conditional option to continue in city employment past retirement age. The charter itself—section 142—distinguishes these employees from the great mass of city and county employees by exempting them from the city and county civil service system. It requires no citation of authority to establish that physicians and attorneys may be classified differently than other businesses, professions and employments. The State Bar Act, Bus. & Prof. Code, § 6000 et seq., applicable alone to attorneys, and the State Medical Practice Act, Bus. & Prof. Code, § 2000 et seq. applicable alone to doctors, are examples of the state classifying those professions differently from all others. Obviously, this classification is well within constitutional limits.

Petitioner Heil is the director of the de Young Museum. One of the amendments to section 221, subd. (c), is made applicable to "directors of museums." This position is not as important or as unique as that of chief administrative officer, nor as widely recognized as subject to classification as the occupations of physician or attorney. But the charter itself—sections 50, 51 and 52—provides specially for the appointment of three museum directors and for their management of the three public museums. The obvious cultural and administrative requirements of these positions provide a legitimate basis for the classification.

The other contentions of the intervener and of *amici curiae* are all unsound and do not require discussion. We conclude that the three questioned additions to section 221, subd. (c) of the Municipal Code are valid and constitutionally sound.

Let the writs of mandate issue as prayed for.

BRAY and FRED B. WOOD, JJ., concur.

149 Cal.App.2d 326

Richard D. FURNISH, M.D., Appellant,
v.
BOARD OF MEDICAL EXAMINERS of the State of California, Respondent.
Civ. 21721.

District Court of Appeal, Second District, Division 1, California.
April 19, 1957.

Mandamus proceeding by physician against State Board of Medical Examiners to set aside board's order suspending physician's license for one year after defendant had been convicted following his pleas of nolo contendere to two counts charging income tax evasion for each of two years. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment of dismissal, and physician appealed. The District Court of Appeal, 308 P.2d 924, affirmed judgment. On application to the court to grant a rehearing on its own motion, the District Court of Appeal held that fact that physician intended to move, in federal District Court, to correct sentence imposed against him on ground that physician had only committed a misdemeanor, would not entitle physician to a rehearing.

Application denied.

Mandamus ⚷175

Fact that physician, who had been convicted of income tax evasion, intended to move, in federal District Court, to correct sentence imposed against him on ground that physician had only committed a misdemeanor, would not entitle physician to a rehearing in mandamus proceeding to set aside order suspending his physician's license for one year. West's Ann.Rules on Appeal, rule 27; 26 U.S.C.A. (I.R.C.1939) §§ 145(b), 3616(a); 28 U.S.C.A. § 2255.

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Murray M. Chotiner, Russell E. Parsons, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Howard S. Goldin, Deputy Atty. Gen., for respondent.

PER CURIAM.

On March 20, 1957, this court filed its decision affirming the order of the superior court in the above entitled action.

On April 3, 1957, a Petition for Rehearing was filed by the appellant, within the time provided for by law; the Petition for Rehearing was denied on April 9, 1957. Appellant has filed in the Supreme Court a Petition for Hearing.

On April 10, 1957, appellant made an application to this court to grant a rehearing on its own motion under Rule 27, Rules on Appeal.

Appellant's present application is basically grounded on the following allegations:

"Petitioner intends to file before the Honorable Leon Yankwich, Judge of the Federal District Court, a motion to correct the sentence heretofore imposed against the petitioner on his plea of nolo contendere to two counts of violating Section 145(b) of the Internal Revenue Code [26 U.S.C.A. § 145(b)] to show that he was convicted of violating Section 3616(a) of the Internal Revenue Code [26 U.S.C.A. § 3616(a)], a misdemeanor.

"Said motion will be made under the authority of Section 2255 of Title 28 of the United States Code;

"The case of Griffin v. United States, 6 Cir., 1949, 173 F.2d 909, holds that even though a sentence is served, but if invalid and creates an unjust result the Court will not ignore error;

"The basis of the motion to correct the sentence is that the offense of violating Section 145(b) of the Internal Revenue Code, a felony, is, in effect, the same as violating Section 3616(a) of the Internal Revenue Code, a misdemeanor".

Upon the authority and for the reasons stated in Ex parte Berkoff, D.C., 65 F.Supp. 976, 979, 781, and the holding in Bowles v. United States, 4 Cir., 73 F.2d 772, 776, certiorari denied 294 U.S. 710, 55 S.Ct. 506, 79 L.Ed. 1245, the application is denied.

150 Cal.App.2d 212

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Russell C. MILLER, Defendant and Appellant.

Cr. 1301.

District Court of Appeal, Fourth District, California.

April 16, 1957.

Prosecution for burglary. From judgment of conviction entered in Superior Court, San Diego County, Harold D. Cornell, J. pro tem., defendant appealed. The District Court of Appeal, Griffin, J., held where screwdriver and flashlight were found on defendant and iron bar found in defendant's automobile which was parked near store which defendant was charged with having burglarized were offered in evidence and court sustained objection to their admission, presentation of the articles before the jury did not prejudice the defendant.

Judgment affirmed.

1. Criminal Law ⚿1170½(1)

The fact that defendant who denied conviction of previous felony, in prosecution for burglary, was ignorant of the fact that he could be impeached by showing that he had admitted prior conviction was not ground for reversal of conviction.

2. Criminal Law ⚿1168(2)

Where screwdriver and flashlight found on defendant by arresting officers and iron bar found in defendant's automobile which was parked near store which defendant was charged with having burglarized were offered in evidence and court sustained objection to their admission, presentation of the articles before the jury did not prejudice the defendant.

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Earl J. Cantos, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of the crime of burglarizing a store in Bostonia on July 2, 1956. He admitted a prior conviction of a felony. Defendant, in propria persona, filed a notice of appeal. A court-appointed attorney filed a report in lieu of an opening brief on his appeal, which shows that in seeking from defendant the grounds of appeal he wished to urge, defendant replied "Ignorance of the fact of impeachment" and "I was thinking of unnecessary inflammation of the jury, of my personal belongings."

[1] Defendant, in face of his previous admission of such prior conviction of a felony, prior to trial, on the witness stand, denied this conviction. Apparently, as represented by defendant's counsel, defendant claims that when he took the stand at the trial, he was ignorant of the fact that he could be impeached by asking him if he had been previously convicted of a felony, and accordingly he was taken by surprise.

The questions propounded by the prosecution in reference to his previous conviction were proper. Code Civ.Proc. Section 2051; People v. Peete, 28 Cal.2d 306, 319, 169 P.2d 924; People v. Hooker, 130 Cal.App.2d 687, 695, 279 P.2d 784. The claimed fact that defendant did not understand the right of the prosecution to propound such questions, if he took the stand to testify, is no ground for reversal of the judgment.

[2] The other ground is equally untenable. Defendant, according to the record, was caught in the act of burglarizing the store at 2:15 a. m. The window screen had been torn, a door was found partially open, the safe had been moved, the cash register rifled, and around $36 in silver was missing from it. Defendant was searched and $39 in silver was found on his person, and a screwdriver and pencil-flashlight were found in his pocket. He was wearing gloves, and an iron bar was found in his car, parked near the store.

Defendant freely admitted the commission of the crime to the officers. On the witness stand, however, he only admitted entering the store that night and claimed it was with no criminal intent and that he did not take anything from the premises. The prosecution offered in evidence the screwdriver, flashlight and iron bar. The court sustained an objection to their admission. Defendant claims he was prejudiced by the presentation of these articles before the jury. Even though it might well appear that these articles were admissible, defendant could not reasonably claim he was prejudiced by the attempted offer and the ruling of the court. People v. Cavanaugh, 44 Cal.2d 252, 267, 282 P.2d 53.

After a careful examination of the entire record we agree with the conclusion reached by defendant's appointed counsel, that there appears no grounds for an appeal in respect to the claims presented by defendant, that no prejudicial error appears, and that the record discloses defendant had the benefit of a fair trial.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

150 Cal.App.2d 154

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Dave R. MILLWOOD, Defendant and Appellant.

Cr. 3321.

District Court of Appeal, First District, Division 2, California.

April 16, 1957.

Hearing Denied June 12, 1957.

Proceeding upon petition for writ of error coram nobis more than fourteen years after defendant was convicted of armed robbery with three prior convictions. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., denied petition, and petitioner appealed. The District Court of Appeal, Draper, J., held, inter alia, that the habitual criminal statute does not subject a defendant to double jeopardy and is constitutional.

Order affirmed.

1. Criminal Law 🔑162, 163

Habitual criminal statute does not subject a defendant to double jeopardy and is constitutional. West's Ann.Pen.Code, § 644.

2. Criminal Law 🔑163

Plea of former jeopardy was not an answer to charge of prior conviction, and therefore trial court's failure to enter such plea was not error. West's Ann.Pen.Code, § 644.

3. Criminal Law 🔑997(4)

Where, in prosecution for armed robbery, information charged defendant with three prior convictions, and trial court directed entry of denial of the priors after defendant refused to admit or deny them on ground that he was entitled to plead double jeopardy as to the priors, fact that information did not specifically charge defendant with being an "habitual criminal" would not entitle defendant to writ of error coram nobis on ground that he had not been fully notified of the charge against him. West's Ann.Pen.Code, §§ 644, 1025.

4. Criminal Law 🔑99

Defendant's contention that he had been arrested in Nevada, "kidnapped", and brought to California for trial without proper extradition proceedings would not be ground for relief after his conviction in a fair trial in California.

5. Criminal Law 🔑997(2)

Coram nobis will not lie to review issues which were known to defendant at time of trial, and which could have been raised on appeal.

6. Criminal Law 🔑997(12)

One seeking writ of error coram nobis must show diligence.

7. Criminal Law ⚿997(12)

Lapse of over 14 years from date of conviction to date of petition for writ of error coram nobis would warrant denial of the petition.

8. Habeas Corpus ⚿48

Jurisdiction in habeas corpus proceeding would lie only in county of confinement, and therefore person who was imprisoned outside City and County of San Francisco would not be entitled to have his petition for writ of error coram nobis treated as one for writ of habeas corpus in the superior court for such city and county.

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Dave Millwood, Represa, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

In 1942, defendant-petitioner was charged with the crime of armed robbery. The information was later amended to charge him with three prior convictions. Originally he pleaded guilty, but was permitted to change his plea to not guilty. When advised that he was charged with three prior convictions, he refused to admit or deny them, asserting that he was entitled to plead double jeopardy as to the priors. The trial court, pursuant to Penal Code, § 1025, directed entry of denial of the priors. The case was tried by a jury, defendant was convicted and it was found that he had suffered the prior convictions as charged. More than fourteen years after his trial, he petitioned the superior court for writ of error coram nobis. That petition was denied, and petitioner appeals.

[1–3] The petition and the briefs in support of it are long and rambling. It appears, however, that petitioner's principal contention is that the habitual criminal statute, Pen.Code, § 644, is unconstitutional in that it subjects a defendant to a second punishment for the prior offenses charged, and that his offered plea of former jeopardy as to the priors should have been received. But the statute does not subject a defendant to double jeopardy, and is constitutional, In re Rosencrantz, 205 Cal. 534, 271 P. 902; People v. Dunlop, 102 Cal.App.2d 314, 316–317, 227 P.2d 281; People v. Floth, 8 Cal.App.2d 600, 47 P.2d 817. Since the plea of former jeopardy is not an answer to the charge of prior convictions, there can be no complaint of the trial court's failure to enter such a plea. Appellant complains also that the information did not specifically charge him with being an "habitual criminal", and thus did not notify him fully of the charge against him. This contention, too, has been disposed of adversely to his view. People v. Dunlop, supra, 102 Cal.App.2d 314, 316, 227 P.2d 281.

[4] Appellant also contends that he was arrested in Nevada, was "kidnapped" and brought to California for trial without proper extradition proceedings. But this is no ground for relief after his conviction in a fair trial here. Pettibone v. Nichols, 203 U.S. 192, at page 206 et seq., 27 S.Ct. 111, 51 L.Ed. 148; and see cases collected at 22 C.J.S., Criminal Law, § 146, p. 242.

[5–8] We have sought diligently to discover the assertions of error in appellant's confusing petition and briefs, and to treat them upon the merits. However, as to any points which we may not have properly understood, as well as to the contentions already discussed, other principles of law established that appellant is entitled to no relief. Coram nobis will not lie to review issues known to a defendant at time of trial, and which could have been raised on appeal. People v. Shorts, 32 Cal.2d 502, 197 P.2d 330; People v. McConnell, 20 Cal.App.2d 196, 66 P.2d 720. One seeking this writ must show diligence, and the lapse of over fourteen years from conviction to petition for writ warrants denial. People v. Muhlenbroich, 137 Cal.App.2d 745, 291 P.2d 45. Appellant suggests that his petition be treated as one for writ of habeas corpus, if coram nobis is not available to him. But admittedly he is imprisoned outside the City and County of San

Francisco, where his petition was filed. Jurisdiction in habeas corpus proceedings lies only in the county of confinement. Carrara v. Superior Court, 113 Cal.App. 2d 823, 248 P.2d 954.

Order denying writ affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Elmer TAHTINEN, Defendant and Appellant.*

Cr. 5707.

District Court of Appeal, Second District, Division 3, California.

April 19, 1957.

Rehearing Denied May 16, 1957.

Hearing Granted June 12, 1957.

Prosecution for unlawful possession of a heroin preparation. From adverse judgment of the Superior Court, Los Angeles County, Allen T. Lynch, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that where police officers went to vicinity of home in reliance upon statements of three drug addicts that they had purchased narcotics at that home and while officers had home under surveillance, they observed actions of defendant indicating he had gone to home and made arrangements to have narcotic placed at base of tree and he was observed picking up something from ground, information received from addicts coupled with officers' observations of defendant's furtive conduct established reasonable cause for arrest without warrant, and subsequent search of defendant and his automobile, which he was driving at time of arrest, was proper.

Judgment affirmed.

1. Arrest 🔑63(4), 71

Where police officers went to vicinity of home in reliance upon statements of three drug addicts that they had purchased narcotics at that home and while officers had home under surveillance, they observed actions of defendant indicating he had gone to home and made arrangements to have narcotic placed at base of tree and he was observed picking up something from ground, information received from addicts coupled with officers' observations of defendant's furtive conduct established reasonable cause for arrest without warrant, and subsequent search of defendant and his automobile, which he was driving at time of arrest, was proper.

2. Criminal Law 🔑576(4)

In prosecution for unlawful possession of heroin preparation by defendant, who had suffered two previous convictions, postponement of trial beyond 60 days from date information was filed upon defendant's own application for continuance effected a waiver of his right to trial within statutory period, and court did not lose jurisdiction to try him. West's Ann.Pen. Code, § 1382, subd. 2.

3. Criminal Law 🔑576(5)

Court was not divested of jurisdiction to try defendant after expiration of 60 days following date of mistrial when public defender, who represented defendant, consented to continuance of trial to date beyond 60 day statutory period because of absence of witness for state. West's Ann. Pen.Code, § 1382, subd. 2.

4. Attorney and Client 🔑86

An attorney has implied authority to bind his client by stipulations affecting procedure of trial.

5. Poisons 🔑9

Evidence was sufficient to sustain conviction for unlawful possession of preparation of heroin. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law 🔑261(2)

In prosecution on information charging unlawful possession of heroin preparation, it was not necessary that defendant be re-arraigned on information after declaration of mistrial. West's Ann.Health & Safety Code, § 11500.

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* Opinion vacated 323 P.2d 442

7. Criminal Law ⚿1202(1)

In prosecution for unlawful possession of a heroin preparation by defendant, who had suffered two previous convictions for narcotic violations, court did not erroneously consider prior convictions in fixing sentence because of alleged lack of opportunity by defendant to replead to prior convictions after declaration of a mistrial. West's Ann.Health & Safety Code, §§ 11500, 11712.

8. Criminal Law ⚿1202(1)

Misdemeanor conviction for unlawful possession of narcotics counts as prior conviction in fixing sentence for subsequent violation of that statute. West's Ann. Health & Safety Code, §§ 11500, 11712.

9. Witnesses ⚿216

In prosecution for unlawful possession of heroin preparation, it was not necessary that arresting officers give names of informants who had given information leading to arrest. West's Ann.Health & Safety Code, § 11500.

◆

Elmer Tahtinen, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Elmer Tahtinen was accused by information of a violation of section 11500 of the Health and Safety Code, in that he willfully, unlawfully and feloniously had in his possession a preparation of heroin. It was also alleged that he had suffered two previous convictions, to-wit: A misdemeanor violation of section 11500 of the Health and Safety Code and a felony violation of the federal narcotics laws. Defendant pleaded not guilty and admitted the priors. Trial was to a jury which failed to agree and was discharged. Defendant then waived trial by jury and the case was tried to the court. The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. The court found Tahtinen guilty and found the prior convictions to be true. Probation was denied and defendant was sentenced to state prison for the term prescribed by law. He appeals from the judgment.

Appellant requested the appointment of an attorney to represent him on the appeal. At the request of the court the record was examined by a member of the Los Angeles Bar Association Committee on Criminal Appeals and a report was made to the court that the record did not disclose error and that there were no points to be raised on appeal which would justify the filing of a brief. Appellant was duly notified. He has filed a comprehensive brief. The court has made an independent examination of the record and has discovered no error in the trial.

[1] There was evidence of the following facts. Edward Vega and Rudolph Berteaux are Los Angeles County sheriff's deputies assigned to the narcotics detail. At about 7 p. m. on November 8, 1955, Berteaux and Vega went to the vicinity of the home of Joe Hernandes at 112 East 111th Street in reliance upon statements of three addicts, whom they had previously arrested on separate occasions, that they had purchased narcotics from Hernandes at that address.

As the officers drove past the Hernandes residence they saw defendant sitting in a 1941 Buick automobile which was parked across the street. They knew that Hernandes did not drive a Buick and that defendant was not Hernandes. The officers drove around the block and when they returned defendant's car was no longer there. The officers continued to patrol the area and observed Tahtinen travelling south on Main Street; he made a left turn on 111th Street, parked on the south side of the street, made a U-turn and then parked on the north side, across the street from and in front of the

Hernandes house. Defendant remained in his car for about half an hour and then walked towards the house. He disappeared up an alley which ran alongside the house and was used by Hernandes as a driveway. After ten or fifteen minutes defendant returned to his car, drove to the corner of Main Street and 111th, turned right on Main and proceeded north to 110th Street, turned right on 110th and drove east to San Pedro Street, turned right on San Pedro and proceeded south to 111th Place, drove along 111th Place and parked just east of the end of the alley which he had formerly entered. He opened the car door on the passenger side, reached towards the ground at the base of a tree and appeared to pick up some object which the officers did not see. Defendant then drove away. The officers followed him as he proceeded west on 111th Place to Main Street, turned south on Main to Imperial, made a left turn on Imperial and proceeded east to San Pedro, turned right on San Pedro and drove south on San Pedro to El Segundo Boulevard, where the officers stopped him, identified themselves, and arrested him on suspicion of a narcotics offense. They had neither a search warrant nor a warrant for defendant's arrest. After Tahtinen was removed from his car, Officer Vega noticed two small packages on the floor near the driver's seat; these were proved to contain 38 capsules of heroin. Defendant was taken to a nearby gas station and searched. The officers found another heroin capsule in his pants pocket.

Defendant, testifying in his own behalf, stated that he parked near the Hernandes residence while waiting for a lady acquaintance to return to her home, that he went up the alley to find a screwdriver so as to repair some defective wiring on the dashboard of his car, that he talked with no one in the alley, and that he reached towards the ground to retrieve an apple which fell out of the car while he was opening the door.

The first assignment of error to be considered is that the court erred in receiving in evidence the heroin which was found on defendant's person and in his automobile. Defendant argues, in this connection, that he was arrested without reasonable or probable cause and that the heroin was obtained through an unlawful search and seizure. The argument is without merit. The question is whether the arrest was lawful. If it was valid, a subsequent reasonable search of defendant's person and the car under his immediate control was lawful and the evidence obtained thereby was not to be excluded. People v. Guy, 145 Cal.App.2d 481, 302 P.2d 657, and cases cited.

The information received from the three addicts entitled Officers Vega and Berteaux to place the Hernandes home under surveillance. People v. Moore, 141 Cal.App.2d 87, 296 P.2d 91. They were justified in arresting defendant without a warrant if circumstances existed which would cause them to entertain a reasonable belief that he was in possession of narcotics. Defendant's contention is that he was an innocent bystander and that his mere presence in the vicinity would not support an inference that he was there for the purpose of procuring drugs from Hernandes. But the officers did not arrest Tahtinen solely upon statements of the informers nor merely because he was near the house they had under observation. The actions of defendant indicated that he had gone to the Hernandes house and made arrangements to have a narcotic placed at the base of the tree. All his actions were suspicious, especially his picking something from the ground at the end of the alley. The information received from the addicts coupled with the officers' observations of defendant's furtive conduct established reasonable cause for the arrest. Since the arrest was valid and based on probable cause, a subsequent search of defendant and his car was also proper. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582.

[2] The next assignment of error is that defendant was denied his constitutional guarantee of a speedy trial. The information was filed on November 29, 1955; on December 21st, trial was set for January 26, 1956. On January 26th, the trial was continued on defendant's motion to February

10th, which was beyond the statutory 60-day period. Defendant argues that the court lost jurisdiction to try him after the expiration of the 60 days. The argument is without merit. The record discloses that on January 26th defendant personally waived his right to an earlier trial. Postponement of the trial beyond the 60 days upon his own application effected a waiver of his right to a trial within the statutory period. Pen. Code, § 1382, subd. 2; People v. Hayes, 3 Cal.App.2d 59, 39 P.2d 213; People v. Greene, 108 Cal.App.2d 136, 238 P.2d 616.

[3] After several short continuances, the matter came to trial on February 20th. The jury having failed to reach a verdict, a mistrial was declared on February 21st. On February 24th trial was set for March 28th. At that time trial by jury was duly waived and it was stipulated that the case be submitted on the testimony taken at the preliminary, with a reservation of the right of the People and the defendant to introduce additional evidence. On that date "trial" was again continued until April 20th, which was within the 60-day statutory period computed from the date of the mistrial. People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873. On April 20th, at 3:50 p. m., the following proceedings took place:

> "The Court: People versus Elmer Tahtinen.
>
> * * *
>
> "Mr. Jackson [Deputy District Attorney]: Your Honor, I think I have already indicated that the People are not ready to proceed at this time because a necessary witness is not here, officer Berteaux and Sergeant Vega, his fellow officer, is on vacation. I heard from officer Berteaux a short time ago, and it will be about forty minutes before he can make it, and I believe counsel would not have any objection to a continuance for one week.
>
> "The Defendant: Your Honor, may I say something? I thought I was entitled to a quick and speedy trial. I have been in jail for five months and twelve days already.
>
> "The Court: You have been in jail five months and twelve days. That is a long time. There is no question about it.
>
> "Mr. Jackson: Your Honor, if the defendant insists on going to trial here today, we can wait for the officer to be here.
>
> "The Court: How about continuing it until Monday at 1:30?
>
> "Mr. Brill [Deputy Public Defender]: I think that would be more satisfactory, your Honor.
>
> "Mr. Jackson: The only trouble with that, your Honor, I have a case pending in Department 11. I finished the evidence but we are to argue and instruct the jury on Monday, and I think I can be here at 1:30 Monday. If we don't finish instructing the jury, maybe I can have the judge recess until two o'clock or something like that.
>
> "The Court: How about Tuesday, 1:30?
>
> "Mr. Jackson: That will be fine with me.
>
> "The Court: No, Tuesday I can't be here.
>
> "Mr. Jackson: Leave it Monday, 1:30.
>
> "The Court: Will that be agreeable with you?
>
> "The Defendant: It will have to be, I guess.
>
> "The Court: All right. The matter will be continued until Monday at 1:30 then, and we will dispose of it at that time. Tell the officer he has to be here. If he isn't here, we will have to dismiss it, I guess.
>
> "Mr. Brill: I think the lack of interest on the part of the officer should be taken into consideration, your Honor."

[4] Trial was thereupon continued until April 23rd, which was beyond the 60-day period. Defendant argues that he did not voluntarily consent to the last continuance, that he did not waive his right to trial within the statutory period, and that the court

was thereby divested of jurisdiction to try him after the expiration of 60 days following the mistrial. The argument cannot be maintained. Defendant was represented by the public defender who consented to the continuance. We have no doubt of an attorney's implied authority to bind his client by stipulations affecting the procedure of the trial. People v. Wilson, 78 Cal.App.2d 108, 119–120, 177 P.2d 567; 14 Cal.Jur.2d 395. Had it not been for the giving of consent to the continuance the trial would probably have commenced on April 20th. Although the point is not mentioned in the briefs it could be argued with good reason that the trial commenced on March 28th. It was understood by counsel and the court that the court was to read, as evidence, the testimony taken at the preliminary. On April 23rd at the commencement of proceedings the court announced that it had read the transcript. It was not offered in evidence in any formal manner at any time, but under the stipulation it was placed before the court to be read and considered as evidence, and the court was free to read and consider it then or later, at its convenience. It would seem that the stipulation was the equivalent of the introduction of evidence by the People, especially when the transcript was furnished to the court to be read before further proceedings were had.

[5] A third assignment of error is the insufficiency of the evidence to support the conviction in that defendant was not identified by the officers as the man they were watching and following. A reading of the transcript leaves no doubt that defendant was the person described in their testimony.

[6–8] Defendant has also presented numerous other assignments of error. He contends that he was improperly retried after the discharge of the jury without a rearraignment on the information; that since he had no opportunity to re-plead to the prior convictions, the court erroneously considered them in fixing sentence (see section 11712, Health and Safety Code); that a misdemeanor conviction under section 11500 of the Health and Safety Code does not count as a prior conviction; and that he was deprived of the assistance of counsel in that his attorney was not present when one of the continuances was granted. We have carefully examined these assignments and find them to be without merit.

[9] At the trial defendant moved to strike the evidence of the officers on the ground there was no evidence of the reliability of the informers. The motion was properly denied. It cannot be contended that the names of the informants should have been disclosed by the officers. They were evidently prepared to name some of them but were not requested to do so.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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150 Cal.App.2d 53

DOCTORS GENERAL HOSPITAL OF SAN JOSE, a non-profit corporation (sometimes designated as Doctors General Hospital), Plaintiff and Appellant,

v.

The COUNTY OF SANTA CLARA and City of San Jose, a municipal corporation, Defendants and Respondents (two cases).

Civ. 17174.

District Court of Appeal, First District, Division 2, California.

April 10, 1957.

Rehearing Denied May 10, 1957.

Hearing Denied June 4, 1957.

Action by hospital to recover property taxes paid under protest. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment adverse to hospital and it appealed. The District Court of Appeal, Kaufman, P. J., held that an amendment to Revenue Code providing that hospitals would not be deemed organized or operated for profit if excess revenues do not exceed 10% of operating expenses, which amendment was enacted after property tax became a statutory lien even though tax was not due and payable, was unconstitutional in so far as it attempted to be applied retroactively and nullify a vested tax lien.

Affirmed.

Dooling, J., dissented.

1. Taxation ⚷79

Vested right of state to tax money on property accrued as of statutory lien date which was the first Monday in March, regardless of fact that amount of tax was not determined until after July 1, and not due and payable until November 1. West's Ann.Rev. & Tax.Code, §§ 2187–2189, 2192.

2. Taxation ⚷37.10

Amendment to Revenue Code providing that a hospital shall not be deemed to be operated for profit if during year its excess operating revenues do not exceed 10% of operating expenses, which amendment was enacted after property tax for year had become a statutory lien even though not due and payable, was in so far as made retroactive to taxes levied during year an unconstitutional attempt to nullify a vested tax lien. West's Ann.Rev. & Tax. Code, §§ 214(3), 2187–2189, 2192, 2605; West's Ann.Const. art. 4, § 31; art. 13, § 1c.

◆

Paul I. Myers, Jr., Los Altos, for appellant.

Spencer M. Williams, County Counsel of County of Santa Clara, Rodney R. Atchison, Deputy County Counsel, San Jose, Ferdinand P. Palla, City Atty., Robert Costello, Asst. City Atty., San Jose, for respondents.

Harold W. Kennedy, County Counsel for Los Angeles County, Alfred Charles De Flon, Deputy County Counsel, Los Angeles, amici curiæ in support of respondents.

KAUFMAN, Presiding Justice.

This is an action brought by appellant Doctors General Hospital of San Jose, a California non-profit corporation, to recover property taxes for the year 1953–1954, which had been levied by the respondents, County of Santa Clara and City of San Jose, and paid under protest by the appellant. The trial court found that the appellant did not meet the requirements prescribed by the 1953 amendment to section 214(3) of the Revenue and Taxation Code for the "welfare exemption" which section 1c of Article XIII of the State Constitution authorized the legislature to grant. The issue here presented is the constitutionality of the retroactive application of the 1953 Amendment to section 214(3) Revenue and Taxation Code.

It is conceded that appellant after the effective date of the amendment has been qualified for the exemption. Prior to the 1953 Amendment, appellant's hospital could not qualify under section 214(3) of the Revenue and Taxation Code, because its operation produced an excess of income over expenses. Sutter Hospital v. City of Sacramento, 39 Cal.2d 33, 244 P.2d 390, held that under a strict but reasonable construction of section 214(3) a hospital could not qualify for the property tax exemption if it made any profit, as the statute prohibited any excess of income over revenue, regardless of the purpose for which the profit is used.

The 1953 Amendment, Ch. 730, Stats. 1953, is as follows: "provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses." As this enactment occurred on May 18, 1953 a date prior to the time that taxes were due and payable, November 1, 1953, Rev. & Tax.Code, § 2605, but after the lien date, the 1st Monday in March, 1953, Rev. & Tax.Code, § 2192, the amendment was expressly made retroactive as to all taxes levied on or after January 1, 1953. The amendment also contained an urgency clause, Ch. 730, Stat. 1953, § 2, making it effective immediately because of the effect of the Sutter case.

The question then is whether the 1953 Amendment contravenes the prohibition against gifts of public money of section 31 of Article IV of the State Constitution. The appellant's first contention that the Constitution of the State of California does not prohibit retrospective legislation per se, need not be discussed.

[1] The appellant's second contention is that there was no gift in the case at bar, as the right to the tax moneys did not vest in the state until the date that the taxes were due and payable, November 1. There is no merit in this contention, in a case such as this one where the statute specifically prescribes a lien date prior to the due date. The statute clearly states that city and county ad valorem property taxes constitute a lien on the property, Rev. & Tax.Code, §§ 2187, 2188, 2189, and that this lien attaches as of the first Monday in March. Rev. & Tax.Code, § 2192.

[2] In all of the cases relied on by the appellants to support their contention, there was no statutory lien date prior to the due date. In Allen v. Franchis Tax Board, 39 Cal.2d 109, 245 P.2d 297 an amendment to State Income Tax law retroactively changing the tax base after the accrual of tax liability but before the date when taxes became due and payable was upheld by the court. This case dealt only with the specific income tax situation in issue. There was no statutory lien date. In Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788, it was held that a retroactive release by the legislature of the collateral inheritance tax was a void gift of public funds within the meaning of Article IV, sec. 31, as the tax was due and payable at the death of the decedent which occurred prior to the legislative enactment. The case does not, as appellant maintains, stand for the proposition that vesting does not occur until the tax becomes due and payable. In dealing with a retroactive amendment in legislation concerned with other types of taxes, the reasoning of the Stanford case has been followed by the courts. In People v. Schmidt, 48 Cal.App.2d 255, 119 P.2d 766, it was held that the repeal of a provision of the Alcoholic Beverage Control Act could not affect the right of the people to collect the fee, as the right to collect had vested under the act before the repeal.

In re Estate of Potter, 188 Cal. 55, 204 P. 826, held that the right to the inheritance tax vested in the state at the date of the taxable transfer even though it was not due and payable until the death of the decedent. As stated by the court in Trippet v. State, 149 Cal. 521, at page 529, 86 P. 1084, at page 1087, 8 L.R.A.,N.S., 1210, "There is no legal inconsistency in the idea of a right being vested, although the possession may be postponed or contingent upon the performance of certain acts."

In City of Santa Monica v. Los Angeles Co., 15 Cal.App. 710, 115 P. 945, the court held that property acquired by the city after the lien date but prior to the levy and assessment was not exempt from taxation as the lien attached on the first Monday in March. The court stated in 15 Cal. App. at page 712, 115 P. at page 946, that "a lien declared by positive statute is not dependent for its existence upon subsequent acts requisite to its enforcement."

In San Diego County v. Riverside County, 125 Cal. 495, 58 P. 81, the court held that although the right of San Diego to the payment of certain taxes assessed on railroad tracks, did not accrue until a valid assessment had been made, the right to taxes arose on the lien date, and was one of the assets of San Diego County to be prorated between San Diego County and the newly created County of Riverside. The court said 125 Cal. at page 500, 58 P. at page 83: "The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but when that has been done and the amount of the tax ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached." Furthermore the legislative history of the 1953 statute reveals that the section providing for retroactive application was added by amendment (1953 Assembly Journal p. 1932). The assumption of the legislature appears to have been that the property tax vests as of the March 1 lien date.

It should be noted that the 1954 Amendment, Stat.1953, Ch. 146, to Article XIII, § 1c of the State Constitution, which was designed to liberalize the welfare exemption, is made applicable to buildings and equipment in the course of construction on or after March 1, 1954.

The appellant further contends that even if the right to tax moneys vested on March 1 and constituted a thing of value within the purview of section 31 of Article IV of the State Constitution, the legislature could make a valid gift thereof under the public doctrine of section 1c, Article XIII of the State Constitution. It is a well recognized rule that the courts will not disturb a legislative determination of what constitutes a public purpose, as long as it has reasonable basis. Alameda County v. Janssen, 16 Cal.2d 276, 106 P.2d 11, 130 A.L.R. 1141; Shean v. Edmonds, 89 Cal.App.2d 315, 200 P.2d 879; Los Angeles City v. Jessup, 11 Cal.2d 273, 78 P.2d 1131. However, in the 1953 Amendment there is no statement indicative of purpose, unless the urgency clause is so construed. There is no doubt that the provision for hospitals is a well recognized public purpose. However, it has been held that a county cannot provide medical treatment and care to those who can obtain and pay for such services at private hospital institutions. Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510. Under the 1953 Amendment the 10% excess of profits over operating costs can be spent for any hospital purpose. The money could be used to provide more luxurious care in the existing facilities. Under the appellant's argument any hospital purpose is a sufficient public purpose for an appropriation of public funds. It is our view that private hospitals are exempt from taxation not because there is a public purpose within the meaning of Article IV, section 31, but rather because the legislature's power to exempt is limited to specific instances.

In City of Ojai v. Chaffe, 60 Cal.App.2d 54, 140 P.2d 116, the court held that a statute providing for the cancellation of uncollected taxes was not in contravention of Article IV, section 31 of the Constitution, because the specific public purpose was to restore the property in question to the tax rolls and make it once more a source of public revenue. In Simpson v. City of Los Angeles, 40 Cal.2d 271, 253 P.2d 464, 469, the court upheld the surrender of unclaimed animals in the pound to private research laboratories for the specific public purpose of increasing "knowledge relating to the * * * cure of disease." In City of Oakland v. Garrison, 1924, 194 Cal. 298, 228 P. 433, the funds were required to be used for the paving of a certain road in the City of Oakland. Under the 1953 Amendment there is no legally enforceable duty to use the 10% excess profits for any specific hospital purpose. It is not enough that appellant intends to use the profits for a hospital purpose. Cedars of Lebanon Hospital v. County of Los Angeles, 35 Cal.2d 729, 221 P.2d 31, 15 A.L.R.2d 1045, involved the application of the welfare exemption to various items of hospital property. In holding that the buildings under construction on tax date intended for use in housing of student nurses were not within the welfare exemption, the court said in 35 Cal.2d at page 742, 221 P.2d at page 39, "as above quoted, the pertinent constitutional provision, Art. XIII, § 1c, and the implementing statute, Rev. & Tax.Code, § 214, unequivocally require that the property be 'used' for the enumerated purposes. Such express limitation making *use* the focal point of consideration contemplates actual use as differentiated from an *intention* to use the property in a designated manner."

We can find nothing in the 1953 Amendment which would compel the appellant to use the 10% profit exclusively for such hospital purposes as would also be proper public purposes.

In view of the foregoing the judgment of the trial court finds support in the law and must be affirmed.

Judgment affirmed.

STONE, Justice pro tem.

[1, 2] I concur on the ground the tax involved in this case became a lien on the first Monday in March 1953, and the tax exemption statute was not enacted until May 18, 1953. The laudatory purpose of the exemption statute as expressed in the dissenting opinion cannot be refuted. Yet, in my opinion the worthy purpose does not justify the abrogation of a vested property right. There appears to be no authority holding that a tax lien is inferior to any other type of lien. In fact, a tax lien takes precedence over earlier liens and is superior and hostile to any prior mortgage or deed of trust. 24 Cal.Jur. 221.

[2] Admittedly, the amount of the tax was not determined until after the beginning of the fiscal year commencing July 1, 1953, but the lien to secure payment of that tax attached the first Monday of the preceding March.

The retroactive aspect of the statute insofar as it purports to nullify a vested tax lien is unconstitutional. I concur.

DOOLING, Justice.

I dissent. My associates in this case take too narrow a view of the power of the Legislature to promote a public purpose. The purpose of the Legislature in adopting the 1953 amendment to § 214, Revenue and Taxation Code, is set forth in section 4 of the enactment. Stats.1953, pp. 1995–1996. After reciting the general understanding that "it was the purpose and the intent of Legislature" that under section 214, Rev. & Tax.Code, "such organization could rightfully use the income from the property devoted to the exempt activity for the purposes of debt retirement, expansion of plant and facilities or reserve for operating contingencies without losing the tax exempt status of its property," the Legislature referred to the then recent decision of Sutter Hospital v. City of Sacramento, 39 Cal.2d 33, 244 P.2d 390, and added:

> "this decision was broad in its application and has caused the postponement or actual abandonment of plans for urgently needed hospital construction and expansion at a time when there are insufficient hospital facilities in this State to properly care for the health needs of its citizens, and virtually no surplus facilities for use in case of serious epidemic or disaster. This Legislature has recognized that in addition to gifts and bequests, the traditional method for the financing of the expansion and construction of voluntary religious and community nonprofit hospital facilities is through the use of receipts from the actual operating facilities. * * *
>
> "It has never been the intention of the Legislature that the property of * * * organizations otherwise qualifying for the welfare exemption should be denied exemption if the income from the actual operation of the property * * * be devoted to * * * debt retirement, expansion of plant and facilities or reserve for operating contingencies * * *."

This Legislative finding is ignored by the majority opinion, the whole expressed legislative purpose to foster hospital facilities which the Legislature has found to be urgently needed being brushed off with the statement: "We can find nothing in the 1953 Amendment which would compel the appellant to use the 10% profit exclusively for such hospital purposes as would also be proper public purposes." This statement ignores the very basis of the tax exemption as outlined in section 214. After providing that to qualify for the exemption the following conditions must be met: "(2) No part of the net earnings * * * inures to the benefit of any private shareholder or individual; (3) The property is used for the actual operation of the exempt activity; (4) The property is not used or operated * * * so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession; (5) The property is not used * * * for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary * * * hospital * * * purpose," the Legislature has added "(6) The property is irrevocably dedicated to * * * hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized * * * for * * * hospital * * * purposes."

The combination of these requirements gives legal assurance that the money remitted in taxes for 1953 will be devoted exclusively to hospital purposes. Pasadena Hospital Ass'n v. County of Los Angeles, 35 Cal.2d 779, 786–787, 221 P.2d 62.

The legislative determination of the facts upon which the constitutionality of the statute depends is primarily for the Legislature and the courts can only overturn such determination if that determination is clearly erroneous. 11 Cal.Jur.2d, Constitutional Law, § 77, pp. 411–412; Id., § 183, p. 583. Every reasonable doubt must be resolved in favor of constitutionality. Id., § 78, pp. 412–413.

"One of the most important fields of regulation under the police power is that of public health and safety." Id., § 158, p. 543. And the Legislature is free to choose any means that has a reasonable relation to the end sought to be accomplished. Id., § 184, p. 584.

The Legislature has determined that a public necessity exists for the encouragement of the operation and expansion of nonprofit hospitals and the means that it has chosen by the remission of taxes cannot be said not to be reasonably promotive of those purposes. The cases cited in the majority opinion demonstrate that taxes already a lien may be remitted for a valid public purpose.

I would reverse the judgment.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

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150 Cal.App.2d 107

Milton M. ESTRIN, Individually and d/b/a Rem Realty Company, Appellant,

v.

D. D. WATSON, The Real Estate Commissioner of the State of California, Respondent.

Civ. 17195.

District Court of Appeal, First District, Division 2, California.

April 15, 1957.

Hearing Denied June 12, 1957.

Proceeding wherein the Superior Court, City and County of San Francisco, Frank T. Deasy, J., affirmed an order of the real estate commissioner suspending a broker's license, and he appealed. The District Court of Appeal, Dooling, J., held that broker could not escape penalty for breach of his fiduciary duty, to inform vendor that he had undertaken to act as broker and purchaser in same transaction, by saying that his agent should have made those disclosures.

Affirmed.

1. Brokers ⇨31

Broker owed duty of full disclosure to his client when he became purchaser of her property.

2. Brokers ⇨19, 31

Broker was under affirmative duty to inform vendor when he undertook to purchase her property for himself, and his taking of commission without seeing that vendor had such information and his placing of $20,000 first mortgage lien on her property for actual loan of $16,000 without seeing that she was informed of that fact constituted violations of his fiduciary duty.

3. Brokers ⚷31

Affirmative duty was on broker personally, when he undertook to act as broker and purchaser in same transaction, to take steps himself to see that his client was fully informed of facts.

4. Brokers ⚷3

Licensed broker could not escape penalty for breach of his fiduciary duty, to inform vendor that he had undertaken to act as broker and purchaser in same transaction, by saying that his agent should have made those disclosures. West's Ann. Bus. & Prof.Code, §§ 10176(a, b, i), 10177 (f).

◆

Shirley, Saroyan, Calvert & Peterson, Robert E. Cartwright, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was a real estate broker doing business under the fictitious name of Rem Realty Company. He appeals from a judgment of the superior court affirming the order of the Real Estate Commissioner suspending his broker's license for six months. The order was based on a finding that appellant had violated section 10176(a), (b) and (i), and section 10177(f) of the Business and Professions Code.

The complainant, Mrs. Elizabeth Collins, placed two pieces of real property for sale at $23,000 with the Rem Realty Company through one Nicholson, an employee of appellant. The evidence shows that appellant executed a contract to purchase the property, describing himself in the contract as a "real estate broker," but not disclosing that he was in fact Rem Realty Company. He placed a first mortgage on the properties of $20,000 paying a $4,000 bonus for the loan. He also collected a commission on the sale to himself.

Mrs. Collins, the seller, was not informed and did not know that the purchaser was her broker and was not informed and did not know the amount of the $20,000 first mortgage nor that appellant had paid a $4,000 bonus for the loan thus placing on the property a lien for $20,000 for an actual $16,000 loan. Nicholson testified that appellant did not instruct him to inform Mrs. Collins that appellant was Rem Realty Company or of the amount of the first mortgage placed on the property.

[1-4] Appellant, as broker, owed a duty of full disclosure to his client, Mrs. Collins, when he became the purchaser of her property. Wells Fargo Bank & Union Trust Co. v. Dowd, 139 Cal.App.2d 561, 574, 294 P.2d 159; Fisher v. Losey, 78 Cal.App. 2d 121, 124, 177 P.2d 334; 9 Cal.Jur.2d Brokers, § 55, pp. 204–205. He was under the affirmative duty to inform Mrs. Collins that he was her broker when he undertook to purchase her property and his taking a commission without seeing that she had this information, and his placing a $20,000 first mortgage lien on her property for an actual loan of $16,000 without seeing that she was informed of that fact were further reprehensible violations of his fiduciary duty. The affirmative duty was on appellant personally when he undertook to act as broker and purchaser in the same transaction to take steps himself to see that his client was fully informed of the facts. He cannot escape the penalty for his failure by saying that his agent Nicholson should have made these disclosures especially when Nicholson testified that appellant did not instruct him to do so.

Appellant's claim that the commissioner's findings are insufficient because they contain no finding that appellant had "guilty knowledge" of Nicholson's conduct is futile. His own conduct in acting as broker and purchaser in the same transaction without taking any steps to inform his client of the facts is the gist of his wrongdoing.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

150 Cal.App.2d 104

Leslie E. TAYLOR, Plaintiff and Cross-Defendant, and Respondent,

v.

Betty Lee TAYLOR, Defendant and Cross-Complainant, and Appellant.

Civ. 17141.

District Court of Appeal, First District, Division 2, California.

April 15, 1957.

Action by husband for divorce on ground of adultery. Wife cross-complained for divorce on ground of extreme cruelty. The Superior Court, Alameda County, Richard H. Chamberlain, J., by interlocutory decree, granted husband a divorce but denied wife a divorce and granted custody of parties' six minor children to husband, and wife appealed. The District Court of Appeal, Dooling, J., held that evidence sustained trial court's finding that wife was unfit person to have custody of the children.

Decree affirmed.

1. Divorce 🔑301

In divorce action, evidence, which revealed that wife, while husband was on overseas duty with Navy, moved into house rented by herself and another man, and that wife and other man represented themselves as husband and wife for almost two years, was sufficient to sustain trial court's finding that wife was unfit person to have custody of parties' six children, the oldest of whom was ten years of age.

2. Divorce 🔑162

Even if, in divorce proceeding in which husband sought divorce on ground of adultery and wife sought divorce on ground of extreme cruelty, wife produced sufficient evidence of cruelty to justify granting of a divorce to her, trial court, which granted divorce to husband, did not have to grant wife a divorce.

3. Divorce 🔑162

Where, in divorce action, both parties show grounds for divorce, trial judge may, in his sound discretion, grant the divorce solely to the party whom he finds less at fault on weight of the whole evidence.

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Newman, Marsh & Furtado, Hayward, for appellant.

Anderson & Peck, Edward F. Peck, Oakland, for respondent.

DOOLING, Justice.

The plaintiff husband in this case was granted an interlocutory decree of divorce on the ground of adultery. Cross-complainant wife had prayed for a divorce on the ground of extreme cruelty which was denied to her in the interlocutory decree. The custody of the six minor children was given to the plaintiff.

Appellant attacks the interlocutory decree in two particulars: 1. She argues that the finding of the trial court that she is an unfit person to have the custody of the children is not supported by the evidence; 2. She argues that the trial court abused its discretion in not granting her a decree of divorce on the ground of extreme cruelty.

The respondent is in the United States Navy and has spent most of the recent years in overseas duty. In December, 1953 the appellant moved to a house in Newark which was rented by her and one Hubert Howeth, representing themselves as husband and wife. She continued these relations with Howeth and in January, 1955 gave birth to a child whose father is Howeth. Appellant and Howeth continued their adulterous relationship, representing themselves as Mr. and Mrs. Howeth, and in September, 1955 they were arrested on suspicion of adultery. The children lived with their mother all during the period of these adulterous relations and were taught to call Howeth "Daddy Hubert." Howeth is a married man but hopes to get a divorce and expects to marry the appellant when both are free to marry. After the arrest of appellant and Howeth the children were taken to live in the juvenile detention home. While they were there some of the children engaged in discussions as to whether Taylor or Howeth was their father. The oldest child was 10 years of age at the time of the trial in October, 1955. The appellant during all of the period that she lived with Howeth as his wife was receiving a regular allotment for the support of herself and the children from her husband's salary. Appellant continued her association with Howeth while the children were in the detention home, Howeth driving her down to see them there.

Respondent testified that if awarded the custody of the children they would be physically cared for by his mother and a married sister living in Illinois so long as he remains overseas.

Appellant relies heavily on Ashwell v. Ashwell, 135 Cal.App.2d 211, 286 P.2d 983, as holding that adulterous relations by the mother standing alone do not warrant a finding of unfitness. The case is an extreme one and does not stand for the rule so broadly expressed. In the Ashwell case the court was careful to point out: 1. that the custody of the children had originally been awarded to the mother; 2. that the children were of such a tender age that they could not be adversely affected by the adulterous relation (the oldest child in that case was only six); 3. that the mother was compelled by economic necessity to live with her adulterous consort; and 4. that she did not go to live with her paramour until after the entry of her interlocutory decree of divorce and planned to marry him as soon as her divorce became final. In the case before us the court was considering the original award of custody, not the change of a custody award already made. The oldest child in our case was 10 and some of the children had been so far affected by the irregular home environment as to engage in discussions as to which one of the two men was their father. The court said in the Ashwell case, where the oldest child was six, 135 Cal.App.2d 218, 286 P.2d 987: "If she does not marry, and continues in her relations with Cassella, then, obviously, the time is fast approaching when that condition will endanger the welfare of the children * * *." That time is already well past as to the older children in the pending case. The mother in our case went to live openly with Howeth as his wife before any divorce proceedings had been initiated and continued this relation for almost two years while she was receiving regular allotments from her husband's salary. She cannot be said to have been acting under force of economic necessity. While the parties say that they plan to be married the marriage depends upon the uncertainty of Howeth securing a divorce from his present wife and the record does not disclose that divorce proceedings between them are even pending.

[1] Unless we are to say that no judge could reasonably find that a mother who has taken her children into an adulterous home and kept them there for almost two years has thereby shown her unfitness to have their custody we must affirm the award of custody made in this case. It is our conclusion that the finding of unfitness finds adequate support in the record.

[2, 3] We may concede that the wife produced sufficient evidence of cruelty to justify the granting of a divorce to her. This does not mean that the court when granting a divorce to the husband for the wife's adultery must likewise grant the wife a divorce. The judge, when both parties to the marriage show grounds for divorce, may in his sound discretion grant the divorce solely to the party whom he finds less at fault on the weight of the whole evi-

dence. Gilmore v. Gilmore, 45 Cal.2d 142, 148, 287 P.2d 769.

Decree affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

150 Cal.App.2d 61

Daniel FREEMAN, a minor, by Henry J. Freeman, his Guardian ad litem, and Henry J. Freeman, Plaintiffs and Appellants,

v.

Louis MAZZERA, Luther M. Warda and Lloyd J. Cosgrove, individually and as copartners doing business under the firm name and style of Peninsula Properties, Peninsula Properties, a copartnership, and Max Schmidt, Defendants and Respondents.

Civ. 17012.

District Court of Appeal, First District,
Division 2, California.
April 11, 1957.

Action for injuries sustained by child who fell from an opening off a landing of a stairway, brought against the builder of the apartment and the lessors. Judgment granting a nonsuit in the Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., and the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that where lessors made no inspection of the latticework nor repairs to it although it had been loose for at least a year, they were liable for the child's injuries, and that the builder was also liable, where the jury could have found that the latticework was negligently installed and that the builder had knowledge thereof.

Judgment of nonsuit reversed as to all defendants.

1. Landlord and Tenant 🔑164(1), 167(8)

Where stairway was a common one reserved by the lessors and under their control, they owed tenants and other invitees a duty to use ordinary care to keep the area in a safe condition.

2. Landlord and Tenant 🔑164(1)

Rule that where a stairway is a common one under control of lessors they owe tenants a duty to use ordinary care to keep the area in a safe condition, and exception to the rule where an injured child is putting opening and lattice on the stairway to use not reasonably intended, does not apply to small children.

3. Landlord and Tenant 🔑164(2)

Where lessors, with knowledge that small children were playing near and upon latticework upon stairway, made no inspection of, nor repairs to, it, although it had been loose for at least a year before the lattice fell and the child of tenant was injured, lessors were liable for injuries sustained by the child.

4. Negligence 🔑55

A builder of an apartment may be held liable for the giving way of a railing on a stairway if it is negligently installed by him under the rule that the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made.

5. Negligence 🔑134(5, 7)

In action for injuries sustained by child of tenant against builder of apartment when lattice on stairway gave way and child was injured, evidence authorized jury finding that the latticework was negligently installed by the builder and that he had knowledge of that fact.

6. Negligence 🔑55

In action for injuries sustained by child of tenant, brought against builder of apartment, when lattice on stairway gave way and child was injured, the lapse of about three years between the construction and the accident could not per se exonerate the builder for negligent installation of the latticework.

M. Mitchell Bourquin, Franklin A. Dill, San Francisco, William B. Boone, San Francisco, of counsel, for appellants.

Barfield & Barfield, San Francisco, for respondents Mazzera, Warda and Cosgrove.

Arthur A. Hyman, San Francisco, Frank W. Prideaux, Jr., San Francisco, of counsel, for respondent Max Schmidt.

DOOLING, Justice.

This action was one for damages for injuries received by Daniel Freeman, a minor, in a fall from an opening off the landing of the stairway of the apartment house in which he lived with his mother and father. Defendant Schmidt was the builder of the apartment and the other defendants its owners. The court granted a nonsuit as to all defendants and plaintiffs appeal.

The apartment building was constructed by respondent Schmidt in 1950. The building housed four apartments, two on the ground floor and two on the second story. A common entrance and stairway served these apartments. There was a landing on the stairway midway between the two floors and in the outer wall adjacent to this landing there was an opening 32 inches wide and 9 feet 8 inches high. The bottom of this opening was 19 inches above the floor of the landing. The lower part of this opening was protected by an iron lattice frame attached to the outside of the building.

Children had been in the habit of playing in this opening, using its lower edge as a platform on which to stand and sit and one of the managers of the apartment testified that she had seen children playing there from time to time.

On August 4, 1953, the minor plaintiff, who was then four years of age, was playing on this ledge when the iron lattice gave way precipitating him to the ground.

The latticework had been attached to the building at the time of its construction. It was fastened to the building by four 2½-inch screws, one at each corner of the iron work which measured over-all 6 feet 2½ inches by 32 inches. There was testimony by several witnesses that the screws holding this lattice had become loose and that the latticework had been loose for at least a year before the accident. The latticework had never been inspected and no repairs were ever made upon it. The witness who replaced the ironwork after the accident, with eight years' experience in installing and repairing similar ironwork, testified that in his opinion this particular latticework, installed as it had been, should have been inspected at least once a year.

Liability of Respondent Owners.

[1, 2] The stairway was a common one reserved by the owners-lessors and under their control. They thus owed the tenants and other invitees a duty to use ordinary care to keep this area in a safe condition. Harris v. Joffe, 28 Cal.2d 418, 170 P.2d 454. Respondents admit this general rule but argue that the case falls under an exception because the injured child was putting the opening and lattice to a use not reasonably intended. The exception does not apply to small children. Crane v. Smith, 23 Cal.2d 288, 144 P.2d 356; Roberts v. Del Monte Properties Co., 111 Cal.App.2d 69, 243 P.2d 914. In the Crane case a three year old girl inserted her finger in an unguarded coffee-grinder in a market. The court held the market owner liable saying at page 300 of 23 Cal.2d, at page 363 of 144 P.2d: "To say that a three-year-old girl * * * was * * * a trespasser when she followed a childish impulse to put her hand on or in the fascinating red contrivance * * * would be to extend the doctrine of the cases denying compensation to one who has exceeded the scope of his invitation beyond their logical scope." In the Roberts case a seven year old boy was injured when he fell through a window from a pile of furniture and mattresses left in a common hallway of an apartment building. In that case at page 73 of 111 Cal.App.2d, at page 916 of 243 P.2d, this court held that the rule that one making an unintended use of the property cannot recover for its negligent maintenance is "inapplicable to infant invitees attracted by dangerous objects * * *."

[3] Here the owners, with knowledge through their manager that small children were playing near and upon this latticework, made no inspection of, and no repairs to, it although it had been loose for at least a year before the catastrophe to the child. "The duty was not limited to conditions actually known by the owner to be dangerous, but extended also to conditions which might have been found dangerous by the exercise of reasonable care." Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 229, 209 P.2d 1, 3.

Liability of the Builder, Schmidt.

[4] The four 2½-inch screws were inserted through the ironwork which was 3/16 inches thick, and through a ¾-inch stucco finish into the wooden siding behind the stucco. There were no wooden studs at these points. Respondent Schmidt testified that he knew that the only fastening for this ironwork, which measured over 6 feet by 32 inches, was these four 2½-inch screws inserted at its corners. His liability must be based, if it exists, on the rule of Hale v. Depaoli, 33 Cal.2d 228, 201 P.2d 1, 3, 13 A.L.R.2d 183. In that case it was held that a jury might hold a builder liable for the giving way of a railing if it was negligently installed by him under the rule that "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."

[5] The witness who actually installed the ironwork, while he testified that when the screws were in it was tight, gave an affirmative answer to the question: "Well, now * * * in the cases where the screw, such as we have here * * * wouldn't go through the stud behind it, but just merely through the stucco and then the sheathing; then in those cases you use a toggle bolt, don't you, in order to firmly affix the iron lattice work such as this that we're talking about?" The witness replied: "Commonly known as a butterfly." He went on to explain that a toggle bolt or butterfly has two wings that open behind the material through which it is inserted and that "keeps it from pulling out." In replacing the ironwork after this accident such butterflies or toggle bolts were in fact used. The evidence further shows that within approximately three years after these buildings were completed not only this particular lattice but most of those similarly installed had become loose. On the whole evidence the jury could have reasonably found that the latticework was negligently installed and the builder Schmidt had knowledge of that fact.

Respondent Schmidt attempts to distinguish the Depaoli case on the ground that Depaoli was owner as well as builder, but the court in the Depaoli case held the evidence sufficient to support a finding against him *as builder*, but *not sufficient to impose liability* on Depaoli *as owner.*

[6] The passage of about three years between the construction and the accident cannot *per se* exonerate Schmidt. In the Depaoli case eighteen years had elapsed and the court said at page 232 of 33 Cal.2d at page 3 of 201 P.2d: "But these incidents of the mere passage of time present questions of fact and not of law."

The court in the Depaoli case found the conditions for liability in the fact that "[t]he purpose of the railing was to prevent one using the porch from stepping or falling from it." *Pari passu* the purpose of the latticework over the opening was to prevent persons from accidentally falling through the opening.

Judgment of nonsuit reversed as to all defendants.

KAUFMAN, P. J., and DRAPER, J., concur.

150 Cal.App.2d 65

In the Matter of the ESTATE of Margherita GAGLIASSO, Deceased.

Angelina CONROTTO, Onorina Krietich and Anna Regnart, Appellants,

v.

Dario ZAPPELLI, Joseph Gagliasso, Charles Gagliasso, Fiuri Gagliasso, John Gagliasso, G. Genovesi and Elvira Gagliasso, Respondents.

Civ. 17394.

District Court of Appeal, First District, Division 2, California.

April 11, 1957.

Proceeding in the matter of the estate of the deceased. Will contest. The Superior Court, County of Santa Clara, Edwin J. Owens, J., granted a nonsuit and the contestants appealed. The District Court of Appeal, Dooling, J., held that the evidence of undue influence was sufficient for the jury, but that there was not sufficient proof that the decedent at time the will was executed, was incompetent.

Judgment of nonsuit reversed for retrial of the issue of undue influence and fraud, and otherwise affirmed.

1. Wills ⚷326

In proceeding to contest will on ground of mental incapacity, undue influence and fraud, record established sufficient specifications of grounds of insufficiency of evidence to support the granting of a nonsuit.

2. Wills ⚷163(2)

When will contestant has shown that proponent sustains a confidential relationship toward testator, and actively participates in procuring execution of will, and unduly profits thereby, burden shifts to proponent to prove that the will was not induced by undue influence.

3. Wills ⚷166(12)

Activity in procuring execution of a will may be established by circumstantial evidence.

4. Wills ⚷324(3)

In will contest, evidence that beneficiaries actively participated in procuring execution of the will and that will was the result of undue influence and fraud was sufficient for jury.

5. Wills ⚷21

Incompetency to make a will must be shown to exist at the very time of the will's execution.

6. Wills ⚷324(2)

In will contest, evidence was insufficient to go to jury that testatrix at time will was executed was incompetent.

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Todd & Todd, San Francisco, Donald B. Richardson, O. H. Speciale, San Jose, for appellants.

Bressani & Hansen, San Jose, for respondents.

DOOLING, Justice.

This case involves the contest before probate of the will of Margherita Gagliasso who died in November 1954. Contestants are the three daughters of decedent. The contest was based on the grounds of lack of due execution, unsoundness of mind, and undue influence and fraud in procuring the will's execution. The court granted a nonsuit at the close of the contestants' case. There is no question presented as to the due execution of the will, but appellants urge that there was sufficient evidence to go to the jury on the other grounds.

The will was executed on January 12, 1953, when the decedent was 87 years of age. She gave the bulk of her estate to her four sons making only minor provisions for the three daughters.

The evidence stated most favorably to appellants shows that in April, 1952 Angelina Conrotto, one of the contestants, called at her mother's home and found her alone, partly blind and undernourished. Decedent's home was filthy and disordered. Angelina stayed with her mother for a few days, arranged with a cousin to stay with her for another few days, and then returned and was with her mother almost constantly from April until August of 1952. Decedent requested Angelina to live with her and take care of her and to this end agreed that Angelina should be appointed her guardian. In August, 1952 Angelina and decedent visited an attorney and a petition for guardianship was prepared and filed. The other children when notified of the pending petition to have Angelina appointed guardian for her mother consulted an attorney and filed an opposition. When the petition for guardianship came on for hearing it was dismissed by the attorney without prejudice on the court's refusal to grant him a continuance.

A few days before the hearing in the guardianship proceeding Angelina's brother Fiuri entered the mother's home and struck Angelina in the face, breaking her nose and blackening both eyes. The following day the brother Charles came and took decedent to his home. None of the three sisters was ever permitted by their brothers to see their mother alone after that. A few days after the dismissal of the guardianship proceeding Angelina went to see her mother and the mother said to her in a low tone: "You had better not stay here. They certainly have it in for you."

Shortly thereafter the mother was taken to live in the home of her son Fiuri and lived with him and his wife from that time on.

Shortly after the dismissal of the guardianship petition the attorney who had been employed to contest the guardianship petition and who later drew the decedent's will prepared and decedent signed a request to decedent's attorney to transmit to him all of the files and papers of decedent. This document was witnessed by two of the sons, Fiuri and Charles.

A few weeks before the execution of the will the decedent was brought to the attorney's office by Fiuri and his wife Elvira to discuss the drawing of a will. The attorney insisted that they remain in the anteroom while he discussed the matter with decedent. When the will was ready for execution the same procedure was followed, Fiuri and his wife taking the decedent to the attorney's office and being excluded from the attorney's room while the will was read, translated into Italian for decedent's benefit and then executed. The decedent's hand was so shaky that she could not sign her name and she made a cross with the assistance of the attorney who put his hand on hers to steady it. There was evidence of earlier declarations of the decedent that she intended to leave her property in equal shares to all of her children.

The son Fiuri had operated the decedent's ranch property for her for a number of years. In the earlier years the profits were divided equally among decedent, Fiuri and his brother John, who was blind. For the last few years the profits were divided between Fiuri and John. In the Autumn of 1952 decedent transferred to Fiuri an indebtedness due to her which was secured by a mortgage upon his promise to care for her for the balance of her life. The mother in 1952 was old, feeble and partially blind. There was testimony that at times she was incoherent and had difficulty carrying on a conversation. The evidence certainly would support the inference that from the time that she went to live with Fiuri and his wife she was sufficiently enfeebled to be totally dependent on them for her care.

At the outset appellants argue that there was no sufficient specification of the grounds of insufficiency of the evidence to support the granting of a nonsuit.

[1] The grounds as stated at the opening of the presentation of the motion, that the evidence was not sufficient to support each of the grounds of contest was certainly too general under the rule announced in Eatwell v. Beck, 41 Cal.2d 128, 257 P.2d 643 and Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604. However in the course of the argument specific alleged defects in the proof were pointed out with citation of authorities to support the claim of their insufficiency. The argument as a whole left no doubt as to the specific alleged defects in the proof relied upon and appellants' counsel in his argument answered the points so made. We are satisfied on the whole

record of the argument of the motion that the alleged defects in proof were pointed out with sufficient specificity to satisfy the rule of the cited cases.

The Issue of Undue Influence and Fraud.

[2] It is now settled that "* * * when the contestant has shown that the proponent of a will sustains a confidential relationship toward the testator, and actively participates in procuring the execution of the will, and unduly profits thereby, the burden then shifts to the proponent to prove that the will was not induced by his undue influence." In re Estate of Pellegrini, 138 Cal.App.2d 143, 145, 291 P.2d 558, 560; In re Estate of Rugani, 108 Cal.App.2d 624, 629, 239 P.2d 500; In re Estate of Abert, 91 Cal.App.2d 50, 58, 204 P.2d 347.

That Fiuri might reasonably be found to have occupied a confidential relation to his mother is made clear by the evidence. She entrusted the operation of her ranch property to him for many years. He divided the profits from this operation without rendering any detailed accounting. He agreed to care for her for the balance of her life in consideration of the transfer of a valuable mortgage to him, and his mother was living with him dependent upon the ministrations of himself and his wife because of her enfeebled condition. It is equally clear that Fiuri unduly profited from the will at the expense of his sisters, the contestants.

[3] Respondents point to the lack of any direct evidence of any pressure brought upon decedent to induce her to execute the will and insist that there is no evidence that any one of them "actively participated in procuring the execution of the will." However it is settled that activity in procuring the execution of a will may be established by circumstantial evidence. In re Estate of Jamison, 41 Cal.2d 1, 8, 256 P.2d 984; In re Estate of Washington, 116 Cal.App.2d 139, 145, 253 P.2d 60; In re Estate of Leonard, 92 Cal.App.2d 420, 207 P.2d 66; In re Estate of Abert, supra, 91 Cal.App.2d 50, 52, 60, 204 P.2d 347.

Here we have a course of conduct by Fiuri commencing with a physical assault upon his sister Angelina who was then caring for her mother at the mother's request, followed by another brother almost immediately inducing the mother to leave Angelina and go with him. We have the mother signing a request to transfer her records and legal papers from her previous attorney to the attorney chosen by the other children to resist the guardianship petition filed by Angelina with her mother's consent, and this request is witnessed by two of the respondents, one of them Fiuri. We have Fiuri, his wife and his brother John persistently refusing to permit any of the contestant daughters to have a private conversation with their mother or to be alone with her without one or more of the three being present. We have an enfeebled old woman, partially blind, and almost completely dependent on the ministrations of Fiuri and his wife. While it is true that the attorney, with commendable zeal, was careful to exclude Fiuri and his wife from his actual conferences with decedent we have Fiuri and his wife taking the decedent to the attorney's office on both occasions and on both occasions remaining with her until the attorney asked them to withdraw.

It is rare that the facts of two cases so closely parallel one another as the facts of this case and those in In re Estate of Leonard, supra, 92 Cal.App.2d 420, 207 P.2d 66. In the Leonard case the court summarized the facts on pages 428–429 of 92 Cal.App.2d, on page 72 of 207 P.2d:

"The evidence presented to the jury shows that the testator executed the attacked will while he was living in the home of his sister Mrs. Danielson, and at a time when he was described as an obedient child who would do anything anyone 'wanted him to do if they handled him right.' He had lived intermittently with contestant for many years, and by a prior will had made the nephew and his wife the sole beneficiaries of his estate, yet shortly after moving to the Danielsons' his whole attitude toward the contestant completely changed. He was restricted to the premises of the Danielson home and could not leave them unaccompanied. The Danielsons sought to prevent him from conversing with the contestant or his wife. The beneficiaries obtained a lawyer for the testator and always accompanied him to the lawyer's office. The beneficiaries of the challenged will took the entire estate to the exclusion of the contestant who, with his wife, were the sole beneficiaries of the prior will which was executed at a time when the testator was admittedly of sound mental capacity and possessed of a fiery and independent personality."

[4] The basic facts in this recital find their substantial parallel in this case. The court in Leonard concluded that the facts were sufficient to support the inference that the beneficiaries in that case actively participated in procuring the execution of the will and reversed the case for a new trial on the ground of undue influence. We are satisfied that the same order must be made herein.

The Issue of Incompetency.

[5, 6] The incompetency to make a will must be shown to exist at the very time of the will's execution. In re Estate of Lingenfelter, 38 Cal.2d 571, 580, 241 P.2d 990. There was testimony of the attorney who prepared the petition for guardianship that when he saw the decedent at that time she could not tell him the nature or extent of her bank accounts and testimony of the contestants that at various times when they saw her after she had gone to live with Fiuri they found her confused or unable to converse coherently and concluded that she was incompetent. Since they, at best, saw decedent infrequently and always in the presence of Fiuri, his wife, or John (because of their refusal to permit them to be alone with her at any time) they could not testify whether the conditions which they described were permanent or temporary. A physician who treated her eyes about the time the will was prepared and executed found her in good health for her age. The only testimony bearing on her competency at the time of the execution of the will is to the effect that she understood and discussed its provisions as they were translated to her in Italian. There was no sufficient proof to go to the jury that decedent at the time the will was executed was incompetent. In re Estate of Lingenfelter, supra, 38 Cal. 2d 571, 241 P.2d 990.

The judgment of nonsuit is reversed for a retrial of the issue of undue influence and fraud, otherwise it is affirmed.

KAUFMAN, P. J., and COMSTOCK, Justice pro tem., concur.

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150 Cal.App.2d 178

Gene WILSON, Appellant, Plaintiff-Cross-Defendant and Respondent,

v.

John K. KEEFE and Mrs. John K. Keefe, Appellants-Defendants-Cross-Complainants and Respondents.

Civ. 21888.

District Court of Appeal, Second District,
Division 2, California.
April 16, 1957.

Suit to recover for extras performed under a building construction contract wherein the defendant cross-complained for damages due to the plaintiff's failure to construct the building entirely upon the lots specified in the contract. From portions of a judgment of the Superior Court of Los Angeles County, Stanley Mosk, J., denying relief to both parties, both parties appealed. The District Court of Appeal, Ashburn, J., held that the contractor's right to recover for extras was not barred for failure to comply with provision of contract respecting agreement in writing therefor, and that the evidence established and the contractor was not responsible for the encroachment of the building upon a public street.

Portion of judgment reversed and portion affirmed.

1. Contracts ⚷232(4)

Contractor was not barred from recovering for extras performed under building construction contract because of failure to comply with paragraph of contract requiring writing for extra work performed under contract, where extras were done upon request and with full knowledge of the owner and neither party suggested compliance with the paragraph, since their conduct waived compliance with the paragraph.

2. Contracts ⚷232(4)

Specifications of building construction contract authorizing owner to order extras which was a partial duplication of paragraph requiring agreement for extras to be fixed upon in writing, yielded to the paragraph which controlled.

3. Appeal and Error ⚷931(1)

Where trial court found for plaintiff on one phase of the case, all testimony and inferences favorable to the plaintiff must be accepted in the appellate court.

4. Contracts ⚷328(1)

An action to recover for extras performed under a building construction contract was not barred on ground that residence was not placed entirely upon lots specified in contract but encroached upon a public street, where evidence warranted a finding that residence was placed in position according to plans prepared by owner and his duly authorized agent, and that plaintiff was not responsible for encroachment.

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R. Norman Wenzell, Hollywood, for appellant and respondent Gene Wilson.

John E. McCall and James C. R. McCall, Los Angeles, for appellants and respondents Keefe.

ASHBURN, Justice.

Plaintiff Wilson sued defendants Keefe[1] to recover for extras performed under a building construction contract. Keefe cross-complained for damages due to plaintiff's failure to construct the building entirely upon the lot specified in the contract. Relief was denied both parties and each appeals from the portion of the judgment adverse to him.

Re Plaintiff's Appeal.

The work was done under a written contract of March 19, 1953, wherein plaintiff Wilson agreed to construct for defendant a residence upon "Lot 34 on Lago Vista Dr., Beverly Hills, Calif." for an agreed sum of 32,200. Paragraph 8 covers the matter of omissions and extras: "Should the Owner at any time during the progress of the work request any modification, alterations or deviations in, additions to, or omissions from, this contract or the plans or specifications, he shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to or deducted from the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation, based upon the actual cost of labor and materials plus 10% profit to the Contractor. * * * The rule of practice to be observed in fulfillment of this paragraph shall be that upon the demand of either the Owner or the Contractor, the character and valuation of any or all changes, omissions or extra work shall be agreed upon and fixed in writing, signed by the Owner and the Contractor, prior to execution. * * * Provided however that the Contractor is not deemed to have waived his right to compensation for extra work if the same is not provided for in writing." The court found upon adequate evidence that plaintiff at defendant's request supplied extra labor and material having reasonable value of $900.82; that neither party ever demanded or requested that the character or value of changes, omissions or extra work should be agreed upon and fixed in writing signed by the parties prior to execution of the work. From this it was concluded that "plaintiff is precluded from recovery of said sum for the reason that paragraph 8 of said building contract was not complied with by the parties in that neither party requested that same be reduced to writing and that same was not so reduced to writing."

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[1] Mrs. Keefe seems to be a nominal party and the husband will be indicated by the use of the word "defendant" unless otherwise indicated.

[1] In this conclusion the court erred. There were omissions amounting to $1,358.94, which were credited to the owner by the contractor without the support of any writing. The extras were done upon the request and with full knowledge of the owner, but neither party suggested compliance with paragraph 8 of the contract or the necessity of an advance agreement or writing. Such conduct waives compliance with a provision such as paragraph 8. Frank T. Hickey, Inc., v. Los Angeles J. C. Council, 128 Cal.App.2d 676, 682–683, 276 P.2d 52; Wyman v. Hooker, 2 Cal.App. 36, 41, 83 P. 79; Bavin & Burch Co. v. Bard, 81 Cal.App. 722, 727–728, 255 P. 200; Miller v. Brown, 136 Cal.App.2d 763, 775, 289 P.2d 572; 9 Cal.Jur.2d § 13, p. 296; 66 A.L.R. 649, 665, 668. The rule extends even to the rights and obligations of a surety, which are *strictissimi juris* and "not to be extended by implication beyond the express terms of his contract." In Roberts v. Security T. & S. Bank, 196 Cal. 557, 570, 238 P. 673, 676, it was held that such a departure from the terms of a contract requiring advance written agreement upon extras does not release the surety from his obligation upon the contractor's bond. The instrument under discussion studiously provided for such an eventuality as the doing of extras without a previous writing, for it concludes with these words: "Provided however that the Contractor is not deemed to have waived his right to compensation for extra work if the same is not provided for in writing." The meaning of this is clear beyond the possibility of misinterpretation.

[2] True, the specifications say: "The owner may order extra work or make changes by altering, adding to or deducting from the work, the contract sum being adjusted accordingly as agreed to by the owner and contractor before the change is commenced." It will be noted that this language is merely a partial duplication of the provisions of paragraph 8 of the contract. In view of the specific nature of the concluding language of that paragraph it must be held that the specifications yield to the contract and that the last sentence of paragraph 8 governs the specification as well as the contract itself. See 9 Am.Jur. § 11, at page 12; Moreing v. Weber, 3 Cal. App. 14, 20, 84 P. 220; Valley Construction Co. v. City of Calistoga, 72 Cal.App.2d 839, 841, 165 P.2d 521.

It follows that, upon the evidence now before us, plaintiff is entitled to recover for said extras.

Defendants' Appeal.

The contract provides that the dwelling be constructed upon the designated lot 34. The street is a winding, mountainous road, with no sidewalks, but apparently the curbs had been installed. When completed the house "did extend over and upon public property owned by the City of Beverly Hills for a distance of approximately 2 to 3 feet at three points." The quoted finding is immediately followed by this language: "[B]ut that said property was placed in such position according to the plans prepared by cross-complainant [defendant] and his duly authorized agent, and that cross-defendant [plaintiff] is not liable or responsible for said encroachment."

The contract, in addition to providing that the building be constructed on lot 34, requires that it be completed "in strict conformance with plans and specifications for the same signed by the parties hereto;" also, "in strict compliance with all laws, ordinances, rules and regulations of competent public authority." Paragraph 7 thereof says: "The plans and specifications are intended to supplement each other, so that any works exhibited in either and not mentioned in the other are to be executed the same as if they were mentioned and set forth in both."

The agreement makes no mention of an architect or of any superintendence of the work. This is also true of the specifications. They were prepared by one Colleen

Crist, who is trained in draftsmanship but not licensed as an architect. The fact that she had no license was known to the contracting parties and plays no part in the solution of this case. The specifications provide: "The owner shall supply all information as to lot lines, deed restrictions, property line argeements [sic], easements, or any other right effecting [sic] this building. The drawings were completed with the information supplied, and changes resulting from misinformation shall be paid for on a fair and reasonable basis." Neither of said documents (Contract or Specifications) mentions Miss Crist or purports to confer any authority on her, except that the specifications do say: "The building is to be framed, braced, spiked and pinned in a sound manner and to be true and plumb. Consult with Miss Crist in regard to any framing which involves construction different from that indicated on various details or which is not detailed in the drawings."

[3] The court having found with plaintiff on this phase of the case, all testimony and all inferences favorable to respondent must be accepted in this court. Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550. We proceed upon that basis.

Defendant says he furnished to plaintiff all plans, contour maps and surveyor's maps which he had received when he purchased the lot; this the plaintiff denies, saying he was furnished no lot lines whatever. It is a reasonable inference that such surveys as defendant had were furnished to Miss Crist, rather than plaintiff, for the specifications prepared by her state, as above quoted, that the "drawings were completed with the information supplied," obviously referring to that which the owner was to furnish as to lot lines and the like. Both parties testified that detailed plans and changes therein were worked out by plaintiff Wilson and Miss Crist during the progress of construction; Wilson says there were some 40 such changes. Having received no survey or other information concerning lot lines, plaintiff called on Miss Crist for information as to any setback requirement of the city, and she told him there was none. This inquiry was made of her because "she was doing his [defendant's] work," which was being done "under her supervision," according to plaintiff's testimony. No motion to strike either of these conclusions was made. Miss Crist showed plaintiff upon the plans [2] "a line around the front end of the premises," but, same not being designated thereon as the curb line, he called upon her for the information and she said it was the curb, and Wilson accepted it as such. No lot line was ever staked out on the ground, but on one occasion plaintiff and defendant were at the premises and, according to defendant, Mr. Wilson "stretched some strings around the lot and claimed he could build the house on the lot; and he showed me these strings which looked to me all right. It represented building lines." When completed, the corner of the house was about three feet inside the curb line. No one ever told plaintiff that there was a city-owned strip of five feet between curb and property line and, as above pointed out, Miss Crist had advised him that there was no setback requirement, no setback from the curb.

[4] The arrangement between the owner and Miss Crist is not in evidence; it does not appear whether the same was oral or written; Miss Crist was not called as a witness. Her conduct was such, and known to defendant to be such, that it raised a fair inference of agency, express or implied, actual or ostensible, with respect to the matters above discussed and continuing throughout the construction period. We cannot say that the evidence does not warrant the finding that the building "was placed in such position according to the plans prepared by cross-complainant [defendant] and his duly authorized agent, and

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[2] The plans themselves seem to have been before the trial court, but they were never formally received in evidence and are not among the exhibits transmitted to this court.

that cross-defendant [plaintiff] is not liable or responsible for said encroachment."

The portion of the judgment which denies plaintiff recovery on his first amended complaint is reversed; the portion which denies defendants recovery upon their amended cross-complaint is affirmed.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 44

Elizabeth T. LASSEN, Bernice Hahan, Edward Gamble, Jr., Marion Williamson, Clarence LaBoyteaux, Lawrence Picetti, Albert E. Mansfield, John B. Heymes, Petitioners and Appellants,

v.

CITY OF ALAMEDA, a municipal corporation; R. P. Kranelly, Harold B. Hove, Irene L. Moresi, William M. McCall and Sidney A. Haag, as members of the City Council of said City of Alameda; Shirley H. Tennier, as City Clerk of said City of Alameda, and Utah Construction Company, a corporation, Respondents.

Civ. 17134.

District Court of Appeal, First District, Division 2, California.
April 10, 1957.

Proceedings on petition by property owners for writ of mandamus and for alternative writ of certiorari alleging evidence on hearing before city council related to different boundary line than the boundary line set out in petition for formation of reclamation district. After alternative writ of mandamus was issued, city and property owner who petitioned for formation of reclamation district filed demurrers and answers. From order of the Superior Court, Alameda County, James R. Agee, J., dismissing writ, property owners appealed. The District Court of Appeal, Stone, J. pro tem., held that where minutes orders of trial court did not indicate that required findings of fact were made or waived by either party, order discharging alternative writ of mandamus was not final and could not be appealed.

Appeal dismissed.

1. Mandamus ⚷170

If question of fact is raised by answer to petition for writ of mandamus, the matter is heard in the same manner as any other trial and findings of fact are required unless waived by the parties. West's Ann. Code Civ.Proc., § 1109.

2. Appeal and Error ⚷76(1)

Where the trial court's minute order lacks one of the requisites of a final judgment, the order is not appealable.

3. Appeal and Error ⚷77(1)

Where defendants, in mandamus proceeding, filed demurrers and answers by way of return to writ which was issued and minute orders of trial court did not indicate that findings were made or waived by either party, order discharging writ of mandamus was not final and could not be appealed. West's Ann.Code Civ.Proc., § 1091, 1094.

◆

Hadsell, Murman & Bishop, Scott Elder, San Francisco, for appellants.

Frank Annibale, City Atty., Alameda, for respondents City of Alameda, etc., et al.

Pillsbury, Madison & Sutro, Wallace L. Kaapcke, Charles R. Purnell, San Francisco, for respondents Utah Const. Co.

STONE, Justice pro tem.

This is a purported appeal from an order discharging an alternative writ of mandamus which was issued pursuant to a petition contesting the validity of an order of the City of Alameda for the formation of a Reclamation District within said city.

The order of the City Council approved a petition of Utah Construction Company, owner of a large tract of tidelands in the city for the formation of a Reclamation District. The petition included Utah's tidelands and contiguous parcels of other owners, all susceptible of reclamation by earthfill and levees. The petition contained a long description by metes and bounds of the boundary line of the proposed district, its proposed acreage and the names of the 218 owners of lands to be included in the district. At the hearing before the City Council a map was introduced purporting to show the boundaries of the proposed district. Evidence was received in relation to said map. Six of the present petitioners appeared in formal opposition without presenting any evidence. Nobody pointed out that the description by metes and bounds contained two clerical errors (west written where east was meant) as a result of which the boundary so described did not conform to the map used at the hearing and the evidence relating thereto and that the description did not close. It also varied from the owners named in the petition and the acreage alleged to be situated within the boundaries. The description with the errors was used in the petition, the publications and in the original order approving the petition.

Appellants, all owners of land, within both the correct and erroneous boundary lines filed their petition for writ of mandamus on September 22, 1955, and in the alternative for a writ of certiorari, alleging that the evidence on the hearing related to a different boundary line than the one set out in the petition.

After the court had made its order for issuance of an alternative writ of mandate, the City Council on September 29, 1955 made an "order correcting an inadvertent and clerical error" in the order forming the Reclamation District. The correct map and the correct description by metes and bounds were made part of the order. Thereafter, the city and Utah Construction Company, by way of return to the alternative writ each filed a general demurrer (for failure to state a cause of action) and a verified answer. The verified answer of the city sets out the facts concerning the map and evidence introduced before the City Council, the unnoticed typographical errors in the metes and bounds description in the petition, and the correction by the order of September 29, 1955, copy of which with attestation of the City Clerk is incorporated by reference in the answer. The correction order of the city also contains an extensive statement of the facts. The answer of Utah Construction Company also incorporates certain of the evidence introduced before the City Council with reference to a record of the proceedings before the City Council in the matter of the formation of a Reclamation District, which record was filed with the trial court and ordered by it included in the record on appeal at the request of Utah Construction Company.

The appellants question the regularity of the mandamus proceedings in the trial court. On the day fixed for the return of the writ, both defendants filed demurrers and answers. The only record of what occurred is to be gleaned from the two minute orders filed in the proceeding. The minute order of October 7, 1955, the day of the return, clearly states the demurrers were argued and submitted. However, the order also refers to the order for issuance of writ of mandate and states in effect that it too was being submitted with the demurrers. The minute order reads as follows:

> "In this action, the demurrer of Utah Construction Co. to the petition; the demurrer of the County of Alameda to the petition and the order for issuance of writ of mandamus come on regularly this day for hearing, Dan Hadsell of the law firm of Hadsell, Murman and Bishop appearing as counsel for plaintiff and Charles R. Purnell of the law office of Pillsbury, Madison and Sutro and W. L. Kaapcke, both appearing as counsel for defendant. After the presentation of arguments and the citation of authorities by respective counsel, said matters are submitted."

The order of October 11th contains the same ambiguity and reads as follows:

> "In this action, the demurrer of Utah Construction Co. to the petition and the demurrer of the City of Alameda to the petition and the order for issuance of writ of mandamus having been heretofore submitted on October 7, 1955, come on this day for ruling and the Court being fully advised, orders that said writ of mandamus be and the same is hereby discharged; that the demurrers of Utah Construction Co. and of the City of Alameda to the petition be and the same are hereby dropped from the calendar and the petition is dismissed."

Although the true nature of the hearing is not clear from the record, it must be assumed the matter was heard on the merits because the demurrers were dropped from the calendar and the writ of mandamus ordered discharged and the petition dismissed. The answers in this case raised a question of fact. One of the questions was whether a person reading the published description would have notice of the error and recognize the correct or intended description. Respondent contends: "Had anyone actually attempted before or at the hearing to follow out the metes and bounds in the petition, the physical facts and the other descriptive elements would have revealed the errors. Hence no one could have been misled, even if he had tried to rely on the errors in the metes and bounds". What the physical facts and the other descriptive elements would have revealed to a landowner constitutes a determination of a question of fact. It would require the testimony of witnesses, probably expert witnesses.

When a question of fact is raised by the defendant's answer, the applicant has the right to countervail it by proof, either in direct denial or by way of avoidance, Code of Civil Procedure, § 1091. If only a question of law is raised the court may hear the matter upon the papers filed and the argument, Code of Civil Procedure, § 1094. Applicant may also waive his right to countervail and the matter may be heard on the papers filed and the argument. Nothing in the record before us indicates the applicants waived their right to produce evidence or countervail the answer. To the contrary, appellants strenuously contend that only the demurrers were argued and submitted. Appellants deny they waived their right to countervail the answers which were filed with the demurrers on the return day.

[1, 2] If a question of fact is raised by the answer to a petition for a writ of mandamus, the matter is heard in the same manner as any other trial (32 Cal.Jur.2d p. 278, § 72). Furthermore, when a question of fact is raised by a mandamus proceeding, findings of fact are required unless waived by the parties. Code of Civil Procedure, § 1109; Delany v. Toomey, 111 Cal.App.2d 570–571, 245 P.2d 26; Beloin v. Blankenhorn, 97 Cal.App.2d 662, 218 P.2d 552. No findings were made in this case and nothing in the record indicates findings were waived by either party. In the case of Delany v. Toomey, 111 Cal.App.2d 570, at page 574, 245 P.2d 26, at page 28, supra, it was held in a mandate proceeding that "Where, as here, a minute order lacks one of the requisites of a final judgment (in this case, the required findings of fact) it is not appealable and the provisions of Rule 2(b) (2) of the Rules on Appeal do not apply. See Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 346–347, 182 P.2d 182; People v. Gordon, 105 Cal.App.2d 711, 716–717, 234 P.2d 287; Reimer v. Firpo, 94 Cal.App.2d 798, 800–801, 212 P.2d 23; In re Estate of Dow, 91 Cal.App.2d 420, 423, 205 P.2d 698; Hirschberg v. Oser, 82 Cal.App.2d 282, 285–287, 186 P.2d 53."

[3] In view of the fact that findings were required in this case and were not made, the order is not final and hence not appealable. Appeal dismissed.

KAUFMAN, P. J., and DOOLING, J., concurs.

CENTRAL CALIFORNIA COMMERCIAL COLLEGE, a corporation, Plaintiff and Respondent,

v.

Ruth G. SHREWSBURY, Executrix of the Estate of William C. Shrewsbury, Deceased, Defendant and Appellant.

Civ. 5383.

District Court of Appeal, Fourth District, California.

April 16, 1957.

Rehearing Denied May 9, 1957.

Hearing Denied June 12, 1957.

Action by corporation against executrix of deceased president of corporation to recover on note made by president. From judgment rendered for the corporation by the Superior Court of Fresno County, Philip Conley, J., executrix appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where president of corporation executed note in favor of corporation and gave it to vice president who placed it in locked compartment of corporation safe inaccessible to president and books of corporation showed transaction, a sufficient presumption of delivery of note to corporation and of ownership arose to make president liable on it.

Judgment affirmed.

1. Bills and Notes ⚷492

Where president of corporation executed note in favor of corporation and gave it to vice president, who placed it in locked compartment of corporation safe inaccessible to president, and books of corporation showed transaction, a sufficient presumption of delivery of note to corporation and of ownership arose to make president liable on it.

2. Payment ⚷65(6)

Burden of proof on defense of payment was on defendant.

3. Executors and Administrators ⚷450

In action by corporation against executrix of deceased corporate president to recover on note made by president, testimony of accountants supported trial court's findings that thousand dollar item on corporate books was allowable to president as set-off as agreed value of lot deeded to corporation by him and that he was entitled to other credits as money due in payment of rentals of property and salaries.

4. Executors and Administrators ⚷450

In action by corporation against executrix of deceased corporate president to recover on note made by president payable to corporation, evidence supported trial court's finding that thousand dollar credit to which president had been entitled on books of corporation was properly to be applied to the outstanding note and not to prior note which had been outlawed by the corporation.

5. Appeal and Error ⚷931(1)

Appellate Court must accept as true all evidence tending to establish as true the correctness of the findings made.

◆

Claude L. Rowe, Fresno, Jefferson E. Hahesy, Fresno, of counsel, for appellant.

Charles Ray Barrett, Fresno, for respondent.

GRIFFIN, Justice.

[1] Plaintiff and respondent corporation brought this action against defendant and appellant Ruth G. Shrewsbury, as executrix of the estate of William C. Shrewsbury, deceased, upon a rejected claim for payment of a promissory note dated June 25, 1949, made and delivered to plaintiff by deceased, during his lifetime. William C. Shrewsbury, president and manager, and C. S. Bowlby, vice president, as partners, operated the college and later it was incorporated. Each was issued 500 shares of stock. One share of common stock was issued to each of their respective wives for the purpose of their serving as members of the Board of Trustees of said corporation. The books of the corporation were kept by Mr. Shrewsbury.

Checks were signed by him and countersigned by Bowlby in the usual course of business and on occasions each issued notes payable to the corporation and took funds from it rather than raise their salaries, which were fixed by the by-laws. It seems that on occasions these notes became outlawed and were destroyed. "I.O.U.'s" were given by each partner as a drawing account and their respective personal accounts were charged with them. About July 15, 1948, the corporation bank account contained over $30,000 in cash. The parties agreed with each other that each would give the corporation a promissory note for $7,500, payable two years from date, at 5 per cent interest. They drew corporation checks for this amount payable to themselves and took the money for personal use, thus spreading the income over future years for tax purposes. A "Notes Receivable" account was set up showing a single debit entry of $15,000. The note given by Shrewsbury, when executed, was delivered to Bowlby and he placed it in a locked compartment of the corporation safe inaccessible to Shrewsbury. A similar procedure was followed with respect to the Bowlby note. Shrewsbury died on January 3, 1955. A claim by plaintiff for the unpaid balance due on the note was filed in his estate and rejected. The claimed defenses to this action were (1) that there was no delivery of the note to plaintiff corporation; and (2) that no sum was due on the note because it was fully paid. We see no merit to the first contention. The corporation, as such, had possession of the unpaid note, admittedly signed by Shrewsbury, and the books of the corporation showed the transaction. A sufficient presumption of delivery and ownership arose. California Standard Finance Corp. v. J. D. Millar Realty Company, 118 Cal.App. 185, 5 P. 2d 41. Moreover, it was delivered to an officer of the corporation.

[2] As to the claim of payment, the burden of proof was upon defendant. Roesch v. De Mota, 24 Cal.2d 563, 153 P. 2d 422. It appears that the trial court allowed offset credits, taken from the ledger account of the corporation, under the heading "Notes Receivable". This showed certain credits. One-half of the amount there indicated was $3,373.03, which was allowed on the note of Shrewsbury, leaving a balance due of $4,126.97. Judgment was entered accordingly, plus attorneys' fees, costs and interest.

On a motion for new trial the court found that an additional credit of $1,000 should be allowed defendant, and reduced the judgment to $3,126.97.

[3] The ledger credit accounts are somewhat involved. The premises occupied by the school were owned by Bowlby and his wife and Shrewsbury and his wife as undivided tenants in common, and certain of these credits represented money due them in payment of rentals and for salaries due. One item of $1,000, on June 30, 1954, was for the agreed value of a lot deeded to this school by Shrewsbury. There is expert testimony of accountants that these items of credit had been established and the court so found upon sufficient evidence.

[4, 5] The item of credit in the sum of $1,000, added on the motion for new trial, arose out of a credit to the account in the sum of $2,000 ($1,000 each) which the court applied in the first judgment as a payment on two similar promissory notes in the sum of $3,500 each, which had been outlawed and which were so considered by the parties at the time the payment was made. The notes had been destroyed by them. The court held this purported payment could and should be reallocated and credited as a payment on the present note. There is sufficient evidence to support this finding. We are bound by the familiar rule that the appellate court must accept as true all evidence tending to establish as true the correctness of the finding as made. Bancroft-Whitney Company v. McHugh, 166 Cal. 140, 134 P. 1157.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

150 Cal.App.2d 171

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence D. WILLIAMS, Defendant and Appellant.

Cr. 5784.

District Court of Appeal, Second District, Division 1, California.

April 16, 1957.

Defendant was convicted of agreeing to sell heroin and selling a substance in lieu of heroin. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⚷566

Evidence on issue of identity of defendant sustained conviction for agreeing to furnish and sell heroin and thereafter selling a substance in lieu of heroin. West's Ann.Health & Safety Code, § 11502.

2. Criminal Law ⚷1159(2, 4)

Appellate tribunal is not authorized to determine credibility of witnesses or weight of evidence but is limited to determination of whether, upon the face of evidence, it can justly be held that sufficient facts were found by trier to warrant inference of guilt. West's Ann.Code Civ.Proc., §§ 1847, 2061.

3. Criminal Law ⚷1159(2, 4)

Credibility of witnesses and effect and value of evidence are committed solely to trier of facts. West's Ann.Code Civ.Proc., §§ 1847, 2061.

◆

Clarence D. Williams, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County, defendant was accused of a violation of Section 11502 of the Health and Safety Code in that on or about February 21, 1956, he agreed to furnish and sell a preparation of heroin to one John Doe, and did thereafter furnish and sell to said person another substance in lieu of heroin. The indictment was amended to allege two prior felony convictions, to-wit: Grand Theft in the Superior Court of Los Angeles County, and Conspiracy and Forgery in the District Court of the United States in and for the northern district of California, and that upon the latter conviction defendant served a term of imprisonment in a federal prison.

In the trial court defendant was represented by counsel, pleaded not guilty to the substantive charge and admitted the prior convictions as alleged. Trial by jury was duly waived and it was stipulated that the People's case be submitted "upon the testimony taken at the preliminary hearing in this matter * * *" and the exhibits received in evidence at such proceeding. It was further stipulated that either side might produce additional testimony if they desired so to do. In this regard it appears from the record that no preliminary examination was held in this case and subsequently no transcript of such a proceeding was available or ever delivered to the trial judge. Neither was the transcript of the proceedings had before the Grand Jury delivered to the trial court. The cause proceeded to trial and the decision therein was predicated upon testimony taken at such trial. Defendant was adjudged guilty and sentenced to State Prison. From the judgment of conviction he prosecutes this appeal.

Upon the request of defendant, counsel was appointed by this court to represent him on his appeal. Under date of November 21, 1956, court-appointed counsel addressed a communication to this court wherein he advised that he had thoroughly studied the transcripts in the case and had concluded that an appeal "would not be meritorious". Counsel's conclusion in this regard was grounded on the fact that "There is no question that the crime was committed, the sole question was, Did the defendant commit the crime? The defendant claimed that he was the wrong man and brought alibi witnesses to show that he was at a different place when the crime was committed. The judge did not believe the alibi witnesses and convicted the defendant. Since the only question of merit in the case was the identity of the perpetrator of the crime and the judge found, on a conflict in the evidence that the defendant was the perpetrator an appeal from this verdict would be frivilous because on appeal the Court will not redetermine conflicts in the evidence."

On December 14, 1956, the clerk of this court wrote defendant, in part, as follows:

"In response to your request for counsel to assist you with your appeal, this court, as is its policy, asked the Bar Association to select from its panel one of its experienced attorneys to examine the record on appeal in your case and report to this court whether he felt he could be of assistance to you in writing the briefs.

"The transcript in your case was studied carefully and the attorney has reported to this court that he feels that the appeal in your case *in* lacking in merit and he feels that he could not conscientiously accept appointment and file briefs. In this situation the court does not feel that it is justified in appointing counsel to represent you on appeal.

"However you may file briefs on your own behalf if you wish or obtain private counsel to do so.

"Please consider this letter notice under Rule 17(a) of the Rules on Appeal, and if your opening brief is not filed within 30 days from date of this letter, or such time extended by this court, the appeal in your case will be dismissed."

No reply was received to such letter and no brief has been filed on behalf of defendant or respondent. However, in accordance with the policy of this court when such a situation arises, we have carefully examined the record now before us and which reflects the following as a fair epitome of the factual background surrounding this prosecution. William Anderson, a police officer of the City of Los Angeles, assigned to the narcotics squad, testified that on February 14, 1956 he encountered defendant at an Auto Park on South Broadway in the City of Los Angeles; that he engaged defendant in conversation, asking him if he knew a person known as "T-Bone"; that defendant replied he did not know "T-Bone" personally, but had heard of him. The witness further testified that he said to defendant: "* * * I am living with a girl that was sick, she had a monkey on her back (a term used by a person who is addicted to narcotics), and I had to find T-Bone". That defendant stated he did not know "T-Bone", but asked, "What did I need?", whereupon the officer said, "* * * that the reason I wanted to find T-Bone was to fix the girl up." That defendant said, "What do you need, man?", to which the witness replied, "* * * I told him about the girl. He said, 'How much junk are you looking for, man?' And I asked him to get in the car and we could talk while we drove around the block.

"I introduced myself as 'Andy,' and at that time the defendant stated his name was J. C. I said, 'How about the junk?' And J. C. stated, 'How much loot have you got?'

"And I said that I had a dime, and J. C. said, 'Nobody will deal for less than half a spoon,' and I said, 'How much is that?'

"And the defendant stated, 'Twelve and a half.'

"I further stated, 'If I dig up the scratch, can you get the junk?' And J. C. said, 'Yeah, man, yeah.'

"He said, 'You get the bread and I'll fix you up.' "

The officer further testified that he then advised the defendant he would attempt to obtain more money and arrangements were made to meet at the same location on the next day at 2 p. m. Pursuant to this agreement, the officer again met defendant who entered the former's automobile and advised him to drive to a certain location. Upon arrival, defendant told the officer to stop and said, "You stay here, I can't take you in. You give me the bread (money) and I'll get the junk." According to the testimony of the officer he remonstrated with the defendant about leaving the former in the automobile and insisted upon accompanying defendant into the New Palace Cafe, but it was finally agreed that defendant alone should enter the place to obtain the narcotic. When defendant emerged from the cafe he informed the officer he was unable to contact "him". A few moments later defendant said he sighted the man he was looking for, walked away and a few moments later reappeared in the company of another man and both approached the officer's automobile, whereupon the defendant said, "This is Jimmy", and with that "Jimmy reached in the window and dropped a small package wrapped with cellophane in my lap." The officer thereupon handed "Jimmy" $12 and placed the package in his pocket. Upon the departure of "Jimmy", defendant asked the officer, "Before you cut out, man, are you going to take care of me for my trouble?" and the officer handed defendant $1.50.

Jay Allen, a qualified forensic chemist, testified that he examined the contents of the foregoing package and "found no evidence of narcotics". Although the record is not clear it seems apparent that defendant was not arrested on February 14, 1956 when the alleged transaction with the officer took place, but was apprehended about midnight on March 23, 1956. As to the identification of defendant, Officer Anderson testified at the trial that shortly after the foregoing transaction took place he made notes as to defendant's description. That defendant was wearing dark brown slacks, a light weight tan sport shirt. That defendant "had a mustache and whiskers and a small patch under his lower lip". That the time of his arrest about March 21, defendant was "dressed at that time almost identically". The officer stated positively that defendant was the man whom he encountered on February 13 and 14, 1956.

As a witness in his own behalf defendant testified that on the day here in question, February 14, 1956, he lived at the home of Mrs. Ella Taylor, that he left there about 7 a. m. on that day and returned about 8:45 a. m. That he worked around the place cleaning the floors and appliances from about 10 a. m. until 5 p. m. (the transaction here in question when the package was transferred to the officer occurred, according to the officer, at about 2:40 p. m.). Defendant testified that the first time he saw Officer Anderson was at the time of his arrest on March 23. In answer to the question, "Had you offered him (the officer) any narcotics?" defendant replied, "No, I don't even use them. I don't even fool around with narcotics and I don't have associates that fool around with them, and I don't fool with them, so I wouldn't know." Defendant further testified that at no time did he wear a goatee or "have any hairs underneath" his lip.

As a witness for the defendant, Mrs. Ella Taylor corroborated defendant's testimony that he lived at her home, that on February 14, 1956 he was working around her home from around 10:30 a. m. until 5 p. m. That she was present in the house all of that time and that defendant was in her presence. The witness testified that she fixed the day as February 14th because it was the commemoration of "a celebration * * * I call it Mardigras".

Miss Dolores Gambrel testified that on February 14, 1956, she was at the home of the previous witness, Mrs. Ella Taylor. That she arrived there about 8 a. m., that defendant arrived later that morning and throughout the day was engaged in washing walls and cleaning the house. This witness testified that defendant did not leave the house that day and was there when she left at 8 p. m. She testified that she was assisting defendant in his work. The witness further testified that she remembered the day because there was a Valentine party for the children on that day. Miss Gambrel further testified that the appearance of defendant on February 14th was the same as it was in court and not as testified to by the officer.

Mrs. Luberta Anderson testified that on the day in question she met her child when school was dismissed at 2 o'clock and went to the home of Mrs. Taylor, arriving there about 2:10 p. m., where she observed defendant cleaning the walls of the house. That she left Mrs. Taylor's home at 3:30 p. m. to pick up some clothes at an establishment that closed at 4 o'clock. That between 2:15 and 3:30 p. m. the defendant was positively at Mrs. Taylor's home. This witness also characterized defendant's appearance in court as the same as it was on February 14th, except on the latter day he was dressed in working clothes.

[1] Not a single objection or motion to strike was made at the trial and no questions of law are presented by the record on this appeal. The sole question is whether the evidence is sufficient to support the adjudication of guilt.

[2] In the instant case it must be conceded that the testimony of Officer Anderson, if believed, is amply sufficient to sustain the conviction. He positively identified appellant as the man with whom on February 13, 1956 he negotiated for the purchase of a narcotic and as the man who on the following day consummated the transaction. True, there was substantial evidence of alibi presented by appellant that if believed would have warranted an acquittal. The only question therefore presented is one of credibility of the witnesses. And it is now well established in our law that an appellate tribunal is not authorized to determine the credibility of witnesses or the weight of the evidence, and is limited to a determination of whether upon the fact of the evidence it can justly be held that sufficient facts could not have been found by the trier thereof to warrant the inference of guilt. In other words, as was said in People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393, and quoted in People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631, and People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below". Manifestly, no such stricture can be placed on the evidentiary features of this case upon which the trial judge relied.

[3] While some variances or inconsistencies do appear in the testimony of Officer Anderson and might afford a persuasive argument to the trial judge against the reliability of the officer's testimony, when viewed in the light of defendant's alibi testimony, we can see in them nothing from which a reviewing court could justly conclude that the officer's entire testimony is, *per se*, unbelievable, and that it was therefore the duty of the trial judge not only to wholly disregard it, but to accept the testimony of the appellant and witnesses in his behalf, or at least find that appellant's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt. As has been so often reiterated by the courts of this state, reviewing judges are obviously in no position to determine the credit which should be accorded to a witness or to weigh their testimony. For this reason, the legislature has ordained that appellate courts are not authorized to review evidence, except where on its face it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. The credibility of witnesses and the effect and value of evidence are committed solely to the duly authorized arbiter of the facts. Code Civ. Proc. §§ 1847, 2061. Under the rules above noted, it necessarily follows that in the case at bar, the trial judge was authorized, if he conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the witness Officer Anderson and to accept that of the latter however sharply his testimony

might have conflicted with the testimony of other witnesses.

For the foregoing reasons, the judgment is affirmed.

DORAN and FOURT, JJ., concur.

150 Cal.App.2d 206

Patrick F. PAOLA, Plaintiff and Respondent,
v.
Jack B. HUSTON, Defendant and Appellant.
Civ. 5603.

District Court of Appeal, Fourth District, California.
April 16, 1957.

Action for dissolution and accounting of oral partnership agreement between partners, who had entered into subsequent agreement whereby defendant was given one year option to purchase plaintiff's interest if partnership business was not sold within sixty days from date of agreement. The defendant filed a cross-complaint. The defendant appealed from a judgment of the Court, Gordon L. Howden, J., dissolving the partnership, and from an order appointing a receiver. The District Court of Appeal, Griffin, J., held that the evidence was sufficient to sustain finding that defendant did not pay amount due plaintiff under agreement when it was due, did not complete performance of option agreement within option period nor within a reasonable time thereafter, and that such performance was not waived, prevented nor excused by plaintiff.

Judgment and order affirmed.

1. Partnership 🔑121

In action for dissolution and accounting of oral partnership agreement, wherein defendant by way of cross-complaint relied on subsequent agreement whereby defendant was given one year option to purchase plaintiff's interest if partnership business was not sold within 60 days, evidence sustained finding that defendant did not pay amount due plaintiff under agreement for his interest when due, did not complete performance of option agreement within option period nor within reasonable time thereafter, and that such performance was not waived, prevented or excused by plaintiff.

2. Partnership 🔑315

In action for dissolution and accounting of oral partnership agreement wherein main defense was validity of subsequent agreement giving defendant one-year option in which to purchase plaintiff's interest, court, upon finding option had not been properly exercised, was authorized to order an accounting of partnership affairs.

3. Partnership 🔑325(2)

In action for dissolution and accounting of oral partnership agreement, wherein court entered interlocutory decree for dissolution of partnership and ordered winding up of partnership affairs, court was authorized to appoint receiver in carrying out interlocutory decree.

◆

Conron, Heard & James, Bakersfield, for appellant.

Deadrich, Bates & Stewart and Kenneth H. Bates, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Patrick F. Paola brought this action against defendant and appellant Jack B. Huston for dissolution and accounting of an oral partnership agreement entered into on December 1, 1950. The partnership was known as the "Arrow Liquor Stores". The complaint alleged that on July 30, 1954, some difficulties arose between the partners and they entered into a written agreement (Exhibit A attached to the complaint) which, in effect, provided that:

> "Solely for the purpose of arranging a settlement of all the differences now existing between" them "it is proposed * * * (1) That in the event the parties hereto can arrange a sale of the said" five "Arrow Liquor Stores, their leases, inventory, licenses and other assets, in their entirety to the mutual satisfaction of the parties hereto, within sixty days from the date of execution herein, the net proceeds from such sale, after paying all outstanding bills and other indebtedness, shall be shared equally between the parties hereto, and there shall be a dismissal of the now pending Superior Court action * * *. (2) In the event no sale is agreed upon between the two parties hereto and any third party within said sixty-day period, the parties hereto agreed to execute Articles of Copartnership, recognizing the equal interests of the parties hereto in said Arrow Liquor Stores, subject" to certain specified terms set forth. It then provides: "In the event that no sale is agreed upon between the respective parties hereto within sixty (60) days hereafter, * * *. Huston shall be granted an option *for a period of one (1) year* to purchase the interest of Paola in said partnership business for a sum equal in amount to .... Paola's capital account in said partnership venture as reflected by the books of said partnership *as of the date of the exercise of such option,* or at any other price mutually agreeable to the parties. Said option may be exercised by * * * Huston by the giving of *thirty days notice in writing* of his intention to exercise his option to purchase to Mr. Paola. * * *." (Emphasis ours.)

The complaint then alleges that defendant elected to dissolve the partnership; that no accounting was had between plaintiff and defendant of the affairs of the partnership; that defendant withdrew funds in excess of the amount shown on the books, and that an accounting should be had. It prays for dissolution of the partnership and liquidation thereof under the court's direction, for an accounting, and distribution of the proceeds.

Defendant answered and claimed complete books were kept by him. He denied withdrawing any funds as alleged and sets up a report of a certified public accountant of the affairs of the partnership as of August 31, 1955. By way of cross-complaint he relies upon the agreement above set forth and alleges he notified plaintiff on August 24, 1955, in writing, of his intention to exercise the option to purchase plaintiff's interest in said partnership for a sum equal to Paola's capital account as reflected by the books as of that date, and alleges that the audit of August 31, 1954, was the closest audit to that date and it reflects plaintiff's balance to be $31,774.69; that defendant is agreeable to a settlement on that basis but plaintiff has refused and has demanded a sum equal to 120 per cent of said amount. Defendant also seeks a declaration or interpretation of the agreement of July 30, 1954, in respect to the time when the sixty-day period referred to expired. It is also defendant's claim that there was no express period of time to exercise the option after giving notice; and that plaintiff refused to join with defendant in the sale or transfer of the licenses for the five liquor stores until the required consideration under the agreement was paid. He prays that no further accounting be had; that the value of plaintiff's interest be fixed at $31,774.69 upon the dissolution of the partnership; that the physical assets be awarded to defendant; and in effect argues that plaintiff be required to specifically perform according to the agreement.

The matter came on for pre-trial hearing and the issues were there stated to be a determination of the validity and finality of the option claimed to have been exercised and, if invalid, to the trial of the issues on the question of dissolution and accounting. It was agreed that this judge try the issue in reference to the option to purchase. By consent, defendant first presented evidence as to this claimed defense. It pertained mainly to the evidence bearing on the interpretation of the agreement, the time of the notice of offer by defendant to purchase, his financial ability to perform, and the status of plaintiff's capital account. As will be noted, the agreement dated July 30, 1954, provides for the arrangement of sale of the stores by the parties within sixty days of the date of the agreement, and if no sale is agreed upon by the parties "within sixty (60) days hereafter", Huston should be granted an option "for the period of one (1) year to purchase the interest of Paola". It does not indicate when that one-year period begins. Plaintiff contends that July 30, 1954, the date they signed, is the commencement date, and defendant argues it did not begin until the expiration of sixty days thereafter, or September 30, 1954.

[1] The written notice of the exercise of the option was not mailed to plaintiff until August 25, 1955, more than one year after July 30, 1954, and if interpreted according to plaintiff's claim, defendant's right to exercise said option had expired. The trial court followed the interpretation that the one-year period commenced to run sixty days after July 30, 1954. It denied defendant relief on his specific performance prayer mainly because defendant did not pay the amount due plaintiff when due; did not complete performance of the option agreement within the option period nor within a reasonable time after September 30, 1955; and found that such performance was not waived, prevented nor excused by plaintiff.

The main question is whether the evidence supports this finding. It is conceded no money was paid to plaintiff at any time. No tender of any sum was made. It is apparent that defendant attempted to negotiate a loan in the sum of $30,000 to make some payment thereon, but he was unable to do so for several reasons. The main one was that it required encumbering the property and a sale or transfer of the liquor licenses to defendant. One of these licenses had been suspended for one year for a law violation and nothing could be done about its sale or transfer. Defendant's counsel testified that on September 20, 1955, he orally told plaintiff he was representing Huston and was recording a notice of intention to transfer these licenses to Huston and asked him to go to the office of the Liquor Control Board and sign the application for transfer; that Paola referred him to his lawyer and that he told Paola Huston was exercising his option; that subsequently Paola's attorney told him Paola was not interested because the notice was too late and the amount mentioned in the audit of August 31st, 1955, was not enough; that he demanded 120 per cent of that amount; and that he told Paola's attorney he was still trying to raise the money. Paola did not remember such conversation and he said he did not "think it happened" because he referred such things to his attorney. His attorney did not testify at the trial. It rather appears from the aforesaid answers of Paola that a conversation was held between them but he stated the conversation was not what defendant's counsel claimed.

The certified public accountant testified Paola's capital account was $32,422.66 on September 30, 1955.

Assuming, as contended by defendant, his counsel did orally notify plaintiff, about September 20, 1955, that defendant intended to exercise his option, and did request plaintiff to come to the Liquor Control Board office to sign the transfer of the licenses to defendant, the obligation of the defendant was not only to notify plaintiff of this fact, in writing, but in good faith to tender to plaintiff, within the time prescribed or within a reasonable time, the full amount required under the agreement. It does appear that defendant had considerable difficulty in his endeavor to obtain a loan sufficient in amount to produce even the $31,774.69 which defendant claimed was due to plaintiff. He was unsuccessful in obtaining this sum even though plaintiff contended his capital account then amounted to $32,422.66. The written notice of intention to exercise the option was not given until August 25, 1955. The contemplated purchase was not consummated within one year from September 30, 1954. In fact it was never consummated. There is a conflict in the evidence as to whether the failure to produce the money and consummate the sale was the fault of defendant or the fault of plaintiff in failing to cooperate with defendant in placing the property in a condition whereby it could be incumbered to finance the purchase. There was also a question as to whether plaintiff, by his conduct, may have waived tender, and whether it would be certain he would refuse it if offered, 12 Cal.Jur.2d p. 438, sec. 217; Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308; 12 Cal.Jur.2d p. 214, sec. 23. Upon sufficient evidence the court found in favor of plaintiff on these issues. Defendant did not place the contemplated sale in escrow. He furnished no substantial proof of his ability to perform. This action was not filed until October 26, 1955, was not tried until April, 1956, and there appears no tender or sufficient offer of defendant to pay plaintiff the amount claimed due by him. The court found defendant failed and refused to pay the sum equal to the capital account of plaintiff within the time prescribed or within a reasonable time thereafter, and did not waive tender of the amount claimed by plaintiff by refusing the amount suggested by plaintiff. Apparently defendant chose his own figures and stood upon that amount as a proper tender.

[2] The remaining question is whether the court was authorized to order an accounting and made sufficient and proper findings in this respect to the accounting already made by the accountant. Plaintiff's complaint sought a dissolution of the partnership, alleged that no accounting had been had, and sought such an accounting. In defendant's answer he denies this fact and alleges that a complete audit or accounting was had between defendant and plaintiff each month and that an accounting was not necessary. It appears from the record at the pre-trial hearing, that each counsel indicated that he was primarily interested in the decision on the validity of the option agreement. From the record it shows the judge remarked that if it was decided adversely to defendant it would require a trial on the other issues presented by the complaint and answer. He said:

> "The defendant does not dispute the right to a dissolution and accounting except that he says there was an option running to him which he exercised and that therefore the plaintiff is obliged to convey the plaintiff's interests in the partnership to him in return for a specified sum of money. So we've agreed that we'll go ahead and try the question of this affirmative defense as it were of option, and we'll see how that works out, and as I see it one way or the other that will determine the further procedure in the case. So for that reason we'll let the defendant and cross-complainant proceed with his proof on the question of the option."

Thereafter defendant proceeded with his proof. In conformity with this procedure and without objection on the part of defendant's counsel, the case was submitted and the court found:

> "The parties having entered into a stipulation in open court that if plaintiff were to prevail in this cause that no accounting need be had in this matter other than that the amounts owing to creditors and the respective accounts of the parties one against the other might be determined in accordance with the accounting of the partnership affairs as might be determined by the books and records maintained by William E. Whitely, Certified Public Accountant, and the parties having further stipulated in open court that the issues raised by the first cause of action of the cross-complaint herein might be first tried by the court and that if the court should then determine that the cross-complainant should not prevail upon the cross-complaint, that an interlocutory decree might be entered herein, decreeing the dissolution of the partnership and ordering a winding up of the affairs of the partnership in ac-

> cordance with the accounting of the partnership affairs as prepared by William E. Whitely, . . . and the matter having been submitted for decision upon the written briefs of the parties; and the court, being fully advised in the premises, now makes the following: Findings of Fact".

Then follows the findings as heretofore indicated, followed by the conclusions that an accounting be made by the C.P.A. and "such accounting be reported to this court"; that an order be made directing the liquidation of the assets of the partnership, under the direction of the court and proceeds be applied in accordance with a certain formula and then the respective capital accounts be determined by said accounting. Judgment was entered accordingly and the assets ordered sold.

[3] As we construe it defendant claims the facts indicated did not amount to a stipulation that an accounting should be had; that the agreement was that the accounting already made by the C.P.A. would constitute the accounting; that the finding was broader in scope than the claimed stipulation; that the trial court failed to find which accounting figure of the C.P.A. was to be adopted; and that the findings are not supported by the evidence. We see no merit to the claim when the entire record and proceedings are considered in connection with the apparent agreement of the parties. It affirmatively appears that it was defendant's option agreement which was the main defense to the dissolution and accounting proceeding and in case this defendant failed in this proof, a dissolution of the partnership was intended, and some form of accounting should be had to determine the respective interests of the parties. The findings sufficiently covered the subject matter. In carrying out this interlocutory decree the court was authorized to appoint a receiver.

Interlocutory judgment and order appointing receiver affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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149 Cal.App.2d 850

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
John Kenny FERRERA, Defendant and
Appellant.
Cr. 5803.**

District Court of Appeal, Second District,
Division 3, California.
April 8, 1957.

Hearing Denied June 4, 1957.

Prosecution on information, after dismissal of previous information, for bookmaking, for keeping and occupying residence with bookmaking paraphernalia for purpose of recording bets on horse races, and for recording a bet. From adverse judgment of Superior Court of Los Angeles County, Clement D. Nye, J., and from order denying motion for new trial, defendant appealed. The District Court of Appeal, Vallée, J., held that order dismissing previous information was not res judicata and that evidence established that deputy sheriff had reasonable grounds for believing that apartment was being maintained as bookmaking establishment and reasonable or probable cause for arrest of occupant without warrant and for resulting search and seizure incident to arrest.

Affirmed.

1. Criminal Law 🔑177

Where magistrate had jurisdiction of preliminary hearing on which present information was based, order dismissing a previous information under Penal Code constituted no bar to present prosecution. West's Ann.Pen.Code, §§ 995, 997, 999.

2. Criminal Law 🔑177

No constitutional right of defendant was invaded by prosecution on information although people had not appealed from order granting motion to dismiss previous information. West's Ann.Pen.Code, § 995.

3. Judgment 🔑751

Order granting motion to dismiss first information was not res judicata as to subsequent information for same offense and provision in Code of Civil Procedure that judgment or final order is conclusive, was not applicable. West's Ann.Code Civ.Proc., § 1908; West's Ann.Pen.Code, §§ 999, 1387.

4. Arrest ⚿63(4), 71

Evidence established that deputy sheriff, who had telephoned bet to person who had answered telephone in apartment at number given by informer and had heard sound as if some one was running away after identifying himself at door of apartment, had reasonable grounds for believing that apartment was being maintained as bookmaking establishment and reasonable or probable cause for arrest of occupant without warrant and for resulting search and seizure incident to arrest.

5. Gaming ⚿60

Where evidence showed state of facts as would lead man of ordinary prudence to conscientiously entertain strong suspicion that apartment was maintained as bookmaking establishment, officers had reasonable grounds for forcible entry of premises after demand for admittance without warrant when they knew premises were occupied.

6. Arrest ⚿63(1)

Where officers had reasonable ground for forcible entry of premises after demand for admittance without response, arrest of occupant thereof was lawful.

7. Arrest ⚿71

Seach without warrant is valid where it is an incident to lawful arrest, if it is reasonable and made in good faith.

8. Arrest ⚿71

Seizure during search incident to lawful arrest is itself lawful where such seizure is related to offense for which arrest was made.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was accused in Count I of bookmaking, in Count II of keeping and occupying a residence with bookmaking paraphernalia for the purpose of recording bets on horse races, in Count III of receiving money for the purpose of betting, and in Count IV of recording a bet. Defendant's motion to dismiss under Penal Code, section 995, was denied. On motion of the People Count III was dismissed. In a jury trial defendant was found guilty as charged in Counts I, II, and IV. He was fined $500 and placed on probation. He appeals from the judgment and the order denying his motion for a new trial.

Prior to the filing of the information on which the convictions were had, a complaint was filed accusing defendant of the identical offenses charged in the present information. After a preliminary hearing on that complaint defendant was held to answer and an information filed accusing him of the offenses. On motion of defendant under Penal Code, section 995, that information was dismissed. No appeal was taken from that order. A second complaint was filed and dismissed by the magistrate, apparently because the People did not have their evidence in court. Thereafter a third complaint was filed, a preliminary hearing held at which defendant was held to answer, and the present information filed. Defendant's motion to dismiss under section 995 was denied.

[1,2] Defendant contends the order granting the motion to dismiss the first information is a bar to the present prosecution for the same offenses. The point is without merit. Referring to the motion under section 995, Penal Code, section 997, reads:

> "The motion must be heard at the time it is made, unless for cause the court postpones the hearing to another time. * * * If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has de-

> posited money, or if money has been deposited by another or others instead of bail for his appearance, that the same be refunded to him or to the person or persons found by the court to have deposited said money on behalf of said defendant; unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if before indictment or information filed he has not been examined and committed by a magistrate."

Section 999 reads:

> "An order to set aside an indictment or information, as provided in this chapter, is no bar to a future prosecution for the same offense."

"There is nothing in the statute [section 997] that would forbid a re-examination where the court had failed to order it, or that can be construed to mean that a resubmission is essential to the validity of a second indictment or information. That an order setting aside an indictment or information is no bar to a future prosecution is plainly declared in section 999." People v. Breen, 130 Cal. 72, 74, 62 P. 408. The order dismissing the first information constituted no bar to the present prosecution. The magistrate had jurisdiction of the preliminary hearing on which the present information was based. The fact that the People did not appeal from the order granting the motion to dismiss the first information furnishes no ground for complaint on the part of defendant. No constitutional right of his is invaded by the present prosecution on a second information. People v. Godlewski, 22 Cal.2d 677, 680–83, 140 P.2d 381; People v. Dawson, 210 Cal. 366, 368–371, 292 P. 267; In re Begerow, 136 Cal. 293, 299–300, 68 P. 773, 56 L.R.A. 528; Patterson v. Police Judge's Court, 123 Cal. 453, 455, 56 P. 105; People v. Vacca, 132 Cal.App.2d 8, 9, 281 P.2d 315.

[3] It is argued that the order granting the motion to dismiss the first information is res judicata under section 1908 of the Code of Civil Procedure.[1] The point is not tenable. "The distinction between civil and criminal actions is fundamental: a separate branch of the law covers crimes, jurisdiction of courts over criminal proceedings, and criminal procedure." 1 Witkin, California Procedure, 494, § 9. The distinct character of civil and criminal proceedings necessarily precludes any general application of the doctrine of res judicata to successive criminal proceedings. 3 Witkin, California Procedure, 1942, § 58. Quoting from Ex parte Clarke, 54 Cal. 412, the court in In re Begerow, 136 Cal. 293, 68 P. 773, 56 L.R.A. 528, speaking of a dismissal for failure to bring a criminal prosecution to trial within sixty days, said, 136 Cal. at page 297, 68 P. at page 775:

> "'But the order dismissing the prosecution ends the action commenced by the complaint upon which the magistrate issued his warrant of arrest. It ends the action, however, not by any judgment upon the merits of the case,

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[1] Code of Civil Procedure, section 1908: "The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this State, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

"1—In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

"2—In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

> but by an order in the nature of a judgment of nonsuit, a simple expression of the opinion of the court that that particular proceeding ought not to be further prosecuted. Inasmuch as there is no limitation of time applicable to prosecutions for murder, and as a defendnat in whose favor an order of dismissal of the action has been made has never been put in jeopardy within the meaning of the constitution, a new action on behalf of the people may, in such case, be initiated at any subsequent day, either by presentment of a grand jury or by a complaint filed with any magistrate.' "

Also see Penal Code, § 1387; People v. Head, 105 Cal.App. 331, 288 P. 106; People v. Romero, 13 Cal.App.2d 667, 57 P.2d 557; People v. MacCagnan, 129 Cal.App.2d 100, 276 P.2d 679. Section 999 of the Penal Code, not section 1908 of the Code of Civil Procedure, controls. Cases in which the defendant was convicted or acquitted after a trial on the merits are not analogous. See People v. Beltran, 94 Cal.App.2d 197, 210 P.2d 238; 26 S.Bar J. 366. The order dismissing the first information is not res judicata.

On February 4, 1956 Officer Latimer, a deputy sheriff, was told by an anonymous informer that bookmaking was going on in Montebello and that the telephone number was RA 3–8013. He was told "Ed" was the name to use in telephoning bets. A special agent of the telephone company gave Latimer the address at which the number RA 3–8013 was located as 730½ South Garfield in Montebello and told him the address was described as that of Raymond Rogers.

Latimer and Deputy Sheriff Earl then went to South Garfield and found a long row of apartment houses. They asked the manager if Raymond Rogers lived at 730½. They were told he did. Latimer and Earl then met two other deputies and had a conversation with them. During that time no one entered or left 730½. Latimer went to a public telephone about two or three blocks from 730½ and dialed RA 3–8013. A male voice answered and Latimer said "This is Bill for Ed." The voice responded, "O.K." Latimer then said, "I would like to bet the second, Jay Frost, two to win, two to place. In the fourth, Count Lathey, one dollar to win, one dollar to place, one dollar to show. * * * The first, Ray Jewel parlay to the second Jay Frost, four dollars to win, four dollars to place. The seventh, Island Queen, one dollar to win, one dollar to place, one dollar to show. The eighth, Pay Section, three dollars to win and three dollars to place." The male voice then stated, "Is that all?" and "O.K." These were purported bets on horses running at Santa Anita that day.

Latimer and Earl, who was with him, drove back to 730½ and met the two other deputies. During the time Latimer placed the telephone call the two other deputies sat in an automobile in front of 730½ and kept the premises under observation constantly. No one entered or left from the time Latimer left until he returned.

Latimer then went to the front door of 730½, knocked, and said in a loud voice, "This is Deputy Sheriff, you're under arrest for suspicion of bookmaking. Open the front door." There was no response for about 10 or 15 seconds. Latimer knocked and identified himself again. At that time he heard scuffing of feet which sounded like someone running. Latimer then kicked the door open. As he and the other officers entered, defendant was about three or four feet from him, running to the rear of the apartment. There was no one else in the apartment. Latimer told defendant he was under arrest for suspicion of bookmaking. A search of the premises was then made, A telephone was on the kitchen table. The number was RA 3–8013. The officers found numerous betting markers; two National Daily Reporters, one dated February 4, 1956; small pieces of paper with writing upon them; pencils; paper; an adding machine; and one or two newspapers. Two hundred and some odd dollars were found with betting markers in a wine-holder case. One betting marker was on top of others. On the right hand corner of that one appeared the name "Bill," and on the upper left-hand corner the name "Ed." Writings on this marker corresponded with the bets made by Latimer over the telephone. Defendant stated this and other betting markers were in his handwriting.

Defendant told Latimer he was using the apartment of a friend of his; he had been coming there for several weeks making book; he took in about $500 a day; all the betting markers were in his handwriting; the two hundred and some odd dollars was his payoff money; he used the adding machine to total his action; the writing on the National Daily Reporter was his; he drew red marks through the horses shown on the Reporter because they had been scratched.

During the time the officers were in the apartment the telephone rang 15 to 20 times. The first time Latimer answered and a male voice said, "This is Ted for Ed," and made a bet on horses running that day at Santa Anita. The arrest and the search which followed were made without a warrant.

[4–8] Defendant urges that the evidence was insufficient to show probable cause for the search and seizure. The point is based on the fallacious assumption that the arrest was based solely on the information received from the anonymous informer and "upon nothing else." Such information was not the sole basis for the arrest. Officer Latimer obtained defendant's telephone number from the informer. He obtained the address at which that telephone was located from an agent of the telephone company. He telephoned that number, using a name given him by the informer. A male voice answered. Latimer placed bets by giving the names of horses, track, and post positions. The male voice stated, "Is that all?" and "O.K." No one entered or left the apartment in which the telephone was located from the time Latimer left to place the call until he knocked on the door. When he knocked on the door, identified himself, and told the person inside he was under arrest, there was no response—there was a sound as if someone was running away. The evidence showed "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain" strong suspicion that the apartment was being maintained as a bookmaking establishment—reasonable or probable cause. People v. Novell, 54 Cal.App.2d 621, 623, 129 P.2d 453. The officers had reasonable grounds for forcible entry of the premises after demand for admittance without a response when they knew the premises were occupied. People v. Miller, 143 Cal.App.2d 558, 299 P.2d 1010; People v. Anderson, 145 Cal.App.2d 201, 302 P.2d 358; People v. Moore, 141 Cal.App.2d 87, 296 P.2d 91. The arrest was lawful. A search without a warrant is valid where it is an incident to a lawful arrest, if it is reasonable and made in good faith; and a seizure during such a search related to the offense is lawful. People v. Winston, 46 Cal.2d 151, 161–163, 293 P.2d 40. The evidence was sufficient to show probable cause for the arrest and the search and seizure.

It is asserted the evidence is insufficient to support the verdicts. The point is so manifestly without merit as not to require discussion.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., concurs.

PARKER WOOD, J., concurs in the judgment.

150 Cal.App.2d 224

Pearl Lucille VISE and Lester Cleo Vise, Plaintiffs and Respondents,

v.

Elmer S. ROSSI, Defendant and Appellant.

Civ. 5397.

District Court of Appeal, Fourth District, California.

April 17, 1957.

Hearing Denied June 12, 1957.

Action for actual and punitive damages for alleged assault and battery. From judgment for plaintiff entered in Superior Court, Kern County, Gordon L. Howden, J., and from order denying new trial, defendant appealed. The District Court of Appeal, Griffin, J., held that where defendant was called as plaintiff's witness and his testimony of conversation with plaintiff's husband was to the effect that defendant denied any violence specifically to plaintiff and that defendant did not tell plaintiff's husband that he would not do anything like that, admission of evidence of other batteries on defendant's wife for purpose of impeachment was prejudicial error.

Order denying new trial dismissed and judgment reversed.

1. Appeal and Error ⚷110

An order denying new trial is not, in itself, appealable.

2. New Trial ⚷90

Where testimony of doctors in assault and battery action as to extent and effect of claimed blows to plaintiff's side was based on erroneous radiologist's report which stated plaintiff had two broken ribs when in fact plaintiff had only negligible fracture of one rib, grant of new trial to defendant against whom jury returned $15,000 verdict would, for that reason alone, have been justified, unless delay and lack of diligence on part of defendant's medical witness and counsel was such that defendant was not entitled to new trial.

3. Appeal and Error ⚷1048(7)

Witnesses ⚷344(2)

Where defendant was called as plaintiff's witness in assault and battery action and defendant's testimony of conversation with plaintiff's husband was to effect that defendant denied any violence specifically to plaintiff and that defendant did not tell plaintiff's husband that he would not do anything like that, admission of evidence of other batteries on defendant's wife for purpose of impeachment was prejudicial error. West's Ann.Code Civ.Proc., § 2055.

◆

Morris B. Chain, Bakersfield, and Manley C. Davidson, Hollywood, for appellant.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents.

GRIFFIN, Justice.

[1] Action for both actual and punitive damages for an assault and battery alleged to have been committed by appellant Elmer S. Rossi (hereinafter referred to as defendant) on Pearl Vise, respondent, (hereinafter referred to as plaintiff) at her home in Bakersfield. Plaintiff's husband also sought claimed expenses for medical and hospital expenses. A jury verdict was rendered in favor of plaintiff for $6,000 compensatory damages and $7,500 exemplary damages, as well as $1,500 to plaintiff's husband for medical and hospital expenses. This latter sum was, by consent, reduced by the trial court, on a motion for new trial, to the sum of $919. Defendant appeals from the judgment and order denying a new trial. This last order is not appealable and should be dismissed. The questions raised thereunder will be reviewed on the appeal from the judgment.

A résumé of the facts shows that defendant married plaintiff's sister in February, 1955. Plaintiff and her husband had been married for a number of years. Plaintiff had had five rather serious operations and was in delicate health. Defendant and his wife had a somewhat "stormy marital relationship" and on many occasions defendant's wife, Nellie, returned to plaintiff's home for various periods, claiming that defendant had inflicted grievous bodily injury upon her. However, defendant and plaintiff were on good terms and they endeavored not to interfere with Nellie's problems. Defendant was a prosperous farmer. His wife was employed in a tavern. According to plaintiff's story, on August 31, 1955, defendant came to plaintiff's home and demanded a dress belonging to Nellie, which defendant had purchased for her. Nellie had expressed some dislike for it. While defendant was at plaintiff's home Nellie called plaintiff on the telephone and told her not to give the dress to him because she thought he was going to destroy it as well as other clothes she left there. Pearl endeavored to pacify defendant and told him to leave the premises. He refused and a struggle ensued at the door of the bedroom where Nellie had been sleeping the night before. She claimed defendant twisted her arms, her body, and "kneed" her in the region of her stomach and left side, and as a result fractured two ribs and caused two hernias in the previous incision resulting from her operations. She crawled to the telephone, called her husband, and told him of the claimed attack. Defendant, knowing the husband, talked to him and claimed he never bothered her in any manner. The husband told him to leave and he did so. The police were called and plaintiff was later taken to the doctor's office and then to a hospital. X-rays were taken of her ribs and the associate radiologist's report showed that the eighth and ninth ribs were fractured. These X-rays were not produced as evidence in the case.

Defendant's story was somewhat different. He presented a milder picture of the affray and claimed that plaintiff was entertaining a man who was a stranger to him in her home. Plaintiff's doctor (Hong) testified he examined the X-rays and noticed the broken ribs indicated, but did not see any abrasions, bruises or trauma on plaintiff's body indicating a blow to her ribs or body; that he did not see welts or red marks on her arms, or any symptoms that would indicate hernia, although plaintiff did complain of pain in that region. Subsequently, on March 4, 1956, he operated for two hernias and testified that in his opinion these hernias were caused by a subsequent blow or external force. There was medical testimony that these hernias, appearing at the time they did appear, could have been the result of previous faulty suturing of the incisions or may have been caused by some internal strain. It does appear that at the time of trial, in June, 1956, there was a complete healing and recovery and plaintiff felt better than she had for years.

[2] On the motion for new trial it was shown by affidavit of defendant's medical witness, who was duly qualified and testified at the trial, that since the verdict he studied and examined the X-rays about which plaintiff's doctors testified, and did not find the existence of any fractures whatsoever of the eighth and ninth ribs; that by utilizing an intense spotlight, no fractures could be observed but there was a "questionable" line on the ninth rib which was presumably an incomplete fracture, a negligible type of injury; that the radiologist was called in and he examined the films with him and stated he could find no fracture of the eighth rib but would call the line on the ninth rib a fracture which was negligible; that the former report was made by his associate and they all erroneously assumed it was correct. Argument was made that if a true report of plaintiff's condition had been before the jury the amount of the award would have been much less. The court denied the motion for new trial on the ground of newly discovered evidence, indicating that since the report showed a fracture of only one rib, rather than two, there would be no consequential difference in the damage sufficient to grant a new trial. There may be some room for a reasonable difference of opinion in this respect. It does appear that the doctors, as well as counsel for the respective parties, believed the report reflected the true situation and did have reason to rely upon it. The testimony of the several doctors, based upon the former report as to the extent and effect of the claimed blows to plaintiff's side, may well have been different and the granting of a new trial,

for this reason alone, would have been justified. However, this same doctor, in testifying for defendant, said he took X-ray pictures of plaintiff's eighth and ninth ribs about the time of trial, and he found no evidence that either rib had ever been fractured in August, 1955, or at any other time. This report was corroborated by one other doctor. Assuming this doctor and defendant's counsel had knowledge of this fact prior to trial, it might well appear that these X-rays were available to them and could have been produced at the trial. This delay and lack of diligence, in itself, and standing alone, might justify the denial of the motion on that ground. Brooks v. Lyon, 3 Cal. 113; 20 Cal.Jur. p. 183, sec. 120. However, a more serious question, raised by defendant on the motion for new trial and on appeal, involves the reception in evidence, over limited objection, of certain evidence of other batteries and wrongful acts committed by defendant against his wife, sister of plaintiff. Defendant's counsel claims this was done for the obvious purpose of influencing the jury to prejudice it against defendant, to degrade him, to show his inclination to commit the battery charged, and to cast reflection upon his character and morality as one more likely to have committed such a battery.

[3] In the opening statement of counsel for plaintiff, after stating the facts of the claimed battery, he said that the married life of defendant and his wife had been a tempestuous one and quarrelsome; that plaintiff knew of defendant's propensity to destroy and had seen it before. Plaintiff then called the defendant as her first witness under section 2055 of the Code of Civil Procedure and immediately propounded the question: "On several occasions and before August 31, 1955, Mrs. Vise had called the police as a result of the battles between you and your wife, did she not? Mr. Chain: If Your Honor please, I submit that is irrelevant * * * If that is within the scope of the testimony I have no objection, but I didn't want to bring in a different action in this action." The objection was overruled and he answered "Yes". Thereafter he was questioned as to his conversation with plaintiff's husband, when he was accused of beating plaintiff, as follows:

> "Q. (By plaintiff's counsel): And will you tell the jury what you said to him when you called him on that occasion?
>
> "A. I said, * * * Lester, I weigh 200 pounds, you expect me to beat up a woman that's been hurt four or five times. I never touched that woman * * *
>
> "Q. You told him that you weighed how much?
>
> "A. Around 200 pounds.
>
> "Q. That you wouldn't do anything like that?
>
> "A. No."

Objection was made to this general line of questioning and the court answered: "* * * in the light of the answer the witness has previously given I'll overrule the objection." Apparently the court relied upon the question and answer as opening up the entire field and permitting the plaintiff to prove all of these claimed beatings of defendant's wife, on the theory that defendant said he would not do anything like that to anyone. Considerable evidence was thereafter produced, in detail, showing such treatment. As we construe the questions and answers the court erred in such a construction. The first statement referred to plaintiff and to no other person. Defendant knew plaintiff had been operated on four or five times. Defendant's wife did not fall in this class. It is apparent he was denying any act of violence towards plaintiff. The second question related to defendant telling plaintiff's husband he weighed around 200 pounds. Plaintiff's counsel asked, in effect, if he did not tell him that he wouldn't do anything like that, and the answer was "No" he did not tell him that. It is plain, therefore, that this answer did not open up the entire question of defendant's previous treatment of his own wife, and could not be construed to constitute a statement by defendant that he had never committed a battery upon anyone other than plaintiff. Therefore, evidence of other batteries on defendant's wife was not admissible for the purpose of impeachment. An example of the testimony of other batteries committed by defendant on his wife is shown by the following, which related to a claimed battery on defendant's wife subsequent to the claimed battery he committed on plaintiff:

> "(By Counsel for plaintiff): Q. Have you seen the results of these other acts on your sister? A. Yes, sir, Mr. Raymond, I got home from the hospital the 13th of March and on the 15th of March he beat Mrs. Rossi, my sister considerable. She came over with blood on her face and big knot on her head, and she was crying, he and another policeman showed her in the door and left. Q. That was at your home? A. Yes, sir. Mr. Chain: If Your Honor please, I move that her answer be stricken as no foundation being laid, that she ever saw him strike her at that time, that is her conclusion. A. He admitted it, Mr. Chain. The Court: The motion to strike the previous answer may go out." The previous answer was "Yes, sir."

Whether the jury understood the motion and ruling was to strike all the questions and answers bearing on this subject is problematical. Even if stricken, it did have a damaging effect and this, together with the other inadmissible evidence of other batteries on defendant's wife may well have accounted for the rather generous actual as well as punitive damages rendered by the jury's verdict.

In Larson v. Larsen, 72 Cal.App. 169, 236 P. 979, defendant was sued for assault and battery for shooting plaintiff with a shotgun. The defendant denied the shooting and, over objection of defendant, the trial court permitted testimony that defendant had shot at other boys on previous occasions. The court held that such evidence was inadmissible either to show a disposition on the part of defendant to commit such offense or as corroborative of the testimony directed to the truth of the specific offense for which he was on trial, and held that this testimony was highly prejudicial to the defendant, requiring a reversal. See also People v. Channell, 136 Cal.App.2d 99, 288 P.2d 326; and 18 Cal. Jur.2d p. 583, sec. 136, and p. 610, sec. 155.

Considering this error, together with the showing made as to newly discovered evidence, it appears to us that a new trial should be had.

The attempted appeal from the order denying a new trial is dismissed. Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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150 Cal.App.2d 306

Reuben STRAUS, M. D., Respondent,

v.

NORTH HOLLYWOOD HOSPITAL, Inc., Appellant.

Civ. 22123.

District Court of Appeal, Second District, Division 2, California.

April 19, 1957.

Proceedings on petition for confirmation of award of arbitrators and entry of judgment in conformity therewith. The Superior Court of Los Angeles County John J. Ford, J., granted the relief sought, and an appeal was taken. The District Court of Appeal, Fox, J., held that where parties submitting question as to whether doctor was entitled to specific performance of agreement, under which hospital gave him leasehold interest and exclusive right to operate pathology department, had given arbitrators power to terminate agreement, and arbitrators determined that agreement was not specifically enforceable and must be terminated notwithstanding fact that doctor had rendered substantial performance, arbitrators could properly award doctor such sum as they might conclude he was entitled to, in order to avoid forfeiture and obviate unjust enrichment of hospital.

Affirmed.

1. Arbitration and Award 🔑1

An arbitration proceeding is grounded on mutual assent of disputants to resolution of their controversy, and arbitrators derive their powers from submission agreement.

2. Arbitration and Award 🔑1

Every reasonable intendment will be indulged to give effect to arbitration proceeding.

3. Arbitration and Award 🔑73

Merits of controversy between parties to arbitration proceeding are not subject to judicial review.

4. Arbitration and Award 🔑7

Submission agreement, like other contracts, must be construed so as to give effect to intention of parties; presumption being that all matters in dispute were intended to be decided.

5. Arbitration and Award 🔑7

Where basic contract between hospital and doctor provided that arbitrators should have power to terminate agreement, such provision was automatically imported into submission agreement, along with such questions as whether doctor could compel specific performance or recover compensatory damages to which he might be entitled at law.

6. Hospitals 🔑6

Under contract by which hospital agreed to furnish doctor certain space and to grant him sole and exclusive privilege of doing all of laboratory and pathology work in and for hospital, doctor had property right.

7. Arbitration and Award 🔑29

Disputants who had conferred upon arbitrators power to terminate contract would be deemed to have contemplated that such power would be exercised justly and with due regard for equities of situation.

8. Contracts 🔑168

Stipulations which are necessary to make contract reasonable are implied with respect to matters to which contract manifests no contrary intention.

9. Contracts 🔑154

A fair and reasonable interpretation of contractual provision, rather than one leading to harsh, unreasonable or inequitable results, is always preferred.

10. Contracts 🔑318

Of two possible constructions of contract, the one which avoids forfeiture of property rights must be made if it is at all reasonable.

11. Contracts 🔑318

"Compensation, not forfeiture," is favorite maxim of both law and equity.

12. Landlord and Tenant 🔑103(1)

Forfeiture of lease is not favored.

13. Arbitration and Award 🔑29

Where parties submitting question, as to whether doctor was entitled to specific performance of agreement, under which hospital gave him leasehold interest and exclusive right to operate pathology department, had given arbitrators power to terminate agreement, and arbitrators determined that agreement was not specifically enforceable and must be terminated notwithstanding fact that doctor had rendered substantial performance, arbitrators could properly award doctor such sum as they might conclude he was entitled to, in order to avoid forfeiture and obviate unjust enrichment of hospital.

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Chase, Rotchford, Downen & Drukker, Richard A. Perkins, Los Angeles, for appellant.

Glickfeld & Goldstein, Beverly Hills, for respondent.

FOX, Justice.

This is an appeal by North Hollywood Hospital, Inc. (hereinafter designated "the Hospital"), from a money judgment entered upon an arbitration award in favor of Dr. Reuben Straus, and from an order (1) confirming the arbitration award to Dr. Straus, and (2) denying the Hospital's motion to vacate that award.

The sole question presented is whether the arbitrators exceeded their powers in making a cash award to Dr. Straus.

The controversy between the parties derives from a written contract which they executed on March 11, 1954. Under this contract, which had a five-year term, it was agreed that the Hospital would furnish Dr. Straus with certain space, facilities, services and equipment for the conduct of a clinical pathology laboratory on its premises. In return, the Hospital was entitled to retain for itself a certain percentage of the gross monthly billings for the services performed by Dr. Straus. The amounts so received represented payment of rental by Dr. Straus to the Hospital for the space, facilities and services provided him. Paragraphs 7 and 11 of the contract indicate that Dr. Straus was to function as an independent contractor in the operation of the pathology laboratory and was to be responsible for manning it with suitable personnel and for payment of their salaries and all welfare and social security taxes. By paragraph 12, Dr. Straus was given "the sole and exclusive right and privilege during the term of this agreement to do all laboratory and pathology work in and for said hospital." Paragraph 21 provided for arbitration of disputes and culminated in the following language: "Arbitrators to have right to terminate contract."

About a year and a half after the execution of the above agreement, differences between the parties became sufficiently acute for invocation of the arbitration provision. In October, 1955, they entered into an agreement for submission to arbitration pursuant to which three arbitrators were selected. The submission agreement provided in essence that the matters to be arbitrated were: (1) whether Dr. Straus had conformed to the contract; (2) whether Dr. Straus had abandoned the contract; (3) whether the Hospital is relieved of any responsibility to Dr. Straus "under the terms of said agreement for his failure to carry out the terms thereof"; (4) "A consideration of each and every breach of the aforesaid written contract on the part of the hospital. The relief sought by Dr. Straus under this issue is that the hospital be directed and compelled to specifically perform this contract; that Dr. Straus be awarded such damages conpensatory and punitive, to which he may be entitled by law; and that Dr. Straus be awarded such other and further relief to which he may be entitled by law * * *." (5) An accounting of money due Dr. Straus to determine whether the Hospital paid him the correct amounts due him in accordance with the contract.

Pursuant to the submission agreement, hearings were conducted by the three arbitrators at which both parties were represented by counsel and evidence was taken. Thereafter, the arbitrators made an award which, so far as here germane, provided: "1. That the contract between Dr. Straus and the [Hospital] be terminated effective October 1, 1955; 2. That Dr. Straus be awarded the sum of $7,814.20 as compensation; * * *."

Dr. Straus petitioned the superior court for confirmation of the award of the arbitrators and entry of judgment in conformity therewith. The Hospital petitioned for the denial of the Straus petition and for an order vacating said award. As has been indicated, the appeal is from the judgment and orders entered in favor of Dr. Straus.

In its brief on appeal, the Hospital asserts it has no quarrel with that portion of the award which purports to terminate the contract between the parties. It concedes further that paragraph 4 of the submission agreement "would permit a cash award under certain circumstances." It argues, however, that inasmuch as the arbitrators found that the Hospital did not wrongfully breach the contract, a monetary award was not justified and in making such award the arbitrators exceeded their powers.[1]

The infirmity of the Hospital's argument stems from its narrow interpretation of the submission agreement, its overemphasis on certain of the findings favorable to itself and its failure to appreciate fundamental principles governing arbitration awards.

[1–4] An arbitration proceeding is grounded in the mutual assent of the disputants to the resolution of their controversy by such tribunal, and the arbitrators derive their powers from the submission agreement. Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 260 P.2d 156. "Every reasonable intendment will be indulged to give effect to arbitration proceedings." Sampson Motors, Inc. v. Roland, 121 Cal.App.2d 491, 494, 263 P.2d 445, 447; Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 451, 207 P.2d 647. The merits of the controversy between the parties are not subject to judicial review. Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 232–233, 174 P.2d 441. Submission agreements are to be construed like other contracts so as to give effect to the intention of the parties, the presumption being that all matters in dispute were intended to be decided. Dugan v. Phillips, 77 Cal.App. 268, 278, 246 P. 566; Popcorn Equipment Co. v. Page, supra.

[5, 6] The basic contract having provided that the arbitrators should have the power to terminate the agreement, that provision was automatically imported into the submission agreement, along with such questions as whether Dr. Straus might compel specific performance or recover compensatory damages to which he might be entitled at law. The arbitrators found that Dr. Straus had substantially conformed with his contract with the Hospital. That contract was a property right, for it was not only the demise of a leasehold, Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 638, 96 P.2d 122, but also granted Dr. Straus the sole and exclusive privilege of doing all laboratory and pathology work in and for the Hospital for the term of the agreement, which still had over three years to run before the expiration date. Inasmuch as the contract involved personal services and continuous acts by both sides, the arbitrators determined, despite the fact that Dr. Straus had rendered substantial performance, that

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[1] The award reads in part: "We, the undersigned arbitrators * * * having duly heard the proofs and allegations of the Parties find:

"1. That in certain respects Dr. Straus has substantially conformed with his written contract with the North Hollywood Hospital, Inc.; that in certain other respects there has not been complete conformance.

"2. That Dr. Straus did not abandon his contract with the North Hollywood Hospital, Inc.,

"3. That the North Hollywood Hospital, Inc., has substantially complied in certain respects with the written contract, and in certain other respects there has not been complete conformance; that the North Hollywood Hospital, Inc., is relieved of all responsibility to Dr. Straus under the terms of the contract, except as more specifically set out in the Award below.

"4. That the North Hollywood Hospital, Inc., is not compelled to specifically perform under the terms of its contract with Dr. Straus; that the said Hospital shall pay compensation to Dr. Straus as set forth in the Award below. * * *

"5. That Dr. Straus is not entitled to accounting of moneys under the contract after October 1, 1955; that prior to October 1, 1955, Dr. Straus received an accounting of moneys under the contract as provided therein.

"6. * * * that under the contract executed between the Parties hereto, the Parties have given to the Arbitrators, specifically, in the event of difference or dispute of any nature whatsoever, the right to terminate the contract.

"We, the Arbitrators, therefore, make the following Award:

"1. That the contract between Dr. Straus and the North Hollywood Hospital, Inc., be terminated effective October 1, 1955;

"2. That Dr. Straus be awarded the sum of $7,814.20 as compensation; * * *."

the agreement was not specifically enforceable under the circumstances. Presumably because of the nature of the strife and dissension between the parties, which would make a harmonious continuation of the agreement unlikely, the arbitrators elected to terminate the contract and to compensate Dr. Straus for loss of his contractual rights and the leasehold which was thereby surrendered to the Hospital.

[7–10] Contrary to the Hospital's assertion, such an award was within the scope of the submission agreement and is agreeable with prevailing principles of law. The parties having conferred upon the arbitrators the power to terminate the contract, it may reasonably be supposed the parties contemplated that such power would be exercised justly and with due regard for the equities of the situation. Stipulations which are necessary to make a contract reasonable are implied in respect to matters as to which the contract manifests no contrary intention. Brandenstein v. Jackling, 99 Cal.App. 438, 445, 278 P. 880. A fair and reasonable interpretation of a contractual provision, rather than one leading to harsh, unreasonable or inequitable results, is always preferred. Disney v. Disney, 121 Cal.App.2d 602, 615, 263 P.2d 865; Bergin v. Van der Steen, 107 Cal.App.2d 8, 14, 236 P.2d 613. Of two possible constructions of a contract, the one which avoids forfeiture of property rights must be made if it is at all reasonable. Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692; Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 374, 108 P.2d 960.

[11–13] As indicated, Dr. Straus had substantially performed under his contract, which gave him a leasehold interest and the exclusive right to operate a pathology department. In support of the arbitration award, it may be inferred that Dr. Straus had devoted time and effort to develop this branch of the hospital service, and that his exclusive right to conduct this operation was a valuable one. Clearly, the effect of the termination of the agreement was to cancel such right and to annul the leasehold. The termination also effected a reversion of the leasehold and the exclusive privilege of operating the pathology laboratory to the Hospital, though there was no serious default on the part of Dr. Straus. To have worked such a result without just compensation to Dr. Straus would have been to sanction a forfeiture, as well as to suffer the Hospital to be unjustly enriched at his expense. These are consequences which the law seeks assiduously to prevent. It is hornbook law that compensation and not forfeiture is a favorite maxim of both law and equity. A forfeiture of a lease is not favored. Flagg v. Andrew Williams Stores, Inc., 127 Cal.App.2d 165, 176, 273 P.2d 294; DeLong v. Black's Package Co., 86 Cal.App. 80, 83, 260 P. 392. Under the circumstances, the arbitrators could reasonably conclude also that to permit the Hospital to reacquire the premises and appropriate the benefit of Dr. Straus' labor in development of the pathology laboratory as well as his exclusive privilege to operate it would constitute unjust enrichment. See Randol v. Scott, 110 Cal. 590, 597, 42 P. 976; Manning v. Franklin, 81 Cal. 205, 208, 22 P. 550. Since Dr. Straus could not have specific performance and he had asked for compensatory damages, the arbitrators could properly award him, upon termination of the contract, such sum as they might conclude he was entitled to in order to avoid a forfeiture and obviate unjust enrichment of the Hospital. In so doing, they acted in harmony with well established rules of law and in conformity with a reasonable interpretation of their powers under the submission agreement.

The judgment and orders are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

149 Cal.App.2d 840

WARD CONCRETE PRODUCTS CO., a California corporation, Plaintiff and Respondent,

v.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, County of Los Angeles, and City of Inglewood, Defendants,

Los Angeles County Flood Control District, Appellant.

Civ. 22030.

District Court of Appeal, Second District, Division 2, California.

April 8, 1957.

Rehearing Denied May 2, 1957.

Hearing Denied June 4, 1957.

Landowner's action against flood control district for damages to land caused by overflow of water from storm drain. The Superior Court of Los Angeles County, William P. Haughton, J., entered judgment for landowner and district appealed. The District Court of Appeal, Fox, J., held that installation of grate in storm drain that resulted in blockage of waters by accumulated debris and caused waters to overflow, constituted a taking of land for a public use.

Affirmed.

1. Eminent Domain ⚷300

In landowner's action against flood control district for damages caused by overflow of surface water, evidence sustained finding that acts of district in installing a grating at an inlet to storm drain causing inlet to become clogged with debris which blocked natural passage of waters which then overflowed onto owner's land, constituted a taking or damaging of private property for public use of which just compensation was compelled under Constitution. West's Ann.Const. art. 1, § 14.

2. Eminent Domain ⚷2(1)

The taking or damaging of private property for maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of improvement as a whole, constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation. West's Ann. Const. art. 1, § 14.

3. Levees and Flood Control ⚷36

In action by landowner against flood control district for injuries to land caused by overflow of surface waters, evidence sustained finding that but for installation of grating in storm drain that interfered with and diverted natural flow of water so that it was discharged over land, resultant damage would not have occurred. West's Ann. Const. art. 1, § 14.

4. Constitutional Law ⚷81

In absence of any compelling emergency or pressure of public necessity, courts will be slow to invoke doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance.

5. Levees and Flood Control ⚷36

Where flood control district installed in storm drain a grating which caused accumulation of debris and resulting blockage of water and overflowing of such water onto private land, district could not escape liability on theory that in installation of grating it was exercising a police power since grating would prevent persons trapped in flood waters from being swept into drains, especially where evidence showed that grating's primary purpose was to serve as a trash rack to collect debris. West's Ann.Const. art. 1, § 14.

6. Levees and Flood Control ⚷36

In property owner's action against flood control district for injury to property caused by overflow of surface waters resulting when grating installed in storm drain accumulated debris and caused overflow of waters, whether damages suffered by property owner exceeded necessities of case presented a question of fact for determination by the court. West's Ann. Const. art. 1, § 14.

7. Levees and Flood Control ⚷36

In property owner's action against flood control district for damages to property caused by overflow of surface waters, evidence sustained finding that entire damages to land caused by flood waters was due to installation of grate by district. West's Ann.Const. art. 1, § 14.

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Harold W. Kennedy, County Counsel and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for appellant.

Pat A. McCormick, Benjamin S. Parks and Floyd H. Norris, Los Angeles, for respondent.

FOX, Justice.

This is an appeal from a judgment awarding damages against defendant Los Angeles County Flood Control District,[1] for injury to plaintiff's property caused by the overflow of surface waters.

Plaintiff is the lessee of improved real property on which it operates a plant for the manufacture of concrete building blocks. The finished blocks were stacked or stored on the premises. On the northern side of plaintiff's property, a street called Hyde Park Boulevard runs in an east-west direction, and then changes its course to proceed in a north-south direction along the western perimeter of plaintiff's premises. Adjacent to the south side of plaintiff's property and sloping in a generally western direction is a watercourse known as Centinela Creek, which, apart from occasional drainage of wastewaters from nearby streets, is normally dry, except during storm periods. In 1949 and in 1952, plaintiff's property was inundated during the rainy season by waters overflowing the banks of Centinela Creek. Plaintiff reported these incidents to the authorities of the city of Inglewood.

In 1952, the electorate authorized a bond issue to finance the construction of a storm drain for the purpose of controlling the flood waters of Centinela Creek. Defendant brought a condemnation proceeding for the acquisition of rights of way for the proposed drain. In the course of this action, defendant acquired a flood control easement across the land occupied by plaintiff, pursuant to a judgment by stipulation of plaintiff and its lessor. No compensation other than the construction of the storm drain was provided for in the stipulated judgment.

The Centinela storm drain was designated as Project 273 and was constructed by defendant Los Angeles County Flood Control District late in 1953 on an alignment approximately following the natural channel of Centinela Creek. The portion of the drain bordering plaintiff's property consisted of a box-type concrete enclosure whose internal dimensions were a width of 12 feet and a height of six feet six inches. Its designed capacity was 1,230 cubic feet per second. The horizontal top of the drain, which ran parallel to the ground, was several feet above the level of plaintiff's property.

As a part of the overall drainage program, defendant contemplated the construction of a storm drain to be known as the Hyde Park Drain (Project 271), which was scheduled to commence eight months after completion of the Centinela Creek Storm Drain (Project 273). In order to provide a future connection between the Centinela Creek and Hyde Park storm drains, defendant constructed a junction structure or chamber some 500 feet to the east of plaintiff's property. The junction structure was of a box-type design with a rounded open end, facing to the north and having a diameter of 78 inches. It was erected at a point where the Centinela Creek storm drain intersected and faced an open ditch. This ditch, commonly known as the Hyde Park Drain, was north of the open end or inlet to the junction structure and in the past had carried the storm waters from the Hyde Park watershed into Centinela Creek.

In the middle of September, 1953, Mr. Pebbles, a representative of the city of Inglewood, communicated with H. E. Hedger, defendant's Chief Engineer, about his concern that the junction chamber "will clog with trash this winter." According to defendant's memorandum of the conversation, Hedger "[r]eminded him we were building 273 as designed by and for the City of Inglewood, but nevertheless agreed to have a check made to see if a temporary trash rack should be installed." On November 25, 1953, a metal grill, somewhat resembling the bars of a prison cell, was installed over the opening to the junction structure. The grating consisted of a series of vertical one-inch iron pipes spaced about 7 inches apart and held together by three horizontal bars. The grate, apparently a temporary expedient, was fastened over the 78-inch opening with iron bolts. Neither Project 273 nor Project 271 included any grate over the opening in the original construction plans. Its installation was authorized by the defendant, presumably at the request of the city of Inglewood, for the purpose of blocking the entrance of large pieces of debris carried by floodwaters, and apparently also in furtherance of a general policy to safeguard against persons being swept into the drain.

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[1] Plaintiff's action against two other defendants, the County of Los Angeles and the city of Inglewood, was dismissed.

In January, 1954, Inglewood was subjected to a rainstorm of moderate intensity. The waters flowing into the Hyde Park drainage area were filled with debris, some of which was pinned against the grating and blocked the entrance of the waters. As a result, the waters overflowed the banks of the ditch, and as they flowed westward along the north side of the Centinela Creek drain, they traversed plaintiff's property and caused minor damage. Plaintiff wrote defendant a letter of complaint and asked that remedial action be taken. Defendant also received other complaints. A crew was dispatched after the storm and the accumulated debris blocking the entrance was cleaned out. Mr. Dusenka, defendant's construction superintendent, admitted that the grating presented a hazard to the free flow of water into the drain.

On February 13, 1954, a heavy storm broke over Inglewood, sending large amounts of water into the Centinela and Hyde Park drainage areas. Defendant assigned a group of men to the junction structure to remove debris as it accumulated against the face of the grating. In the early stages, this crew managed to cope successfully with the job of keeping the grate clear. However, before noon, there occurred an upsurge of debris-laden water which pressed large quantities of flotsam against the grate. The workmen were unable to handle its removal and as the debris piled up in front of the grate the passage of water was impeded. As a result, the waters poured over the top of the junction structure and over the banks of the ditch, flooding plaintiff's land to a depth of several feet. As a result of the overflowing of the water, many thousands of concrete blocks were damaged and considerable sums were expended by plaintiff in cleaning up the premises.

Two days after plaintiff's land was flooded, defendant ordered the grating removed. Mr. Dusenka testified this was done "[t]o avoid a repetition of what happened there on the 13th." He stated it was decided in his office that "if we couldn't keep the debris off the grate * * * we thought the best thing is to take the grate off." The grating remained off for the rest of the season and was never reaffixed.

There was a conflict in testimony as to what part the existing storm drain had played in causing plaintiff's property to be flooded. Plaintiff's expert, Mr. Shields, testified that had the waters not been prevented from entering the junction structure opening by virtue of the accumulation of debris on the grating, the flooding would not have occurred. He testified that the effect of the installation of the grate was to create a "man-made dam." Defendant's witnesses testified there was twice as much water flowing in the Hyde Park ditch as could have entered the Centinela drain even if no blockage by debris had occurred. They testified that because of the quantity of water flowing, plaintiff's premises would have been inundated to almost the extent of the maximum high-water level even if no drain had been constructed.

The trial court found in favor of plaintiff and awarded judgment for the damage sustained.

Plaintiff does not suggest that liability should be fastened on defendant on account of mere negligent operations on the part of its employees. It contends, in harmony with Bauer v. County of Ventura, 45 Cal.2d 276, 286, 289 P.2d 1, that the obstruction caused by the grating was a part of the construction or maintenance plan adopted by defendant, for which liability attaches when, as a result, a taking or damaging of private property for public use occurs. Thus the gravamen of plaintiff's action, as embodied in its pleadings and propounded during the trial, is predicated on the theory of inverse condemnation, which derives from Article I, sec. 14 of the California Constitution.[2] "The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor [citations], whether the damage was intentional or the result of negligence on the part of the governmental agency [citations]." Clement v. State Reclamation Board, 35 Cal.2d 628, 641, 220 P.2d 897, 905.

It is plaintiff's position that defendant, during the construction of the storm drains, negligently installed and maintained a grating at the inlet to a storm drain, causing said inlet to become clogged with debris; that as a result of such blockages, waters which normally would flow into the inlet could not move along their natural course, accumulated in front of the grating and were diverted into an overflow over plaintiff's land; that this interference with the free flow of waters resulted in damage to plaintiff's land which otherwise would not have occurred.

[1] It is plain that the evidence adduced fully sustains plaintiff's position and that the trial court correctly based its judgment on the conclusion that the acts of the defendant constituted a taking or damaging of private property for public use for which just compensation is compelled under Article I, sec. 14, of the Constitution of the State of California. To recapitulate the essential facts, we find that at the time of the original condemnation action, the construction plans for the storm drain did not provide for a grating to be installed and the judgment in that proceeding was made with reference to the plans and specifications as then furnished by the public agency. After Project 273 was completed in accordance with the original plans, an official of the city of Inglewood discussed with defendant the problem of keeping debris out of the storm drain. Defendant's Chief Engineer stated that he would investigate the problem "to see if a temporary trash rack should be installed." Some two months later, the grating in question was erected. In January, 1954, the inadequacy of this structure to cope with the debris problem became evident during a rainstorm of only moderate intensity, when the accumulation of debris against the grating caused water to overflow plaintiff's property. Plaintiff complained to defendant of the minor damage it then sustained. Defendant took no remedial action. A month later, during a heavier rainstorm, the prior experience was duplicated, this time on a larger scale. The grating became blocked by debris, denying entrance of the water to the junction chamber inlet. As a result, the waters backed up, broke loose over the banks of the ditch and flooded plaintiff's land to a depth of several feet. Thereafter, defendant removed, and never restored, the offending barrier.

[2] With this factual context established, plaintiff's right to recovery is clearly

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[2] That section provides in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *". It will be observed the constitution applies to a damaging as well as a taking.

supported by the recent case of Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1. In that case, the action was for damages to property caused by the overflow of water from a ditch constructed by defendant county and a storm maintenance district. The damage to plaintiff's property resulted from the raising of the ditch banks, the placing of a pipe across the ditch and the collection of debris and stumps in the ditch which raised an obstruction and caused the water to back up on plaintiff's land. Previously, overflowing waters had drained downward and away from plaintiff's property. In reversing a dismissal as to the defendant county, the court expressed the controlling principle in these terms, 45 Cal.2d at page 285, 289 P.2d at page 7: "It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation." Applying this principle to the facts before it, and in determining that the damage sustained was within the purview of Article I, sec. 14 of the California Constitution, the court stated, 45 Cal.2d at page 286, 289 P.2d at page 7:

> "But the raising of a ditch bank appears on its face to be a deliberate act carrying with it the purpose of fulfilling one or another of the public objects of the project as a whole. Here the raising of the bank is not an accident or an act in itself resulting from carelessness. It is deliberate. The damage to property in this instance resulted not from immediate carelessness but from a failure to appreciate the probability that, functioning as deliberately conceived, the public improvement as altered and maintained would result in some damage to private property. * * *
>
> "The plaintiffs, as stated, also allege that the collection of debris and stumps in the ditch raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use under section 14. If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach because the means of carrying out the plan of construction and maintenance are immaterial. [Citations.] The allegations in the complaint in the present case make the plaintiffs' theory clear. They allege that the collection of debris and stumps was part of the construction and that the taking was for a public use. The presence of debris and stumps was therefore properly characterized to bring it within the scope of section 14."

[3] This analysis of compensable damage within the meaning of section 14 applies with equal validity to the case at bar. The installation of the grating was a deliberate act adopted primarily for the purpose of fulfilling the object of the project as a whole and the damage to plaintiff's property resulted from defendant's failure to appreciate the probability that, functioning as deliberately conceived, the alteration in the public improvement would result in damage to private property. As the evidence shows, the water was impounded by the debris which accumulated in front of the grating. In the words of Mr. Shields, there was thus created a "man-made dam," the grating having dammed up the inlet and impeded the flow of water, which consequently spilled over the banks of the ditch and inundated plaintiff's property. Giving full weight to the effect of plaintiff's testimony, the inference reasonably to be drawn is that but for the installation of the grating, which interfered with and diverted the natural flow of water so that it was discharged over plaintiff's land, the resultant damage would not have occurred. This evidence is sufficient to sustain the

trial court's conclusion that the installation of the grating directly caused the damage and that it was a "damaging" without compensation within the meaning of our Constitution.

[4–6] Relying on such cases as O'Hara v. Los Angeles County Flood Control Dist., 19 Cal.2d 61, 119 P.2d 23, and Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, defendant seeks to escape liability by asserting that the installation of the grate was a valid exercise of police power by a governmental agency, since the grating would prevent persons trapped in flood waters from being swept into the drains. This argument loses its force in the light of the evidence that the immediate, primary and actuating reason for the installation of the grate was to serve as a "trash rack" to collect debris, and it was its functioning in this very manner which caused the damage here complained of. Thereafter, defendant removed the grating permanently. Clearly, this suggests that it was experimenting as to the efficacy of the grating as a debris-control mechanism rather than as furthering any police power function. Furthermore, since the decisions in the cases cited, the Supreme Court has given further consideration to this latter subject matter (police power) in Bacich v. Board of Control, 23 Cal.2d 343, 351, 144 P.2d 818, and House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 391, 153 P.2d 950. Those cases indicate that, in the absence of any compelling emergency or the pressure of public necessity, the courts will be slow to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by proper construction and proper precautions in the first instance. See also Veterans' Welfare Board v. City of Oakland, 74 Cal.App.2d 818, 831, 169 P.2d 1000. As stated in the House case, supra [25 Cal.2d 384, 153 P.2d 953]: "It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the *unnecessary* damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property owner as the result of a public improvement undertaken in the exercise of the police power must have some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not *needlessly* inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage." Whether the damage suffered by plaintiff exceeded the necessities of the case as expounded in the House case was a question of fact for determination by the court. Selby v. County of Sacramento, 139 Cal.App.2d 94, 99, 294 P.2d 508. Having resolved this issue against defendant on the basis of the evidence previously alluded to, defendant may not avoid the payment of compensation under the police power.

[7] Defendant concedes that the judgment in the prior eminent domain proceeding does not bar recovery for such damage as was caused by the installation of the grating, since this was not provided for in the original plans. People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 935, 936, 268 P.2d 117. It argues, however, that its liability should have been limited to no more than the difference between the damage which occurred and that which would have occurred if the grating had not been in place. The evidence on this point was in substantial conflict. It is true that defendant produced evidence indicating that because of

the volume of water flowing, the inlet would have been inadequate to accommodate the amount of water flowing during the height of the storm and that some flooding of plaintiff's land would have occurred even without the obstruction produced by the grating. Mr. Shields, on the other hand, testified that in his opinion there would have been no inundation of plaintiff's property but for the installation of the storm drain and further testified that the installation of the grate created a "man-made dam" which caused the impounded waters to flood plaintiff's land. In the light of this testimony, we are unable to say that the determination of the court finds no adequate support in the evidence. As stated in a similar context in Clement v. State Reclamation Board, 35 Cal.2d 628, at page 641, 220 P.2d 897, at page 905 where the evidence was conflicting as to the quantity of water dumped on plaintiff's land caused by a cutting of levees: "The resolution of the conflict must be made by the trier of fact and not by this court on appeal [citations]."

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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150 Cal.App.2d 152

The PEOPLE of the State of California, acting by and through the DEPARTMENT OF PUBLIC WORKS, Plaintiff and Respondent,

v.

A. T. L. Inc., a corporation, Bayshore Investment Corporation, et al., Defendants,

Bayshore Investment Corporation, Defendant and Appellant.

Civ. 17143.

District Court of Appeal, First District, Division 2, California.

April 16, 1957.

Condemnation action. From an order of the Superior Court, County of Alameda, Chris B. Fox, J., denying a motion by a corporate defendant to set aside a judgment for plaintiff, such defendant appealed. The District Court of Appeal, Draper, J., held that trial court's order amending a recital, introductory to its fact findings, that counsel for moving defendant filed withdrawal as attorney of record, "which was allowed by the court," by striking quoted words therefrom on stated ground that leave for withdrawal of counsel was never sought, after filing of notice of appeal, was proper as correction of clerical error in preliminary recital, not in findings themselves.

Order affirmed.

1. Judgment 🔑386(3)

A motion, made by defendant over six months after judgment for plaintiff, to vacate it, cannot be deemed a motion for relief from judgment taken through defendant's mistake, inadvertence, surprise or excusable neglect, but ground for relief, if any, must be under statute authorizing court to set aside void judgment. West's Ann.Code Civ.Proc., § 473.

2. Eminent Domain 🔑258

A superior court's order, amending recital, introductory to its fact findings in condemnation action, that counsel for a corporate defendant filed withdrawal as attorney of record, "which was allowed by the court," by striking quoted words therefrom on stated ground that leave for withdrawal of counsel was never sought, after filing of notice of appeal from judgment for plaintiff, was proper as correcting clerical error in preliminary recital, not in findings themselves, in absence of showing that original recital was correct or that amendment was contrary to facts.

3. Trial 🔑400(1)

While trial judge's fact findings may not be amended to correct judicial error after judgment becomes final, mere clerical errors may be so corrected.

4. Appeal and Error 🔑440

Taking of appeal from judgment does not deprive trial court of right to correct clerical errors in its records.

M. F. Hallmark, Gilbert D. Calden, Oakland, for appellant.

Robert E. Reed, Holloway Jones, Jack M. Howard, Joseph F. DeMartini, Thomas F. Vizzard, San Francisco, for respondent.

DRAPER, Justice.

[1] Defendant Bayshore Investment Corporation appeals from order denying its motion to set aside the judgment in this condemnation action. On the second day of trial, at least one of counsel for this defendant withdrew. The trial proceeded, and the jury returned a verdict for defendant corporation in the sum of $100. Through its president, who is not an attorney, defendant filed notice of appeal. Later, present counsel were employed, dismissed the appeal, and moved to vacate the judgment. The motion was made more than six months after judgment, and thus cannot be deemed a motion for relief from a judgment taken through defendant's "mistake, inadvertence, surprise, or excusable neglect". Rather, if defendant has any ground for relief, it must be under the final paragraph of Code of Civil Procedure, § 473, which authorizes the setting aside of a void judgment. The motion to vacate was denied, and this appeal followed.

As originally filed, recitals introductory to the findings of fact stated that "counsel for defendant Bayshore Investment Corporation, a corporation, filed a withdrawal as attorney of record, which was allowed by the Court". After the notice of appeal was filed, the trial court made an order stating that leave for withdrawal of counsel was never sought, and amending the findings by striking therefrom the words "which was allowed by the Court".

Appellant contends that the order amending the recitals of the findings is beyond the power of the trial court. It then argues that the judgment was void because part of the trial was held and judgment entered after the court had allowed appellant's attorneys to withdraw. Since a corporation cannot appear *in propria persona,* the contention runs, "the corporation was not in court" after withdrawal of counsel. Appellant expressly concedes that, if the amending order is proper, "the question raised on this appeal disappears".

[2-4] We hold that the order of amendment was properly made. Admittedly, findings of fact may not be amended to correct judicial error after the judgment becomes final. However, the rule is clear that mere clerical errors may be so corrected. Williams v. Koenig, 219 Cal. 656, 28 P.2d 351; Erickson v. Stockton, etc., R. Co., 148 Cal. 206, 82 P. 961; Boylan v. Marine, 104 Cal.App.2d 321, 231 P.2d 92. The taking of an appeal does not deprive the trial court of the right to correct clerical errors in its records. Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, 252 P. 1072. Here the findings themselves were not amended in any way. The amendment dealt with a mere recital wholly preliminary to statement of the findings proper. There is no attempt to enlarge or add. The record contains nothing by way of minute order, transcript excerpt, or otherwise to show that the original recital was correct or that the amendment is contrary to the facts.

By appellant's own concession, its motion to vacate must therefore be deemed properly denied by the trial court. Thus, it is unnecessary to pass upon the merits of appellant's somewhat ingenious contention that a trial court, by permitting withdrawal of counsel for a corporate defendant. loses jurisdiction of such party.

Order affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

149 Cal.App.2d 857

In the Matter of the ESTATE of Olive A. LOUNSBERRY, a/k/a Olive Alvina Lounsberry, Deceased.

William HINDIN, Contestant and Appellant,

v.

Frederick W. LOUNSBERRY, Respondent.

Civ. 8956.

District Court of Appeal, Third District, California.

April 8, 1957.

Rehearing Denied April 30, 1957.

Hearing Denied June 7, 1957.

Proceeding in the matter of the estate of deceased. From an order of the Superior Court, Glenn County, Arthur Coats, J., admitting to probate, a will of the testatrix, the contestant appeals. The District Court of Appeal, Van Dyke, P. J., held that a judgment in an action by the contestant as special administrator of the deceased's estate to set aside a deed and power of attorney was not res judicata on issue of the alleged fraud, and that the evidence of the alleged fraud was insufficient for the jury.

Order affirmed.

1. Wills 🔑326, 384

In a proceeding to probate a will where jury found that testatrix was of sound mind and not acting under undue influence, trial court's order granting a nonsuit on the ground of fraud, and certain rulings in rejection of evidence was incorrect procedurally, but was immaterial where scope of review was the same as if a verdict had been directed on that issue.

2. Appeal and Error 🔑927(3)

In determining the validity of nonsuit, the evidence must be viewed in the light most favorable to the party against whom a nonsuit was directed.

3. Judgment 🔑560

Only such issues become res judicata as are properly adjudicated in a judgment.

4. Judgment 🔑23

"Findings" while they may constitute a decision of the court and amount to rendition of a judgment, are not the judgment itself, and amount to nothing more than an order for judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Findings".

5. Judgment 🔑743(1)

In suit to contest will making testatrix' divorced husband sole beneficiary, judgment in a prior action by which contestant as special administrator of the testatrix' estate sought to have a deed to the respondent set aside, based on alleged false representations with respect to execution of power of attorney was not res judicata so as to become an estoppel in the will contest.

6. Judgment 🔑728

In suit to contest will making testatrix' divorced husband sole beneficiary, judgment in suit by contestant as special administrator of testatrix' estate decreeing cancellation of a deed conveying realty to husband was not res judicata in the will contest with respect to fraud where findings concerning fraud were wholly unnecessary to the decision of the court.

7. Wills 🔑322

In proceeding to contest will of testatrix leaving her property to former divorced husband, refusing to admit interlocutory decree granting the divorce on alleged ground that the divorce was trumped up by a lawyer and that neither the respondent nor the testatrix fought for the divorce was not error, where counsel stipulated that the divorce action was very acrimonious.

8. Wills 🔑324(3)

In suit to contest will of testatrix leaving her property to divorced husband, evidence of alleged fraud of the husband because of breach of his promise that if testatrix would leave all her property to him, he would send his present wife to France and care for the decedent for the rest of her life was insufficient for the jury.

Laughlin & McKalson, Francis R. Crable, Chico, for appellant.

Husted, Pinney & Smith, San Francisco, and Donald V. Smith, Red Bluff, for respondent.

VAN DYKE, Presiding Justice.

[1,2] This is an appeal from an order admitting to probate a formal will which a jury found the seventy-four year old testatrix executed when she was of sound mind and not acting under the undue influence of respondent. Appellant does not attack the sufficiency of the evidence to support the jury's findings, but assigns as error the trial court's order granting a nonsuit on the ground of fraud, and certain rulings in the rejection of evidence. Procedurally, the granting of the nonsuit was incorrect. In re Estate of Jamison, 41 Cal.2d 1, 6, 256 P.2d 984. However, the scope of review is the same as if a verdict had been directed on that issue. In determining the validity of the nonsuit, the evidence must be viewed in the light most favorable to appellant who is the contestant herein.

Appellant is not an heir of the testatrix, but he and his wife were her closest friends for nearly twenty years and were devisees under an earlier will. Respondent is the sole beneficiary under the probated will.

Appellant contends that the jury could have found from the evidence that the testatrix was induced to make the will by promises which respondent made without intent to perform. Civil Code, Sec. 1572 (4). From the evidence hereinafter set forth it could reasonably be inferred that the testatrix made the will in reliance on respondent's representations. In re Estate of Carson, 184 Cal. 437, 442–444, 194 P. 5, 17 A.L.R. 239; see also In re Estate of Newhall, 190 Cal. 709, 720–721, 214 P. 231, 28 A.L.R. 778. The question then is whether there is evidence to support the charge that the representations were false and fraudulent.

Respondent is the testatrix' former husband from whom she obtained a divorce in 1933. Respondent remarried and lived with his wife, Madeleine, until October 16, 1952, the day on which the will was executed. They owned a small home in Orland. Their only income for several years had been respondent's old age pension. The testatrix lived alone on her ranch near Orland. The respondent testified that in 1940 the testatrix told him that their divorce had been a mistake, and that if he were ever free, she would like him to come back to her. Respondent further testified that early in October of 1952 the deceased sent for him and told him that she was having trouble with appellant and was afraid of him. Respondent promised to protect her and told her that his wife was going to leave him and return to France. Respondent and the testatrix planned between themselves that if and when that happened they too would sell their properties and go to Reno, where respondent would get a divorce and remarry the testatrix.

On the morning of October 16, 1952, respondent and his wife entered into a property settlement agreement under which he agreed to pay her $2,750, and she agreed to deed him her interest in their home. In order to make the agreed payment, respondent borrowed $2,500 from a friend. The money and deed were placed in escrow. A few days later the money was released to Madeleine and she left Orland, presumably for France.

On the afternoon of October 16, 1952, the aforementioned friend drove respondent and the testatrix to Chico where she consulted Mr. Peters, an attorney at law. Respondent introduced the two and then left. Mr. Peters testified that the testatrix told him that she wished to make a will in favor of respondent and did not wish to leave any of her property to her relatives in Illinois as they were not close. She also advised him that she was having trouble with appellant, who refused to return certain papers to her, including her earlier will and an insurance policy of which he was the beneficiary. Apparently for this reason the attorney suggested she give a power of attorney to respondent.

Mr. Peters testified that there was no question in his mind as to testatrix' mental capacity and understanding. He said the will was prepared in accordance with her wishes and directions. The following day the respondent and deceased returned to Mr. Peter's office, where the deceased executed the power of attorney and the will which was witnessed by Mr. Peters and his secretary. Two days later respondent moved into the testatrix' home and the two lived there until January 27, 1953, when the deceased had a cerebral hemorrhage and was taken to the hospital where she died on February 6, 1953, after having three more cerebral hemorrhages. However, while in the hospital, on January 28th, she signed three checks. They were drawn on her joint account with respondent, to which account he had had her funds transferred. One check was to pay Mr. Mello the $2,500, which respondent owed him, one was to pay the taxes on the testatrix' ranch and the third, in the amount of $200, was for respondent's use. On the same day the deceased executed a deed to the ranch to respondent and herself as joint tenants. After her death, that deed was set aside on the grounds of undue influence and incompetency in a suit brought against respondent by appellant here, acting in the capacity of special administrator of decedent's estate. In that action and regarding the allegations of a second count charging misuse of the power of attorney, the court found: "That on or about the 15th day of October, 1952, the defendant Frederick W. Lounsberry who was then and there married to Madeleine Lounsberry, represented and promised to the decedent that he would divorce his said wife and would marry the decedent and live with and care for her for the rest of her life and would safeguard, manage and care for her property both real and personal in her interest and behalf; that at said time the said promises and representations were false in this, to wit: That said defendant had no intention to fulfill and keep the same; that the decedent relying upon said promises and representations of the said defendant made and constituted him her general attorney in fact and entrusted to him the joint managership and control of a certain bank account in the Orland Branch of the Bank of America NT&SA of which she was theretofore in sole control and which was her sole property."

We will first consider the rulings on evidence which appellant assigns as error. The trial court refused to admit in evidence the quoted findings made in the prior action. Appellant argues that the quoted findings estop respondent from denying that his promises were made without intention to perform. In order to consider this assignment of error, it is necessary to examine the pleadings, the findings and the judgment in the prior action. The complaint contained several causes of action, but we are concerned only with the first two. By the first count the plaintiff, appellant here, as special administrator of decedent's estate, sought to have a certain deed, conveying real property to Lounsberry, set aside upon grounds stated. These grounds were as follows: That on January 28, 1953, while decedent was confined in a hospital suffering from severe physical and mental illness, she executed the subject deed; that at that time and place decedent suffered hypertension, which affected her brain, was 74 years of age, weak of mind and unable, unassisted, to properly care for herself or her property; that Lounsberry knew this, and with the purpose of profiting himself thereby, persuaded her to execute the deed through which he now claimed ownership of the property. The relief sought on this first cause of action was to have the deed declared null and void, and the property restored to the estate of decedent. In the second count the pleader repeated his assertions as to the physical and mental condition of decedent, and further alleged as follows: That Lounsberry, on or about the 1st of October, 1952, knowing the mental and physical condition of decedent "falsely and fraudulently represented to the decedent that he was not married to said Madeleine Lounsberry, and that he would thereafter live with and care for decedent, and safeguard, manage and look after her property, both real and personal, in her interest and behalf; that said false and fraudulent representations were made pursuant to the said plan and intention of the said Frederick W. Lounsberry, and as part and parcel of a scheme of said defendant to acquire dominion over the decedent's mind and will, and to secure for himself her property." That pursuant to that plan, Lounsberry, on or about October 16, 1952, persuaded the decedent to appoint him as her general attorney in fact, and thereafter, acting under color of his authority and power as such attorney in fact, he appropriated to his use large sums of money belonging to decedent and kept and retained the same, refusing to pay over any part thereof to the plaintiff. The relief asked as to this count was that Lounsberry be compelled to account to the decedent's estate for all the money that had come into his hands as her attorney in fact, and when the amount was ascertained, that he be ordered to pay the same over to the plaintiff as administrator. It is to be noted that the first count places no reliance upon and contains no allegations of fraudulent representations. It is also to be noted that the allegations of fraud in the second count are wholly immaterial to the cause of action therein stated. That cause of action depends wholly upon the fraudulent use by Lounsberry of a power of attorney whereby he obtained decedent's property. It made no difference how he obtained the power of attorney. Whether he got it honestly or induced its execution fraudulently neither added to, nor detracted from, the right of the administrator to compel him to turn in to the estate any sums of decedent's obtained by him by the use of the power. The result is that the findings of fact concerning false and fraudulent representations consisting of promises made without intention of performing the same were wholly unnecessary to the decision of the court in the cause. The judgment, responsive to the first count, declared that the deed was cancelled, annulled and set aside for all purposes; it ordered and directed Lounsberry to account to the plaintiff as special administrator for the rents, issues and profits of the real property. Responsive to the second count, the judgment ordered Lounsberry to account for all money of the decedent received by him subsequent to the 16th day of October, 1952.

In Mason v. Del Valle, 213 Cal. 30, 1 P.2d 419, wherein plaintiff instituted an action to enjoin the use and maintenance of a pipeline across his property by the defendant City of Los Angeles, the defendant imposed two special defenses: (1) That a public use had intervened, and (2) That the city had acquired by prescription a right of way across plaintiff's property for the maintenance of the line. The complaint prayed only for an injunction. The answer prayed for no affirmative relief, and as the Supreme Court said, the issue of injunction was therefore the sole issue before the court. The court denied the injunction, stating in the judgment that it did so upon the ground that the benefit to the plaintiff of the injunction prayed for would be much less than the detriment to the defendant which would follow its issuance. The judgment continued, however, to decree that the denial of the injunction was without prejudice to the maintenance by plaintiff of an action for damages, if any, occasioned by the trespass of the city through the maintenance and use of the pipeline across plaintiff's property. The city appealed from all of the judgment, except the part denying the injunction, and urged that the provisions of the judgment having reference to the maintenance by plaintiff of an action for damages, coupled with certain findings of fact and conclusions of law, would amount to an adjudication against the city upon the issues it had tendered concerning prescription. Discounting the possibility that such result could arise from the record, the Supreme Court said:

> [3] "* * * The judgment is the only real conclusion of law, and dis-

places all former statements in the findings on the subject. * * *

"Even if it be conceded that the judgment might have been broader under the findings of fact, it does not follow that such issues as were not determined by the judgment have become res adjudicata because of the language of the findings. The safe rule seems to be that only such issues have become res adjudicata as were properly adjudicated in the judgment. * * * [T]he judgment does not purport to settle any issue save alone the issue of injunction based upon the ground of the intervention of a public use."

In Hamilton v. Hamilton, 109 Cal.App.2d 145, 240 P.2d 14, 16, the wife had filed a suit for divorce during the existence of which the parties had become reconciled, and she dismissed the action. Shortly thereafter, the husband sued the wife for divorce, and she cross-complained. The court found that by an agreement in writing during the pendency of the first action the parties had settled their respective rights to community property, and that a promissory note executed to the wife by the husband during negotiations for property settlement during the first suit had not been paid. Notwithstanding this finding and other findings on property issues, the interlocutory decree thereafter entered made no mention of the property settlement agreement or of any of the findings with respect thereto and provided only that the wife was entitled to a divorce. Thereafter, the wife sued upon the promissory note and after an adverse judgment contended on appeal that the findings of fact and conclusions of law in the second divorce proceeding constituted the decision of the court and therefore the matters found therein were res judicata in the third action on the note. In its opinion the court cited 1 Freeman on Judgments, Fifth Edition, page 6, section 3, wherein the text writer states:

[4] "'There is a distinction between the findings and conclusions of the court and its judgment. While they may constitute its decision and amount to the rendition of a judgment they are not the judgment itself. They amount to nothing more than an order for judgment, which must, of course, be distinguished from the judgment.'"

Said the court further:

"It necessarily follows that since the trial court in the second divorce case did not carry the findings and conclusions into the interlocutory judgment that judgment was not res judicata on the question of the note."

We quote the following from 2 Freeman on Judgments, Fifth Edition, section 692:

"It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must be taken as conclusively settled * * *

"While the effect of the judgment as an estoppel is limited to matters involved in the litigation, it is equally conclusive whether the point decided was of itself the ultimate vital point or only incidental, if its determination was necessary to the judgment * * A judgment is a conclusive adjudication of every matter both of law and fact the determination of which is essential to support it."

We take the following from Section 693

"Matters which follow by necessary and inevitable inference from an adjudication because the judgment could not have been rendered without determining them are as effectually concluded thereby as those specifically and in terms adjudicated."

[5, 6] Applying the foregoing rules to the instant case, it is seen that the judgment upon the second cause of action following the findings concerning the false representations made with respect to the execution of the power of attorney depended not at all upon such findings. Consequently, it was not adjudicated so as to become an estoppel in a collateral action that Lounsberry made promises to decedent without intent to perform them. The trial court was correct in excluding the offered evidence. For the reasons given that part of the judgment which decreed cancellation of the deed of January 28, 1953, likewise offered in evidence, raised no estoppel so far as the issues in the present action were concerned.

[7] Appellant maintains that the trial court erred in refusing to admit into evidence the interlocutory decree which granted the testatrix a divorce from the respondent. He contends that the decree would have rebutted respondent's testimony that the divorce was "trumped up" by a "shyster lawyer" and that neither he nor the testatrix "fought the divorce". The findings and interlocutory decree in the divorce action would have had no such probative value. Moreover, counsel stipulated that the divorce action was very "acrimonious". There was no error in refusing to admit into evidence the findings and decree in the divorce action.

[8] We now turn to appellant's main contention, which is that, without regard to the evidence refused by the court, there was sufficient evidence in the record to justify submitting to the jury the issue of whether or not the will of decedent had been procured by fraud. Upon this subject the contestant's pleading, after alleging the weakened physical and mental condition of decedent, pleaded that Lounsberry, prior to October 16, 1952, had represented and promised decedent that, if she would leave all her property to him by a will and would constitute him her attorney in fact under a general power of attorney, he would put away his wife with whom he was then living and send her to France, live with and care for decedent for the rest of her life, handle and manage her property in her interest and behalf and protect her from certain individuals who had threatened to harm her and take her property from her; that these representations and promises were false and known by Lounsberry to be false when made; that he had no intention of sending away his wife or caring for decedent for any period longer than that necessary to secure full control of her property; that no person was threatening to harm or molest her in any way or deprive her of any property; and that the representations and promises were made with the sole object and aim of fraudulently procuring the execution of decedent's will in Lounsberry's favor and securing control of her property during her lifetime; that in reliance upon said promises and representations decedent executed the will and delivered to Lounsberry her general power of attorney, which power he thereafter exercised to his advantage and her loss; that except for the said promises and representations decedent would not have executed the will. There was no direct evidence that anything said to decedent by Lounsberry was said in the way of a bargain being made. But there was proof of the following statements and promises made to decedent by him; That he and his wife Madeleine were separating, dividing their property, and that she intended to go to France, from which country she came to America; that decedent and Lounsberry, after he and Madeleine had separated and adjusted their affairs and Madeleine had gone, would mutually dispose of their properties; that they would then go to Reno, where he would establish a residence and obtain a divorce from Madeleine; that he would then remarry the testatrix. The element of fraud alleged, however, and which was lacking in proof was that when he made these statements and promises, he did not intend to carry them out. Of this there was, as

might have been expected, no direct testimony. The proof was that he and Madeleine did separate, and that Madeleine departed from the area where they had lived. Whether she went to France or not was not shown. There was proof also that immediately thereafter Lounsberry and decedent both listed their several properties for sale with the several brokers, and that no sale was forthcoming prior to the time that decedent became ill and was hospitalized, where in a short time she died. No inference, therefore, that Lounsberry failed to carry out any promise made in the way of going to Reno and divorcing Madeleine and marrying decedent can be inferred from the record, for decedent and Lounsberry were engaged in carrying out the promised plan when it was interrupted and further performance was made impossible by decedent's illness and sudden demise. Lounsberry could have transferred to decedent an interest in his home in Orland. He did not. But nothing can be made of this in view of the fact that, so far as the record shows, the two were engaged in selling their properties and converting them into money. Any division promised or planned would naturally await the sale and take effect as to the money derived, so no breach of that promise could be inferred. No breach of any promise from which there might have been inferred an intent not to keep the promise when made having been shown and there being nothing else, we conclude that from the whole record there was no evidence of fraud, and that the court did not err in granting a nonsuit on that issue, save in the way of procedure as hereinbefore discussed.

Appellant makes certain contentions that the trial court erred in the giving and refusing of instructions. We have examined these matters and find no merit in them. We think it unnecessary to discuss them in detail.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

Elizabeth GILLESPIE, Plaintiff and Respondent,
v.
Mary B. RAWLINGS, Defendant and Appellant. *
Civ. 21887.

District Court of Appeal, Second District, Division 1, California.

April 8, 1957.

Rehearing Denied April 23, 1957.

Hearing Granted June 4, 1957.

Action by automobile guest against motorist for injuries sustained in head-on collision which occurred in lane of oncoming automobile when motorist turned out to pass another automobile. From adverse judgment of the Superior Court, Los Angeles County, Jesse J. Frampton, J., the motorist appealed. The District Court of Appeal, Fourt, J., held that the evidence was insufficient to establish that the motorist was guilty of wilful misconduct which was the proximate cause of the accident.

Judgment reversed.

1. Appeal and Error ⚷1027

If verdict in plaintiff's favor is general in form and there is one count of complaint which is supported by evidence and is free from error, such verdict will be upheld on appeal.

2. Automobiles ⚷181(2)

Whether person riding with another is passenger or guest depends upon whether rider confers benefit on driver for ride.

3. Appeal and Error ⚷989
Automobiles ⚷245(24)

Whether rider in automobile has conferred benefit on driver for ride or whether ride was merely of social nature is question for trier of fact to determine and once trier of fact has determined fact of benefit, province of reviewing court is simply to examine record to determine whether factual finding is substantially supported.

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* Opinion vacated 317 P.2d 601.

4. Appeal and Error ⚷930(1), 989

On appeal from judgment in favor of plaintiff, all conflicts must be resolved in favor of plaintiff and all legitimate and reasonable inferences indulged in to uphold verdict if possible, and power of reviewing court is limited to determination as to whether there is any substantial evidence, contradicted or uncontradicted which will support conclusion reached by jury.

5. Automobiles ⚷244(20)

In personal injury action against motorist for injuries sustained in head-on collision by rider, who worked as receptionist for motorist, who was taking Sunday drive to look at some lots and who had asked rider to accompany her, evidence was insufficient to sustain finding that rider's presence in automobile conferred upon driver a special tangible benefit which was motivating influence for furnishing ride and which would constitute compensation so as to make rider a passenger rather than a guest.

6. Automobiles ⚷244(20, 36)

In action by automobile guest against driver for injuries sustained in head-on collision, which occurred in left lane of traffic as motorist was turning out to pass preceding automobile on straight stretch of road in open country, evidence was insufficient to sustain finding that motorist was guilty of wilful misconduct which was proximate cause of accident.

◆

Parker, Stanbury, Reese & McGee, Los Angeles, for appellant.

Wayne Veatch, Henry R. Thomas, Los Angeles, Albert L. Garvey, Huntington Park, and Henry F. Walker, Los Angeles, for respondent.

FOURT, Justice.

From a judgment in favor of plaintiff in an action for damages for personal injuries sustained in an automobile accident, defendant has appealed.

Plaintiff alleges in the first cause of action of her complaint that she was a passenger for consideration and that defendant was negligent in the operation of the automobile; in the second cause of action plaintiff alleges that she was a guest and that defendant was guilty of wilful misconduct.

At the conclusion of the trial, defendant moved for a directed verdict upon the grounds that there was insufficient evidence as a matter of law to establish that plaintiff was a passenger for compensation or to prove wilful misconduct. The motion was denied. Following a verdict in favor of plaintiff, defendant filed a notice of motion for judgment notwithstanding the verdict and a motion for new trial, in the alternative. The motion for judgment notwithstanding the verdict was made upon the same grounds as was the prior motion for a directed verdict, and insufficiency of the evidence was specified as one of the grounds for the motion for new trial. Both of said motions were denied.

The only questions for determination are:

(1) Was the evidence insufficient as a matter of law to prove that the plaintiff was a passenger for compensation in the defendant's automobile?

(2) Was the evidence insufficient as a matter of law to prove that the defendant was guilty of wilful misconduct which was the proximate cause of the accident?

[1] The jury having returned a general verdict against defendant, unless both of the foregoing questions can be answered in the affirmative, the judgment must be sustained since it is the rule that if a verdict in plaintiff's favor is general in form and there is one count of the complaint which is supported by the evidence and is free from error, such verdict will be upheld. Leoni v. Delany, 83 Cal.App.2d 303, 309, 188 P.2d 765, 189 P.2d 517; Wells v. Brown, 97 Cal.App.2d 361, 365, 217 P.2d 995; Moss v. Coca Cola Bottling Co., 103 Cal.App.2d 380, 384, 229 P.2d 802.

[2, 3] As stated in Follansbee v. Benzenberg, 122 Cal.App.2d 466, at page 471, 265 P.2d 183, at page 186, 42 A.L.R.2d 832, "Whether a person riding with another was a passenger or a guest is to be determined on the basis of the answer to the factual

question: Did the rider confer a benefit on the driver for the ride? Malloy v. Fong, 37 Cal.2d 356, 376–378, 232 P.2d 241. It is for the trier of fact to determine whether the rider conferred a benefit or whether the ride was merely of a social nature. Darling v. Dreamland B. & U. Co., 44 Cal.App.2d 253, 257, 112 P.2d 338; Sullivan v. Richardson, 119 Cal.App. 367, 371, 6 P.2d 567; Gosselin v. Hawkins, 95 Cal.App.2d 857, 861, 214 P.2d 110. Once the trier of fact has determined the fact of benefit, the province of the reviewing court is simply to examine the record to determine whether this factual finding is substantially supported."

[4] In reviewing the evidence it is also the rule, as stated in Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184, that "all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citing cases.]"

The following facts are undisputed: The accident occurred on a Sunday, near noon, on U. S. Highway No. 6, near Ward Road in Los Angeles County. The weather was clear and sunny. Highway No. 6 goes from Los Angeles through Palmdale and Lancaster to Mojave and beyond. Defendant, accompanied by her husband and plaintiff, was driving in a northerly direction on the highway toward Palmdale on a straight stretch of road in the open country, about ten miles toward Los Angeles from Palmdale. Ahead of the car driven by defendant, going in the same direction and in the same lane of travel, was a car driven by Jean Novobilsky. As the two cars were approaching Ward Road, which leads into the highway from the northeast and ends there, defendant's automobile collided almost head on with a southbound automobile driven by Jean B. Brundage. The paved main portion of the highway at this point was 20 feet wide, divided by a broken white line down the center and with asphalt and dirt shoulders on each side. When the cars collided, the Brundage automobile was wholly within the southbound lane and defendant's automobile was partly in that lane, the point of impact being approximately four and a half feet over into the southbound lane. The accident caused serious injuries to plaintiff and defendant, and fatal injuries to defendant's husband.

Plaintiff and defendant were members of the same church and were active in church affairs. Defendant was a real estate broker. Plaintiff was a widow and owned a small home, which she was considering trading for income property. She first met defendant when another member of the church recommended her and defendant showed plaintiff some income property. Several months later defendant suggested that plaintiff go to work for her in her real estate office. At the time of the accident, plaintiff had been working for defendant in the office about four months at a salary of $30 a week for a five day week. Plaintiff did not have a real estate license and before going to work for defendant she had no experience in the real estate business. Defendant's husband had a real estate brokers license but he was very seldom in the office. Defendant ran the office and gave plaintiff instructions as to what to do.

With respect to her duties generally in the office, plaintiff testified as follows: "I was to answer the telephone, and if there were no sales people in the office and some one inquired about property I was to find out what kind of property they wanted, and if I could, where they wanted it, and get their names, and get their telephone number, and have one of the sales people call them when they came back into the office. And then, twice a week we received listings from the multiple board that all the realtors belonged to, and have property and their description, and their price, and everything. And it was my work to go through these listings and to make tickets for books for the sales people, and then, any property that had been sold, or any property that had been canceled, or if there were changes made on the listings for, maybe less money down, more money down, larger amount for the property, or lesser amount, or bonds added, any sort of change that was made, I was to go through the tickets that I had made for the sales people and put all this information on there for them. And then, these papers that we received were kept on file in the office so that they could be referred to at any time, and it was my job to keep those papers up so that if someone came in for a piece of property and the salesman wanted to take the file and find out they all went by number, and if they wanted to find out exactly the state of the property at that moment they would know it, because that was important to keep it up.

"Then, anyone who came in the office, sales people were not always in the office, I was there alone many of the times, to try to get as much information as I could from them in regard to the type of property they wanted, and where they wanted it, and what price they expected to pay, and whatever information I could get for the sales people, and their telephone number and their name, and promised to have somebody call them. Anyone that called in on the telephone, and when there wasn't anybody there, I did the same thing for them. And taking care of the ads in the paper, keeping them in a book, and as they were canceled to take them out of the book, and keeping a record of telephone calls that we had on each ad that was in the paper each day, and just general office work that came up to do.

* * * * * *

"I couldn't quote prices, she told me, and I couldn't quote down payments. I couldn't quote monthly payments. I could quote if we had two bedroom houses in Hermosa, or if we had three bedroom houses in Manhattan, or if we had property for sale in Redondo. It was my job to find out what size house people wanted, how many bedrooms they wanted, and about what they wanted to pay, and the location that they wanted. But I couldn't go into any details or discussions about prices or sizes or things like that, descriptions, so to speak, of the legal description of the property, because I didn't have the license to do that."

Plaintiff further testified that although she couldn't quote prices, and couldn't sell, defendant "wanted me to learn all I could about the office so that when people came into the office I could have intelligent conversation with them regarding properties."

From the listing blanks which were filled out by a realtor from information obtained from a customer, plaintiff could give certain information regarding the properties. As to that information, plaintiff's testimony was as follows:

> "Q. Yes. You could answer whether the place was furnished or not? A. That is right.
>
> "Q. The number of bedrooms? A. That is right.
>
> "Q. Baths? A. Yes.
>
> "Q. Whether it had showers? A. Yes.
>
> "Q. Extra lavatory? A. Yes.
>
> "Q. Sleeping porch, den, library, breakfast room, living room, dining room, kitchen, garage, heat whether it had gas or what kind of heat refrigeration and sprinkler system? A. Yes.
>
> "Q. And the only other questions you could answer would be the size of the lot, and the age of the property? A. Yes.
>
> "Q. And you got all that information off cards that had been prepared by a realtor? A. This is right."

Plaintiff did not own a car. Defendant's husband had on many occasions brought plaintiff back and forth from her home to the office; defendant did so occasionally.

Ordinarily, plaintiff worked Monday through Friday of each week and did not work on Saturday or Sunday. On two occasions while she was employed by defendant she was asked by defendant to do something on her day off. One Saturday evening at defendant's request she attended a half hour advertisement program on television put on by real estate brokers; after the program at defendant's request she answered one of the three telephones for a time. Afterwards, plaintiff, defendant and her husband went to dinner together and defendant or her husband paid for the dinner. On the other occasion, after the Sunday morning church service, defendant asked plaintiff to go to the office with her so that she could straighten out the matter of her withholding tax. The office was always open on Sunday and while plaintiff was there the telephone rang several times and she answered it. Some people came in to see an apartment that was listed for rental and defendant gave plaintiff the key and asked her to show them the apartment, which she did. Plaintiff went home about four o'clock. On neither of these occasions did plaintiff receive any pay for her work and she did not expect any.

On two other occasions plaintiff and defendant were together on week-day evenings. On one occasion defendant was going to a church lecture and asked plaintiff if she would like to go; they went to the lecture in defendant's car. The other instance was the night before the accident when plaintiff, defendant, defendant's husband and Mr. and Mrs. Miller, who were business associates of defendant, went to an adult education high school play together. Afterwards they all had dinner together.

With respect to the purpose of the trip on which the accident happened and the circumstances that led to plaintiff's presence in the automobile, the evidence is as follows:

Defendant testified that for a number of years she and her husband had owned some lots in the desert near Miracle city; they liked to go once in a while to see the lots and see what was going on in the community; they enjoyed getting away from the general run and routine of business; they had not had a Sunday trip for over a year because she had been teaching Sunday School; when she and her husband decided to take the trip, she told plaintiff they were going and would like to have her go; it was a pleasure trip; she knew a Dr. Lindsey, who owned some property in the Palmdale area; he had discussed his property generally with her and asked her if she would also look at his property when she went to look at her lots; it was her intention to do so as the property was along the route they would take.

Plaintiff testified that there had been considerable talk in the office about real estate activity in Palmdale; the week before the accident a friend of hers who worked at Northrup brought her a newspaper from Northrup which had information about Palmdale and a map of the area; she took the paper to the office and everyone read it and studied it; Dr. Lindsey came in the office and was talking about his property; he marked the approximate location of his property on the map and asked defendant if she would look at it when she went to look at her lots. Regarding her conversation with defendant about going on the trip, plaintiff's testimony is as follows: "Mrs. Rawlings talked about going to see their lots, and about going to Palmdale to see the real estate activity, and to find out what she could about it, because she could have contacted her realtor and sold the property there through them if somebody came into the office for that * * *. And she said, well I wouldn't know—this was at the last moment when she decided to go, and she said, 'We are going up there, and I want you to go with us.'" In response to a question as to whether she had been told she was to come along for the purpose of performing some duty on or in connection with the trip, plaintiff stated: "No, but the thing is, we went to see the real estate activity in the Palmdale area and that was when—what we talked about going for, and to see the Rawling's lots."

Plaintiff also testified that she did not regard defendant as a close personal friend; that she considered her an acquaintance.

Plaintiff asserts that the evidence, and the inferences which the jury could draw therefrom, clearly establishes that the relationship between plaintiff and defendant was that of employer-employee; that defendant was not plaintiff's personal or social friend; that the trip on which the accident occurred was a business trip; that plaintiff went on the trip because she was directed to do so by her employer and she could not well refuse and retain her employment; that she was, therefore, in the automobile because of the employee relationship; that defendant had in mind anticipated profit which she might derive from dealings with the Lindsey Palmdale acres, and that plaintiff's work as a receptionist and her discussions with customers of property and activities she had seen all would be facilitated by her seeing the Palmdale properties and activities. Such evidence, plaintiff maintains, is sufficient to support an implied finding by the jury that defendant would derive a benefit by having plaintiff accompany her on the trip and that therefore plaintiff was a passenger and not a guest.

The rule is stated in Martinez v. Southern Pacific Co., 45 Cal.2d 244, at pages 250–251, 288 P.2d 868, at page 871, as follows:

[5] "In considering whether or not a benefit constitutes compensation within the meaning of the statute, Veh.Code, § 403, certain general rules have been applied. Where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, compensation may be said to have been given, with the result that the rider is a passenger and the driver is liable for ordinary negligence. Thompson v. Lacey, supra, 42 Cal.2d 443, 447, 267 P.2d 1; Whitmore v. French, supra, 37 Cal.2d 744, 746, 235 P.2d 3. But the benefit to the driver must be something more than simply the pleasure of the rider's company, Whitechat v. Guyette, 19 Cal.2d 428, 433, 122 P.2d 47; and the mere extension of customary courtesies of the road, such as sharing travel expenses, does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities or reciprocal hospitality. McCann v. Hoffman, 9 Cal.2d 279, 286, 70 P.2d 909; Kroiss v. Butler, 129 Cal.App.2d 550, 555, 277 P.2d 873. On the other hand, the benefit need not be money or its equivalent. Malloy v. Fong, 37 Cal.2d 356, 377, 232 P.2d 241; Kruzie v. Sanders, 23 Cal.2d 237, 241, 143 P.2d 704; Brandis v. Goldanski, 117 Cal.App.2d 42, 45, 255 P.2d 36. However, where the inference of a tangible benefit amounting to a motivating influence rests wholly upon conjecture, it is not sufficient. Lyon v. City of Long Beach, 92 Cal.App.2d 472, 478, 207 P.2d 73. But an anticipated or prospective profit is a benefit and may be as effectual as an immediate or direct compensation. Follansbee v. Benzenberg, supra, 122 Cal.App.2d 466, 471, 265 P.2d 183, 42 A.L.R.2d 832. Where the trip is primarily for a business purpose rather than a social purpose, it is sufficient to show that the driver was to derive a substantial benefit from the transportation, Kruzie v. Sanders, supra, 23 Cal.2d 237, 242, 143 P.2d 704; and such substantial benefit may be found if the transportation was for the mutual economic benefit of all concerned. Thompson v. Lacey, supra, 42 Cal.2d 443, 447, 267 P.2d 1."

Applying the foregoing rules to the evidence in the instant case, we are of the opinion that there is not sufficient evidence to sustain a finding that plaintiff was a passenger rather than guest. It may be conceded, as contended by respondent, that there is evidence that the relationship between plaintiff and defendant was that of employer-employee and that plaintiff accompanied defendant on the trip to see the real estate activity around Palmdale because defendant had said to her, "We are going up there and I want you to go with us." However, the evidence also discloses that the nature of plaintiff's employment was that of receptionist and clerk. She had no real estate license. She could not sell property or price it, nor could she describe it except as to certain limited matters which she read from a listing card prepared by a realtor. She was not asked to perform any duties on the trip. There is no evidence from which it may reasonably be inferred that plaintiff's presence in the automobile conferred upon defendant a special tangible benefit which was a motivating influence for furnishing the ride and which would constitute compensation; nor may it reasonably be inferred from the evidence that it was a business trip for the mutual benefit of plaintiff and defendant and that there was a direct benefit, in the nature of an anticipated and prospective profit, to both parties.

[6] With respect to the accident itself, only two witnesses testified as to how it occurred, the defendant and John Novobilsky. The driver of the automobile that collided with defendant's car, Jean B. Brundage, and his wife, were both injured in the accident and had no recollection of seeing any vehicle before the accident happened, or any of the facts concerning it. The last time Mr. Brundage remembered anything before the accident his speed was around 50 miles an hour. Plaintiff was asleep in the front seat of defendant's car at the time of the accident and knew nothing about how it occurred.

Defendant testified that she did not recall how fast she was driving; that there was a car in front of her which slowed up very quickly; that she slammed on her brakes, her car swayed and nearly went over and then she was faced with another car. That was all she could recall.

John Novobilsky, the driver of the automobile ahead of defendant's car, denied that he stopped or decreased the speed of his car before the accident. He testified on direct examination that he was travelling at a speed of 50 to 55 miles an hour. He first noticed defendant's Mercury when he looked in the rear view mirror and saw it behind him at a distance of between 150 and 200 feet. The next time he looked the Mercury was "starting to turn out to the left, crossing over as though it intended to pass." At that time he was about 150 feet ahead of defendant's car, which seemed to be gaining. He did not see the oncoming car, but caught a glimpse of something as it went by his left window. He did not see the impact. On cross-examination, Mr. Novobilsky testified as follows:

> "Q. Now, the first time you saw the car, I believe you told us it was around 150 to 200 feet back?
>
> "A. That is correct.
>
> "Q. When you say it began to veer over it was only about 50 feet closer to you than it had been the first time you saw it?
>
> "A. I'm not positive. The distance I would say approximately. I can't judge it driving so good.
>
> "Q. And at the time that the crash occurred your estimate as to the distance that the crash occurred behind you is, of course, just a very rough approximation, is it not?
>
> "A. Yes, it is.
>
> "Q. By the way, you've given us your speed as 50 to 55 miles an hour. Is that just an estimate, or did you happen to notice your speedometer?
>
> "A. Well, I glance at my speedometer occasionally.
>
> "Q. And you had glanced at it as you were driving along there?
>
> "A. I glance at it no matter where I go. When I'm riding along a main road I always keep my speed down to where it belongs.
>
> "Q. Did you glance at it after you had seen the Mercury in your rear view mirror?
>
> "A. I don't recall.
>
> "Q. You are unable to give any estimate as to the speed of the Mercury car, isn't that right?
>
> "A. Definitely not."

The highway patrol officer who appeared at the scene of the accident testified he found no skid marks attributable to defendant's Mercury.

Plaintiff maintains that the evidence supports a reasonable inference that defendant was going at an excessive rate of speed; that she drove over onto the left half of the highway in the face of oncoming traffic which could be clearly seen by one looking ahead, without necessity or emergency compelling her; that she failed to apply her brakes or take appropriate action to avoid the collision, knowing that serious injury to her guest was probable as well as possible. Plaintiff further asserts that "in the language of the cases," defendant "flirted with danger" and "without necessity or emergency compelling her, took a chance" and she was, therefore, guilty of wilful misconduct.

Defendant contends that plaintiff has failed to prove facts from which the required state of mind can reasonably be inferred so as to constitute wilful misconduct—that is, the intentional wrongdoing with knowledge that serious injury will be a probable consequence, or a wanton and reckless disregard of the possible results.

In Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102 at page 115, 251 P.2d 955, at page 961, the Supreme Court stated:

"Whether in any given case serious and wilful misconduct is shown, inherently presents questions of both fact and law. Insofar as the issues may relate to the credibility of witnesses, the persuasiveness or weight of the evidence and the resolving of conflicting inferences, the questions are of fact. But as to what minimum factual elements must be proven in order to constitute serious and wilful misconduct, and the sufficiency of the evidence to that end, the questions are of law."

And 40 Cal.2d at page 117, 251 P.2d at page 962:

"And as appears from Porter v. Hofman (1938), 12 Cal.2d 445, 447–448, 85 P.2d 447 (a case involving the term 'wilful misconduct' as used in the so-called guest statute, Veh.Code, § 403), and cases there cited, this court has approved the following definitions: 'Wilful misconduct * * * necessarily involves deliberate, intentional, *or wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom.*'

"'Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences.'

"'"Wilful misconduct" means something different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, wilful misconduct. It amounts only to simple negligence. To constitute "wilful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. * * *' Substantially the same principles are stated in Helme v. Great Western Milling Co. (1919), 43 Cal.App. 416, 421, 185 P. 510; In James I. Barnes etc. Co. v. Industrial Acc. Comm. (1944), 65 Cal.App.2d 249, 254, 150 P.2d 527; In Parsons v. Fuller (1937), 8 Cal.2d 463, 468, 66 P.2d 430; and in Cope v. Davison (1947), 30 Cal.2d 193, 198, 180 P.2d 873, 171 A.L.R. 667 * * *.

"In Meek v. Fowler (1935), 3 Cal.2d 420, 425–426, 45 P.2d 194 (a case also involving the so-called guest statute, and quoting in part from Howard v. Howard (1933), 132 Cal.App. 124, 128, 22 P.2d 279 [guest statute]; see also Weber v. Pinyan (1937), 9 Cal.2d 226, 230-235, 70 P.2d 183, 112 A.L.R. 407 [guest statute]), the pertinent principles are discussed as follows: 'While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears * * * in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence and that this misconduct must be wilful. While the word "wilful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.

" 'Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of wilful misconduct. As has been repeatedly declared, " 'wilful misconduct' means something more than negligence—more, even, than gross negligence." [Citations.]' " (See also, Emery v. Emery, 45 Cal.2d 421, 426–427, 289 P.2d 218.

Applying the foregoing principles to the facts in the present case, we are of the opinion that a finding that defendant was guilty of wilful misconduct cannot be sustained. There is no evidence from which it can be inferred that prior to the accident defendant was driving in a reckless or wanton manner, or that in veering into the left hand lane there was a conscious reckless disregard of the safety of the guest in her car, or that there was any express or implied knowledge on her part that serious injury was the probable result of her conduct.

The judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

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150 Cal.App.2d 137

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph William VERODI, Defendant and Appellant.

Cr. 5772.

District Court of Appeal, Second District, Division 1, California.

April 15, 1957.

Defendant was convicted of first degree murder. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment of conviction and thereafter, in trial by court without jury and on plea of not guilty by reason of insanity, found defendant to be sane and denied defendant's motion for new trial, and defendant appealed from the judgment of conviction. The District Court of Appeal, Fourt, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law 🔑778(2)

In murder prosecution, evidence warranted giving of instruction that, if defendant acted as if he were conscious, law would presume that he was conscious but that such presumption could be overcome by contrary evidence, and that, if defendant committed an act which, if he were conscious, would have constituted crime charged or element thereof, and if jury were not convinced beyond reasonable doubt that he was then conscious, jury should find that he was unconscious.

2. Homicide 🔑269

In murder prosecution, questions whether defendant was perfectly conscious of his acts at all times, whether he had mental capacity to plan and scheme the crime with which he was charged, and whether he had the required specific intent to do what he did were for jury.

3. Witnesses 🔑254

In murder prosecution, district attorney's referring witness' attention to memorandum, previously prepared by witness, for purpose of refreshing witness' recollection and correcting a perfectly obvious omission was proper, even though witness had stated, prior to the seeing the memorandum, that he had testified to everything which had been said and that he did not need the memorandum to refresh his recollection. West's Ann.Code Civ.Proc., § 2047.

4. Homicide ⚷22(1)

Murder, which is wilful, deliberate, and premeditated is murder in the first degree. West's Ann.Pen.Code, §§ 187, 189.

5. Homicide ⚷253(1)

Evidence sustained a conviction for first degree murder. West's Ann.Pen.Code, §§ 187, 189.

Eugene V. McPherson and Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information filed March 9, 1956, in the county of Los Angeles, it was charged that the defendant did on or about February 4, 1956, murder Marie Yvonne Verodi. The defendant pleaded not guilty and not guilty by reason of insanity. A trial by a jury was had on the not guilty plea which resulted in the defendant being found guilty of murder in the first degree, with a recommendation that the punishment therefor be life imprisonment. Thereafter, there was a trial by the court without a jury on the not guilty by reason of insanity plea and the court found the defendant to be sane. A motion for a new trial was made and denied and the defendant was sentenced to the state prison for life. This appeal is from the judgment of conviction.

The facts are substantially as follows: The defendant had been married to Carmen Verodi for about ten years before the episode in question, and as the issue of the marriage, Marie Yvonne Verodi was born about nine years ago. The marriage had many unpleasantries and shortly before the Christmas season in 1955, the defendant told his wife that he could not go on living the way they were. He threatened to take the life of the daughter and to commit suicide; that he was not going to leave the daughter for the mother. On other occasions he made similar threats. On Christmas Day, in 1955, when the defendant was apparently drunk, he attempted to kill himself by using a pistol but Mrs. Verodi took the gun away from him. The incident was reported to the officers at the police department, but an officer thought it better to let him "sleep it off". On that date Mrs. Verodi left the defendant and with her daughter, Marie Yvonne, lived at 817 East Central Street in San Gabriel. The defendant resided with Mr. and Mrs. Elmo Powers at 811 South Bronson Avenue in Los Angeles. A few days later the defendant came to the house where Mrs. Verodi was staying and told the sister of Mrs. Verodi that if Mrs. Verodi "didn't come home and bring the gun with her he would make our home look like a roman candle". The wife stated that the defendant had never threatened her personally.

On February 1, 1956, between 1:00 and 2:00 o'clock p. m., the defendant went to the Pachmayr Gun Works, 1220 South Grand Street, Los Angeles, where he purchased a Smith and Wesson Chief Special .38 caliber revolver, paying therefor the sum of $61.39. He was told that he would have to wait a certain time and would have to secure what amounts to a police release before he could pick up the gun. The defendant came back to the gun store on Friday, the third day of February, 1956, with the proper documents from the police department and picked up the gun. The defendant told the clerk who sold him the gun that he wanted it to "shoot sharks off his fishing boat". The clerk stated that the defendant did not appear to him to be under the influence of liquor on February 1st, and that he appeared perfectly sober. The clerk who delivered the gun to the defendant along late in the afternoon on the day of the shooting observed the defendant at that time and stated that the defendant did not appear to be under the influence of intoxicating liquor.

The defendant called Mrs. Verodi during the day of February 3, 1956, and stated to her that he wanted to see the daughter because he was ill and was going to the hospital. Sometime shortly after 7:00 o'clock p. m. on February 3, 1956, the defendant did go to the house where his wife and daughter were living, ostensibly for the purpose of a visit. The daughter admitted the defendant into the house. Mrs. Verodi, who was in the kitchen washing dishes at the time, heard the defendant say to the daughter, "Put the latch on the door, baby." The latch was put on the door and the defendant called to Mrs. Verodi and asked her to come into the living room. He was told by Mrs. Verodi that she would be there in a minute as she was fixing some soup for the daughter, and the defendant called again and told her to come to the living room. Mrs. Verodi went into the living room and saw the defendant sitting on the right side of the divan. Mrs. Verodi inquired of the defendant if he was going to the hospital and the defendant answered that it was none of her business. The wife then asked him if he was ill, and she was told by him that it was none of her business. The wife put several other questions and to each the reply was, "It is none of your business" or "You will find out." Mrs. Verodi stated that the defendant "looked very sick", and she "knew something was wrong, and we just weren't getting anywhere talking." The wife became frightened and wanted to open the door, and seeing that the latch was on or that the "door was bolted down", she picked up the cat and opened the latch, put the cat out, closed the door, but left the latch off. The defendant insisted that the latch be put back on. Mrs. Verodi explained to the defendant that there was no reason to put the latch on, whereupon the defendant said "Baby, put the latch on the door", and Mrs. Verodi said, "Yvonne, you just leave it off; there is no reason for it to be on." The defendant then directed Mrs. Verodi to put the latch on, and she refused, and thereupon he stated that he would if she did not. Mrs. Verodi had wanted the daughter to go to the kitchen to eat her soup and the defendant would not let her and asked the daughter to bring it into the living room. The daughter was eating from the coffee table and when the defendant started toward the door, apparently to fix the latch, the daughter jumped up and ran toward the kitchen. The defendant followed her and Mrs. Verodi started toward them, saying, "Joe, don't scare the baby." The defendant then grabbed the daughter around the shoulder, as they were in the kitchen doorway, pulled the gun from his right hand coat pocket and held it against the daughter and shot her in the chest. Mrs. Verodi grabbed the hand of the defendant that held the gun and at about the same time the daughter fell to the floor. The mother called to the daughter and told her to run next door, but there was no response from the daughter. Mr. and Mrs. Verodi struggled while she was attempting to get the gun away from him. He was trying to point the gun at himself and she was trying to point it toward the ceiling. While they were so struggling, and he was attempting to put the latch on the door, Mrs. Verodi got the gun from him and he thereupon tried to get it back. She ran through the hallway, a bedroom, and out of a window to the house next door, where her parents and brother-in-law and sister lived. The brother-in-law, Harley Potts, took the gun from Mrs. Verodi and told her to stay in the house of the parents. Potts then returned to the house of Mrs. Verodi where the defendant was. When Potts entered the house he saw the defendant standing in the front room close by the front door and his eyes had a "glassy look". Potts went to the child and observed where the bullet had entered her chest. The defendant then came toward Potts, who told him to sit down on the couch, at which time the defendant said, "Shoot me"—"Shoot me, I want you to shoot me, Harley." The speech and manner of speech of the defendant were very plain. The father of Mrs. Verodi came into the house and Potts told him to call an ambulance and the police. Potts did not remember noticing alcohol on the breath of the defendant, but he did notice that the speech of the defendant was not at all thick. During the period of time just related the daughter regained consciousness and said, "Daddy, Daddy, why did you shoot me?" and the defendant made no response thereto.

The daughter died the next day, Saturday, February 4, 1956, at a hospital. An autopsy was performed by two doctors and the cause of death was ascribed "to gunshot wound of chest and abdomen, with massive hemorrhage."

Lt. Lloyd of the San Gabriel Police Department arrived at Mrs. Verodi's home at about 7:35 o'clock p. m., February 3, 1956, with officer Rucker. Lloyd saw the body of Marie Yvonne lying face down, with a large amount of blood under her. Lloyd heard the defendant say to Potts, "I shot the baby, but it is all your fault." The officers took the defendant to the police station and Rucker took him into the officers' room. The defendant asked for and received a cigarette, and also asked the officer to get him some cigarettes, which was done from a vending machine. The defendant also got a drink of water at this time. During the booking procedure the following conversation took place between Rucker and the defendant, as related by Rucker:

> "A. I asked Mr. Verodi why he shot his wife. He said, 'I didn't shoot my wife.' I says, 'Who did you shoot?' He says, 'I shot the baby.'
>
> "I says, 'Who is the baby?' He says, 'That is my daughter.'
>
> "I says, 'How old is she?'
>
> "And he says, 'Nine years old.'
>
> "I says, 'Why did you do that?'
>
> "'Well,' he says, 'I wanted to shoot her and shoot myself, but they wouldn't let me.'
>
> * * *
>
> "Q. (By Mr. Smith, Deputy District Attorney) You asked Mr. Verodi why he wanted to shoot the baby?
>
> "A. Yes. I asked Mr. Verodi why he shot the baby. He said, 'I did this so it would impress itself upon my wife's mind, so that she could carry this to her grave.'
>
> * * *
>
> "Q. By Mr. Smith: Was there anything said after that statement that he wanted his wife to carry the memory to her grave?
>
> "A. I said, 'Was your wife with you at the time of the shooting?' And he replied, 'Yes.' And I asked him where she was, and he said, 'Standing beside me.'"

Rucker also stated that the defendant had said that his wife "took the gun away from him after he had shot the baby".

The defendant was then taken to Lt. Nelson's office for questioning, during which time Rucker was present. Nelson testified that in his opinion the defendant was not under the influence of intoxicating liquor, nor under the influence of any drugs. The gun was shown to the defendant and he was asked if that was the gun he had purchased, and he stated, "It looks like the gun." Nelson also testified as follows:

> "I asked him if he had had the gun in his pocket when he went in the house that night, and he said he had. I asked him if it was loaded and he stated yes, it was fully loaded. I asked him why he had taken the gun to the house and he said he had wanted to shoot his baby and kill himself but things had not worked out that way. I asked him if he wouldn't tell me what he meant by 'things hadn't worked out.' He stated his wife had taken the gun from him. I asked him if he had loaded —I asked him where he had loaded the gun. To the best of his knowledge he stated that 'I was at Crawford Market on Valley Boulevard.' I questioned him concerning the particular place, why that particular place, and he stated he had become hungry and had stopped and purchased a barbecued chicken at that location, and while he was in the parking lot, he had loaded the gun.

"I questioned him further regarding where the baby was when the baby was shot. He stated the baby was in the doorway between the kitchen and the dining room. I asked him if he had had hold of the baby. He said yes. I asked him where he had hold of or grabbed the baby. He stated he was not sure but he had used his left hand. I asked him, after the actual shooting and his story of his wife taking his gun from him, if he had attempted to leave the premises at all. He stated no, he had not, that he had remained there on the premises. I asked him concerning any drinking that he had done that day and he said he had consumed some liquor. I asked him in what amount and he was unable to tell me. He stated, 'I do not know,' or 'I don't recall.'

> "I had several other questions concerning his occupation, concerning some of his family life, and any other questions that I asked him concerning the actual shooting. His reply was, 'For God's sake don't ask me that,' or 'don't ask me any more.' One of those answers, I'm not certain which.
>
> "Q. (By Mr. Smith) Did you ask him whereabouts he shot the baby?
>
> "A. Yes. I asked him where he had recalled shooting the baby in relation to the physical body, and he placed his hand on his chest in this manner, and he said, 'I think it was somewhere near the heart.'
>
> "Q. Did he tell you where he bought the gun?
>
> "A. Yes, he said he had purchased it at Pachmyr's in Los Angeles, and that he had purchased it two or three days before, but because of the laws it was necessary for him to wait until that day, which he indicated as Friday the 3rd, before the gun was picked up."

Officer Ruiz found a spent bullet "in the service porch against the west wall". Laboratory tests indicated that it had been fired from the defendant's gun. A chemist compared fibers from Marie Yvonne's sweater with those found on the edge of the cylinder bore of the gun and found that the fibers taken from the gun were of the same type of fibers found in the sweater.

On February 4, 1956, the district attorney caused the defendant to be examined by Dr. Marcus Crahan, the medical director of the sheriff's department, who had made a special study of psychiatry over a period of fifteen years. The doctor testified that the defendant admitted to him that a week before the killing he had bought the gun in question, and further testified:

"He stated that on the day before the recent incident he had consulted his physician, who advised that he enter a hospital for X-ray studies and most probably gall bladder surgery. He felt that he would be able to face this ordeal if he could return to his home to convalesce, and on Friday, February 3rd, after calling his wife, he went down to their home to ask if she would permit him to come home following the anticipated surgery.

"Subject admits he had been drinking whiskey and water highballs all day.

"On arrival at the house at about 7:00 p. m., the defendant cannot recall the trend of conversation other than when he said something about going to the hospital his wife jumped up and asked, 'Do you want me to drive you to the hospital; is that all you want?'

* * *

"* * * He recalls calling to the child, but does not know if she ran from the room, stating that he thinks that she was standing there crying, but believes it possible he might have grabbed her. He knows only that his wife said something, that it could have been a threat to call her father or her brother.

"* * * He knows only that he saw the child lying on the floor, that she spoke to him, saying, 'Daddy, why did you shoot me?' but is aware of no reaction to this or of an answer to the little girl. His first recollection is that of many people standing around, mostly neighbors, of his brother-in-law standing with the gun pointing at him, saying, 'Don't move or I will shoot you in the leg,' and thinks he replied to this by saying, 'Go ahead and be sure to shoot me in the heart.' He cannot recall if he threatened his wife, and hardly knows what went on.'

* * *

"* * * 'his occupational history shows a peculiar mixture of craftiness and stupidity. For many years he was in the juke box business, as promoter, collector, and operator. He was out-maneuvered on two or three occasions by his associates, then built a boat which he hoped to use in charter service but this venture proved unsuccessful * * *'"

The doctor stated that it was his opinion that the defendant was aware that he had shot his daughter the night before. At the time of the examination the defendant did not know that the child was dead and was told of the death by the doctor. The doctor also was of the belief and opinion that the killing was an act of aggression upon the part of the defendant, and that the acts of the defendant in getting the gun and going to the home of the daughter and later shooting the child were all conscious acts on his part. In answer to the question:

> "Q. By Mr. Smith: Well, assuming that Mr. Verodi now claims that he doesn't recollect the events of that evening or that day, in fact, do you have an opinion as to his mental processes, or what caused him to have a present inability to recollect, if in fact he does presently fail to recollect? A. Yes.
>
> "Q. Would you explain that, state that opinion, please? A. I believe that the instant he shot his child, the emotional shock of realization of the enormity of his act was so overwhelming that it created in him a retrograde, functional amnesia in a subconscious effort to wipe out from his memory the things that were horrible to him. And I believe that he has wiped them out from his memory. I don't believe he is falsely stating that he did not remember. I don't believe he can remember that instant.
>
> "Q. Do you have an opinion as to whether or not he was acting consciously up to and including the time that he fired the fatal shot? A. Yes, I believe he was acting consciously up to the time and including the time he fired the shot.
>
> "Q. And, in your opinion, was he or was he not suffering from any organic amnesia as he walked into the room and shot the child? A. He had no organic amnesia at any time.
>
> "Q. Assuming that same evening, February 3rd, after his arrest, he made certain statements to officers at the San Gabriel Police Department; he was asked the question: 'Why did you shoot your wife?' and he answered, 'I didn't shoot my wife; I didn't even harm her' —pardon me just a minute.
>
> "Assuming he was asked the question, why did he shoot his wife, and he said, 'I didn't shoot my wife.' He was asked the question, 'Whom did you shoot?' and he said, 'I shot the baby.' He was asked the question, 'Who is the baby?' and he said, 'That's my daughter.' And he was asked, 'How old is she?' and he replied, 'Nine years old.' He was asked, 'Why did you do that?' and he replied, 'I wanted to shoot her and shoot myself, but they wouldn't let me.'
>
> "Later on he was asked the question why he wanted to shoot the baby, or why he shot the baby, and he replied, 'I did this so it would impress itself on my wife's mind so she would carry this to her grave.'
>
> "Now, would Mr. Verodi's statements, assuming Mr. Verodi made those statements, could you state an opinion as to whether or not Mr. Verodi possessed sufficient understanding to have comprehended the significance of that confession?

"A. Yes, I believe he had sufficient comprehension of the significance of it.

"Q. Do you have an opinion as to whether or not he was conscious of what he was saying and understood the import of his words and acts, and appreciated their significance?

"A. I believe he was."

Mrs. Powers, the landlady of the defendant, testified for the defendant, and in substance stated that on the night of February 2, 1956, she saw the defendant when he came home from work about 5:45 o'clock p. m., and that at such time he was on a couch in the den in a stupor, half asleep. Further, that he had refused to eat at her house during the three weeks he was there, and that it was her opinion that he was under the influence of drugs.

Robert Craychee, a pharmacist called by the defendant, stated that on January 29, 1956, he had filled a prescription for the defendant of fifty 3-grain Tuanol pills. Tuanol is not a narcotic, but is a barbituate or a hypnotic.

Bill Kolman, a defendant's witness, said that he was with the defendant when he took delivery of the gun on February 3, 1956, and further that the defendant had told him that he had sold his boat and that he told the buyer that there was a gun aboard and when the buyer was unable to find the gun that the defendant told the buyer he would purchase one for him. The witness noticed that the defendant was different on this particular occasion, his eyes being glassy and partially closed, and it was his opinion that the defendant was under the influence of some kind of a drug or narcotic.

A Joseph Hughes testified that he had known the defendant for about eleven years and that when he saw him on February 3, 1956, between 11:00 and 12:00 o'clock a. m., the defendant appeared to be "very despondent".

The defendant testified in his own behalf and stated that he was employed as a grinder at a plant in Los Angeles, that he had no recollection of leaving his place of abode on February 3rd. He stated that he did remember going to a bar located at Main and Pico streets in Los Angeles, but that he did not recall very clearly where he went after he left that bar, except that he did remember stopping at a liquor store and buying half a pint of whiskey. It was related that he was taking the capsules he had secured from Craychee to make him sleep, and that when he did not get the result desired he would take whiskey with them. He stated that he recalled buying the gun but said that he could not remember taking delivery of it. He further testified that he remembered making a call to Father Montoya, but could not recall the time of day that such call had been made and that he had no recollection of anything which had occurred in his wife's home; that he did not remember seeing Potts; did not remember talking to the police, being booked or searched, and denied having any recollection of the statements which he had made to the police. He said that his recollection commenced with his activities on February 4, 1956.

A Dr. Arthur Chandler, who stated that he practiced psychiatry, testified on June 13, 1956, that he had first seen and examined the defendant the day before, and that in his opinion the defendant suffered amnesia for a period of three weeks following his arrest which was caused by his "psychosis and, during the period when he was taking drugs and alcohol, accentuated by those" and that relative to the time of the killing "that at that time he was in a paranoic psychosis, in which he could not formulate any intent in keeping with his conscious normal mind." The defense also called Dr. Claude Movius, a physician and surgeon engaged in general practice, who had talked with the defendant on January 30, 1956, and the doctor stated that it was his opinion that the defendant was "conscious of his acts".

Father Michael Montoya, a member of the Claretian Fathers and pastor of San Gabriel Mission, testified as a witness for the defendant that he had met Mrs. Verodi and the defendant; that the defendant had been in his rectory; that the defendant had frequently called him on the telephone and that on February 3, 1956, about 1:00 o'clock p. m., he received a telephone call from the defendant and at such time the defendant's voice sounded nervous and it became angrier and angrier, but not hysterical. Further, that the defendant did not sound like he was intoxicated, that the conversation was rational and that the defendant sounded like he was perfectly conscious of what he was saying.

The defendant now contends that the court committed error in the giving of an instruction on the subject of unconsciousness and burden of proof; that there were errors of law as to the admissibility of certain evidence and that the evidence is insufficient to support the judgment.

Among others, the following instruction was given to the jury:

"When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption, however, is disputable and may be overcome or questioned by evidence to the contrary, and, if you should find that the defendant committed an act, which, if he was conscious, would have constituted the crime charged against him or have been an element of that crime, and if you should not be convinced beyond a reasonable doubt that he then was conscious, you shall find that he then was *un*conscious."

[1,2] The defendant asserts that the instruction is error and cites as authority therefor People v. Hardy, 33 Cal.2d 52, 198 P.2d 865. The instruction which was given in this case was not the one which was given in the Hardy case. The instruction here was prepared by the authors of CALJIC after the Hardy decision, and apparently for the purposes of correcting the claimed error in the instruction set forth in the Hardy decision and the original volume of CALJIC. (See, CALJIC, Pocket Parts, 1953, p. 49, for criticism.) In the Hardy case the court held that the instruction was so worded that it required that the presumption of consciousness be overcome by a preponderance of the evidence—that the defendant then had a burden which was not his. There is no such phraseology in the given instruction in this case. We believe it was a proper instruction under the circumstances. There was certainly ample evidence in the record in this case from which the jury could conclude that the defendant was perfectly conscious of his acts at all times, that he had the mental capacity to plan and scheme the crime which he committed and that he had the required specific intent to do just what he did do.

The defendant also contends that officer Rucker was erroneously permitted to use a memorandum to refresh his recollection. The officer was on the witness stand and had testified concerning a conversation he had had with the defendant wherein the defendant had stated that he had shot his nine-year old daughter and that he wanted to shoot her and then shoot himself, but they would not let him, and that he did this to impress upon his wife, who would carry the memory to her grave. The above set forth matter is all that the officer could recall of the conversation at the time, but that his recollection would be refreshed by looking at his notes made of the conversation. Counsel for the defendant examined the officer on a voir dire examination, wherein it was developed that the witness had a conversation on February 3, 1956, with the defendant, that the witness took some notes of the talk and the next day or so dictated to a stenographer the contents of the memorandum, which had evidently been typed, and which was dated February 6, 1956, and consisted of three pages. The officer then stated that he did not think he needed the memorandum to refresh his recollection and the defendant thereupon objected to the use of it. The court then stated: "Obviously, if the officer doesn't need it to refresh his recollection, there is no need of using it. You may proceed." The following then took place:

> "Q. By Mr. Smith: What was said after Mr. Verodi said he wanted to do that to impress itself on his wife's mind so she will carry it to her grave?

"Mr. McPherson: Objected to as asked and answered. The witness said nothing was said after that time. He has already purported to give the entire conversation by question and answer.

"The Court: Let us find out if he has given the entire conversation. You may answer.

"A. I think that is all that was said at that time, your Honor.

"Mr. Smith: Then it is obvious you do need to refresh your recollection, Mr. Rucker.

"Mr. McPherson: Just a minute. I object to him taking the memorandum up and showing it to the witness, because the witness has already testified he doesn't need it. And he has already given what purports to be the entire conversation. I will object to any other questions about the use of the memorandum.

"The Court: I think the witness may be shown the memorandum if there is something that should be recalled to his memory.

"Q. By Mr. Smith: Was there anything said after that statement that he wanted his wife to carry the memory to her grave?

"A. I said, 'Was your wife with you at the time of the shooting?' And he replied, 'Yes.' And I asked him where she was, and he said, 'Standing beside me.' "

[3] Later, substantially the same course was followed and the witness referred to the memorandum to refresh his recollection as to further conversations with the defendant wherein the defendant had said that after he shot the baby his wife had taken the gun away from him. It is perfectly clear from a perusal of the record that the officer did not relate the entire conversation, prior to his seeing the memorandum, and even though the witness was of the impression that he had testified to everything which had been said, and even stated in effect that he did not need the memorandum to refresh his recollection, we are of the opinion that it was proper under the circumstances for the district attorney to refer the witness' attention to the memorandum which he, the witness, had prepared, for the limited purpose of refreshing his recollection and to correct a perfectly obvious omission. Code Civ.Proc., § 2047; People v. Gardner, 147 Cal.App.2d 530, 305 P.2d 614.

Here the witness obviously had no present recollection while on the witness stand of any conversation with the defendant, other than that which he had previously related, and was of the belief, evidently, that the memorandum would not induce a refreshing of his brain. The district attorney, apparently, had the memorandum before him while questioning the witness and could easily determine that some of the conversation had between the defendant and the witness was not being related. Surely, in the interests of truth and accuracy, it was proper for the district attorney to proceed as he did. Some persons are able, in situations involving events of importance, to have a vivid and clear recollection of what was said and done, and thereafter need no memory refresher. Sometimes, however, events involving routine investigations and so forth, fade in the recollection of a witness. It is to be noted that the district attorney did not attempt to get the memorandum before the jury or to cause the same to be introduced into evidence. It is not claimed that there was any testimony given which is not set forth in the memorandum. Counsel for the defendant took the opportunity to carefully inspect the document before the witness used the same to refresh his recollection therefrom and properly examined the witness on voir dire as to the time the document was prepared and all of the circumstances surrounding it. The defendant could have used the memorandum if he had been so minded in cross-examination to bring out any discrepancies between the writing and the testimony, if any there were. The memorandum itself was not evidence, but it only assisted the officer in giving accurate testimony. The witness evidently believed that he remembered and had related completely all of what had been said and done and apparently he was at least hesitant to admit at first that he was afflicted with that ailment which is common to all human beings, namely forgetfulness. A reference to the memorandum at once served to make him recall added facts. The Chinese had a proverb which is pertinent, "The palest ink is clearer than the best memory."

It is our opinion that the witness can refresh his memory from a memorandum such as was done in this case.

[4] The defendant also contests the sufficiency of the evidence, and particularly argues that there was no evidence of premeditation or the forming of a wilful intention to kill another person with malice aforethought. Murder is the unlawful killing of a human being with malice aforethought. Penal Code, § 187. All murder which is wilful, deliberate and premeditated is murder in the first degree. Penal Code, § 189.

[5] Here the defendant had on many occasions threatened to take the life of his daughter, and two days before the killing he bought the gun, got some ammunition someplace, stopped at a parking lot on the way to the house and loaded the gun. The defendant was obviously preparing for the killing. On the night of the murder he entered his wife's and child's home under circumstances which indicate that he had murder in his thoughts. At the house he insisted upon locking or bolting the door and his conduct demonstrated that he had something very serious on his mind. When the child started to leave the room where he was seated, he got up, grabbed the child and deliberately pulled the gun from his right-hand coat pocket, held it against the child and shot her in the chest. The conversations at the police department indicate that he knew what he was doing. In our opinion, it was a cold, calculated and deliberate murder, and under our law the defendant was indeed fortunate to get the recommendation of life imprisonment from the jury.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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149 Cal.App.2d Supp. 879

H. M. WARD, Plaintiff and Respondent,

v.

SYSTEM AUTO PARKS & GARAGES, Inc., etc., Defendant and Appellant.

C. A. 9207.

Appellate Department, Superior Court,
Los Angeles County, California.

March 28, 1957.

Rehearing Denied April 8, 1957.

Action for damages. From a judgment of the Municipal Court of Los Angeles Judicial District, R. Morgan Calbreth, J., the defendant appealed. The Appellate Department of the Superior Court, Bishop, P. J., held, inter alia, that where bailment of automobile was under written contract which contained provision limiting period for bringing an action for damages to three months, action for damages brought more than three months after accrual of damages was barred by such contract provision in view of fact that three month period was not unreasonable under circumstances.

Reversed.

Swain, J., dissented.

1. Limitation of Actions ⚷14

Contracting parties may agree upon a shorter period of limitation for bringing an action than that prescribed by statute, so long as the time allowed is reasonable.

2. Bailment ⚷28

Where bailment of automobile was under written contract which contained provision limiting period for bringing an action for damages to three months, action for damages brought more than three months after accrual of damages was barred by such contract provision in view of fact that three month period was not unreasonable under circumstances.

3. Pleading ⚷291(2)

The statute providing that matter in answer is deemed controverted is not controlling as to genuineness and due execution of a written contract alleged in full in an answer, and hence the plaintiff's failure to comply with requirements of statute by filing an affidavit denying genuineness or due execution of written contract set forth in answer is an admission thereof. West's Ann.Code Civ.Proc. §§ 448, 462.

On Petition For Rehearing

4. Bailment ⟹30

Where defendant in action for damages to bailed automobile pleaded a contract which contained a three month limitation provision, and plaintiff failed to file affidavit challenging genuineness of contract, there was no issue of fact that there was no contract. West's Ann.Code Civ. Proc. §§ 448, 462.

◆

Thomas D. Mercola, Beverly Hills, for appellant.

Virgil R. Wells, Los Angeles, for respondent.

BISHOP, Presiding Judge.

Judgment was entered for $271.16 in this action in which the plaintiff sought to recover the amount that he had expended for repairs to his automobile, necessitated by careless handling of the car during the time that it was left with the defendant. The defendant appeals, relying upon the fact that the action was brought more than three months after the damage was done, and so after it was barred by the terms of the written contract of bailment set forth in haec verba in the answer. The trial court found "that the purported 'contract' set forth in said Affirmative defense was never entered into by any of the parties herein; that plaintiff's automobile was parked and stored under an implied contract of bailment * * *." We are reversing the judgment because the trial court was not at liberty to make any such finding; that beyond dispute the bailment was under a written contract which contained the provision limiting the period for bringing an action to three months.

[1,2] We note, preliminarily, that contracting parties may agree upon a shorter period of limitation for bringing an action than that prescribed by statute, so long as the time allowed is reasonable. Tebbets v. Fidelity & Casualty Co., 1909, 155 Cal. 137, 138–139, 99 P. 501; Beeson v. Schloss, 1920, 183 Cal. 618, 622–624, 192 P. 292; Olds v. General Acc. Fire & Life Assur. Corp., 1945, 67 Cal.App.2d 812, 817, 155 P. 2d 676. Three months has been approved, see references in Beeson v. Schloss, supra, 183 Cal. 624, 192 P. 294, and we are unwilling to state that, as a matter of law, it is unreasonably short under the circumstances of this case.

In its "Second, Separate and Affirmative Defense" the defendant set forth at length that which it termed a contract in writing. These words of introduction preceded the contract: "[as alleged by the plaintiff he] brought into the premises of the defendant that certain 1954 Lincoln automobile, at which time and place Plaintiff left his said automobile with said Defendant under a contract in writing, in words and figures as follows:" In a succeeding, separate and affirmative defense the defendant alleged that if plaintiff parked his automobile with the defendant, as he claimed in his complaint, "the same was parked and stored under and by virtue of a contract, in writing, between Plaintiff and this answering Defendant, as set forth in the Second Affirmative Defense of this Answer and by this reference is incorporated herein."

The draftsmanship of the affirmative defenses from which we have just quoted might be improved upon, but no demurrer was addressed to either of them, and we are satisfied that they sufficiently state that the parties had entered into the contract that was quoted at length. The trial court so evaluated the pleadings, or it would have had no occasion to find that the contract was never entered into by any of the parties hereto.

[3] Section 448 of the Code of Civil Procedure was called to the attention of the trial court, but the provisions of section 462 to the effect that new matter in an answer is deemed controverted, were deemed con-

trolling. The latter section is not controlling as to the genuineness and due execution of a written contract alleged in full in an answer. The cases are legion which hold that plaintiff's failure to comply with the requirements of section 448, C.C.P., by filing an affidavit denying the genuineness or the due execution of a written contract, set forth in an answer, is an admission thereof. Stoneman v. Fritz, 1939, 34 Cal.App.2d 26, 28–31, 92 P.2d 1035, 1036–1037, 1038, is a good illustration of the cases applying the rule. It contains a review of many other cases, concluding its review with this statement: "This question is not now open for debate in California. This rule is that where the answer contains or has attached to it a copy of an instrument upon which a defense to the action is founded, if the affidavit required by section 448 of the Code of Civil Procedure is not filed, the genuineness and due execution, including delivery of the instrument, are admitted facts in the case. This is true under these circumstances even though neither plaintiff signed the instrument.

"As the delivery of the two deeds to defendant was admitted by the pleadings, no evidence should have been received on that question as it was not an issue in the case. Findings of fact contrary to these facts admitted in the pleadings must be disregarded. 21 Cal.Jur., sec. 106, p. 155." See also Butler v. Stratton, 1949, 95 Cal.App.2d 23, 29, 212 P.2d 43, 47–48; and Sunset Milling & Grain Co. v. Anderson, 1952, 39 Cal.2d 773, 778–779, 249 P.2d 24, 27–28.

The judgment is reversed.

Kauffman, J., concurs.

SWAIN, Judge (dissenting).

I dissent. The failure of the plaintiff to file an affidavit under C.C.P. § 448 admits only that the copy of the parking ticket alleged in the answer is a correct and genuine copy of the one issued to the plaintiff by the defendant. It does not admit its legal effect or that it is a contract. "The cases in which section 448 has been construed are numerous. The result reached may be briefly stated as follows: Where the defendant has pleaded a written instrument in defense (not by way of cross complaint), and the plaintiff has not served and filed an affidavit denying the instrument, and has offered no evidence controverting it on any ground, the instrument is to be deemed admitted, and must be taken for what it appears on its face to be. But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses, under section 462 of the Code of Civ. Proc." Moore v. Copp, 1897, 119 Cal. 429, 432, 51 P. 630, 631. The plaintiff could not truthfully have made an affidavit that this was not a copy of the parking ticket he received, but he could and did dispute defendant's interpretation of the ticket.

As to the merits, although National Automobile and Casualty Company v. System Auto Parks, Inc. (1949) our Civil Appeal 7286, is squarely in point and calls for a reversal, it should be disapproved. It involves the validity of a provision on a parking ticket limiting to six months the time within which an action for damages could be brought. This court reversed a judgment for the plaintiff. In doing so, this court held as a matter of law that the plaintiff was bound to read the printing on the parking ticket and was bound by it whether he read it or not. This is not the law. It omits any consideration of the question "Would a prudent man have read the ticket?" "An offeree is not bound by the unknown terms of a document by his acceptance of the same without objection, where the document delivered to him purports to be, and would by a reasonable man be understood to be, merely a check or voucher, and not a contract, as in the case of a baggage check or receipt, as explained in Carriers § 877, or an ordinary railroad ticket, as explained in Carriers §§ 616, 617, and other receipts or papers of a similar character." 17 C.J.S., Contracts, § 41, p. 377.

In Merrill v. Pacific Transfer Company, 1901, 131 Cal. 582, 63 P. 915, judgment for the plaintiff was reversed because the court refused to instruct the jury that if a prudent man could and would have read the limitation of liability on a baggage check, the plaintiff was bound thereby whether he read it or not.

Williston, in vol. 1 of Contracts, page 274, (1936 Rev.Ed.) states: "The sole question seems to be whether the facts present a case where the person receiving the paper should as a reasonable man understand that it contained the terms of the contract which he must read at his peril and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion."

The opinion in National Auto., etc., v. System Auto Parks, Inc., supra, our Civil A 7286, relies on U Drive & Tour v. System Auto Parks, 1937, 28 Cal.App.2d Supp. 782, 71 P.2d 354. This latter case is easily distinguishable. It deals not with a provision on a parking ticket limiting the time within which a damage action may be brought, but with a notice on the ticket that the parking lot closed at midnight. This appeared not only on the ticket but also on a sign on the parking lot. Every customer knows there is a closing time for auto parks. Furthermore, the judgment was for the defendant and was affirmed. At page 787 of 28 Cal.App.2d Supp., at page 357 of 71 P.2d, the court stated: "The trial court impliedly found that the circumstances disclosed afforded him a reasonable opportunity to read the printed matter thereon and accordingly that he became bound by it as a part of the bailment contract." To the contrary, in National Auto., etc., v. System Auto Parks, supra, the trial court impliedly found that the plaintiff did not have a reasonable opportunity to read the ticket and that a reasonable person in the same circumstances would not have read it. This court reversed that judgment without mentioning or recognizing that what a reasonable person would do in the circumstances was a question of fact. In the case at bar, the trial court made the same implied findings favorable to respondent. We should not say as a matter of law that a reasonable person who receives a parking ticket will read the printing on the back of it to learn within what time he may sue for damages. We should recognize the fact that a trier of the facts could hold that a prudent man may consider a parking ticket merely as a means of identifying his car when he claims it.

Sandler v. Commonwealth Station Co., 1940, 307 Mass. 470, at page 472, 30 N.E. 2d 389, at page 391, 131 A.L.R. 1170, at page 1174, supports this view: "It could be found to be a reasonable assumption by the plaintiff that the stub that was given him was a receipt for his automobile, or a means of identifying him when he should return to get his automobile, rather than a contract freeing an apparent bailee from all responsibility."

I would affirm the judgment.

Order Denying Rehearing.

PER CURIAM.

The petition of respondent for a rehearing after judgment of this court on appeal in the above entitled case having been filed and having been duly considered,

Said petition is hereby denied.

[4] By failing to file affidavit, there was no issue of fact (that there was no contract). Oswald v. Northrop Aircraft, Inc., 1944, 62 Cal.App.2d 824, at pages 827, 828, 145 P.2d 635.

SWAIN, Judge.

I would grant a rehearing.

48 Cal.2d 338

Hoyt REED, Plaintiff and Appellant,
v.
Carl O. NORMAN et al., Respondents.
L. A. 24415.

Supreme Court of California,
In Bank.
April 12, 1957.

Stockholder's derivative action. The Superior Court, Los Angeles County, Philbrick McCoy and Aubrey N. Irwin, JJ., entered judgment for defendants, and plaintiff appealed. Defendants moved to dismiss the appeal. The Supreme Court, Carter, J., held, inter alia, that where plaintiff's uncontradicted affidavit stated that bid of purchaser at execution sale of plaintiff's stock was for account of plaintiff, and that any right or interest in such shares sold at execution by reason of said bid was for benefit of plaintiff, and that plaintiff was beneficial owner of any such interest, plaintiff would be deemed not to have lost his title to his stock, and defendants' motion to dismiss his appeal would not be granted on any theory that such appeal was rendered moot by virtue of fact plaintiff was no longer a stockholder.

Motion to dismiss appeal denied.

Opinion, 302 P.2d 690, vacated.

1. Appeal and Error 🔑781(4)

Where plaintiff's uncontradicted affidavit stated that bid of purchaser at execution sale of plaintiff's stock was for account of plaintiff, and that any right or interest in such shares sold at execution by reason of said bid was for benefit of plaintiff, and that plaintiff was beneficial owner of any such interest, plaintiff would be deemed not to have lost his title to his stock, and defendants' motion to dismiss his appeal from a dismissal of his derivative suit against corporation and other stockholder therein would not be granted on any theory that such appeal was rendered moot by virtue of fact plaintiff was no longer a stockholder.

2. Appeal and Error 🔑801(4)

The merits of case should not be considered on motion to dismiss appeal, but should be determined on appeal itself.

3. Appeal and Error 🔑105

A finding that certain conditions required by statute for the institution or maintenance of a stockholder's derivative suit do not exist may result in a dismissal of such action, and a judgment based upon such a finding is on the merits of that phase of the case and is reviewable on appeal, the same as any other judgment of dismissal. West's Ann.Corp.Code, § 834.

4. Appeal and Error 🔑801(4)

Question of whether trial court was correct in determining by its judgment that certain conditions required by statute for institution or maintenance of stockholder's derivative suit did not exist would be determined on appeal from judgment of dismissal based in part on such determination, rather than on motion to dismiss appeal itself. West's Ann.Corp.Code, § 834.

5. Corporations 🔑630(1)

In a stockholder's derivative suit, where corporation was not attempting to exercise its rights as a corporation, but was being used as a necessary channel by a shareholder, and plaintiff stockholder was not in a position to make a return or compute payment of franchise tax because corporate books were not in his hands statute providing that a corporation may not prosecute or defend an action where it has been suspended for failure to pay franchise tax would not be permitted to stand as a shield for protecting allegedly dishonest corporate officials, and appeal in shareholder's suit would not be dismissed under such circumstances because of corporation's failure to pay such franchise tax. West's Ann.Rev. & Tax.Code, §§ 23301, 23302.

6. Corporations 🔑630(1)

Where corporation involved in shareholder's derivative suit was suspended for nonpayment of franchise taxes in 1952, and judgment dismissing suit was entered in 1956, and defendants at no time until motion to dismiss appeal from such dismissal made any claim that the action could not be maintained because of such suspension, and the records and books of the corporation had been retained by defendants, under such circumstances, even if plaintiff could not maintain the action because of the suspension, he was entitled to an opportunity of paying taxes and reinstating corporation. West's Ann.Rev. & Tax.Code, §§ 23301, 23302, 23305.

7. Appeal and Error ⚿801(3)

Where plaintiff, in shareholder's derivative suit, alleged that defendant had control of all the books and records of the corporation, and that a defendant shareholder had assumed complete control and management of the business of the corporation to the exclusion of plaintiff, proof of such allegations was a matter for the trial court and could not appropriately be considered on a motion to dismiss plaintiff's appeal from dismissal of his complaint, notwithstanding the fact that plaintiff was legal owner of a majority of the shares of the corporation.

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Hy Schwartz, Beverly Hills, for appellant.

John E. Haskins, in pro. per., and Raymond R. Roberts, Van Nuys, for respondents.

CARTER, Justice.

This litigation has been here before. It is an action commenced in 1950 by plaintiff, a stockholder in Norman Decorating Co., Inc., a corporation, against the corporation and Carl Norman, another stockholder, the main defendants, to contest the validity of an election of corporate directors including Norman, to void shares issued to Norman and obtain an accounting of corporate funds alleged to have been dissipated by Norman. Judgments against plaintiff were reversed on appeal, this court stating that the election of directors was illegal, Norman having only 150 shares of the 500 shares whose issue was authorized. The accounting by Norman for corporate assets was left for future determination. Reed v. Norman, 41 Cal.2d 17, 256 P.2d 930; Reed v. Norman, 41 Cal.2d 901, 256 P.2d 933. Since then a further determination has been made. The trial court sustained defendants' objection to the introduction of any evidence on the ground that the complaint, amended complaint and supplemental complaint failed to state a cause of action and judgment was entered that plaintiff recover nothing and defendants "be discharged." Plaintiff now appeals from that judgment. On the retrial resulting in the instant judgment, it appears, and no real dispute on the subject seems to exist, that the action is a derivative action by plaintiff, a stockholder of the corporation, Norman Decorating Company, for a wrong to the corporation, the dissipation by defendant directors and officers of the corporate assets. See Gagnon Co., Inc., v. Nevada Desert Inn, 45 Cal.2d 448, 289 P.2d 466; Sutter v. General Petroleum Corp., 28 Cal.2d 525, 170 P.2d 898, 167 A.L.R. 271; Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318. The theory of the trial court in rendering the judgment now on appeal was that the action being derivative, plaintiff was not entitled to recover because he failed to show compliance with section 834 of the Corporations Code.[1]

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[1] "(a) No action may be instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation unless both of the following conditions exist:

"(1) The plaintiff alleges in the complaint that he was a registered shareholder or the holder of voting trust certificates at the time of the transaction or any part thereof of which he complains or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of.

"(2) The plaintiff alleges in the complaint with particularity his efforts to secure from the board of directors such action as he desires and alleges further that he has either informed the corporation

Norman has moved to dismiss plaintiff's appeal on the ground that it cannot be maintained because (1) plaintiff no longer owns any stock in the corporation, (2) there is no showing of a compliance by plaintiff with section 834 of the Corporations Code, supra, and (3) on January 4, 1952, the corporation's right to engage in litigation was suspended for failure to pay the state franchise tax under section 23301 of the Revenue & Taxation Code.[2]

[1] With reference to plaintiff no longer being the owner of any stock, it is urged that he lost his stock at execution sale after the judgment from which the appeal is taken. The theory is that the question of his right to recover for the corporation is moot because by reason of his no longer holding stock he no longer has any interest in the corporation or any recovery by it. Defendant Norman in his affidavit in support of the motion to dismiss the appeal states that on April 4, 1956, plaintiff Reed's stock was sold under a writ of execution to a Marlow Baar and since then plaintiff has not been a stockholder. He attaches to his notice of motion an exhibit entitled "Certificate of Sale" by a marshal, but it states therein that all of *Norman's* stock (rather than plaintiff's) was sold to Baar. Norman has offered to have that certificate corrected. Apparently the writ was issued pending the instant appeal on that part of the judgment on appeal which awarded $3,768.10 costs against plaintiff and in favor of the corporation, Norman, and another defendant. Plaintiff in his notice of appeal filed March 13, 1956, lists the order taxing costs and denying plaintiff's motion to strike costs, but those orders do not appear in the record and plaintiff has made no request to augment the record. Plaintiff in his opposition to the motion to dismiss the appeal claims that the sale was invalid because proper notice was not given the corporation and that he has the rights of Baar, the purchaser at the execution sale. Plaintiff's uncontradicted affidavit states that the bid of Baar, the execution purchaser, was "for and on account of" plaintiff "and that any rights or any interest in said shares [sold at execution] by reason of said bid is for the benefit of" plaintiff "and that he is the beneficial owner of any such interest and rights." It is thus clear that plaintiff has not lost his title to the stock and hence the motion to dismiss is not sustainable on that ground. For that reason we need not and do not pass upon the validity of the sale or whether, if valid, it would render the appeal moot.

[2–4] As to the question of failure to comply with section 834 of the Corporations Code, supra, the case falls within the general rule that the merits of a case should not be considered on a motion to dismiss the appeal; it should be determined

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or such board of directors in writing of the ultimate facts of each cause of action against each defendant director or delivered to the corporation or such board of directors a true copy of the complaint which he proposes to file, and the reasons for his failure to obtain such action or the reasons for not making such effort.

"(b) In any such action, at any time within thirty days after service of summons upon the corporation or any defendant, the corporation or such defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. Such motion may be based upon one or more of the following grounds:

"(1) That there is no reasonable probability that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders;

"(2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.

"The court on application of the corporation or any defendant may, for good cause shown, extend such 30-day period for an additional period or periods not exceeding sixty days." Corp.Code, § 834; Hogan v. Ingold, 38 Cal.2d 802, 243 P.2d 1, 32 A.L.R.2d 834.

[2] Except for the purpose of amending articles of incorporation for a new name the "corporate powers, rights and privileges * * * shall be suspended" for failure to pay the franchise tax. Rev. & Tax.Code, § 23301.

on the appeal itself. In re Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874, and cases cited. It is true that section 834 states that no action shall be "instituted or maintained" unless certain conditions exist and the complaint must show whether or not those conditions exist. A finding that they do not may result in a dismissal of the action, and a judgment based upon such a finding is on the merits of that phase of the case and is reviewable on appeal the same as any other judgment of dismissal. The question is whether the trial court was correct in determining by its judgment that they did not exist.

[5] On the issue of suspension of the corporation for failure to pay franchise tax, it is true that under the corporation law, Rev. & Tax.Code, §§ 23301, 23302, supra, the corporation may not prosecute or defend an action, nor appeal from an adverse judgment in an action while its corporate rights are suspended for failure to pay taxes, Boyle v. Lakeview Creamery Co., 9 Cal.2d 16, 68 P.2d 968; Ocean Park Bath House & Amusement Co. v. Pacific Auto Park Co., 37 Cal.App.2d 158, 98 P.2d 1068; Baker v. Ferrel, 78 Cal.App.2d 578, 177 P.2d 973; Fidelity Metals Corp. v. Risley, 77 Cal.App.2d 377, 175 P.2d 592, and, generally, in a derivative action the wrong is "to the corporation as such and not the stockholders individually, hence a bar to an action by the corporation would be a bar to an action by the stockholders for the corporation." Gagnon Co., Inc., v. Nevada Desert Inn, supra, 45 Cal.2d 448, 453, 289 P.2d 466, 471. But here, in a stockholders' derivative action, the corporation is forced to be a party because any recovery goes through the corporate channel and thus enhances the stockholders' interest therein. The corporation is not attempting to exercise its rights as a corporation. It is being used as a necessary channel by the shareholders. The books and records of the corporation are in the hands of the mismanaging officers according to plaintiff's complaints and thus the shareholders are not in a position to make a return or compute the franchise tax. In such a case it is not equitable to permit section 23301 of the Revenue & Taxation Code to stand as a shield for protecting allegedly dishonest corporate officials. The corporation is not enjoying any of the privileges accorded to such entities; it is more analogous to the winding up of the business. In Weinert v. Kinkel, 296 N.Y. 151, 71 N.E.2d 445, 446, the stockholders' derivative action was for breach of fiduciary duty of directors to the corporation. The action was commenced after the corporation had been "dissolved for nonpayment of taxes," yet the court held the corporation was not an indispensable party, stating: "The technical argument made by appellants disregards realities and should not prevail. It has been recognized that the court may dispense with the presence of a defunct corporation in a derivative action, if the circumstances warrant such exercise of its equitable powers. Cohen v. Dana, 287 N.Y. 405, 410, 411, 40 N.E.2d 227, 230; Norman v. General American Transp. Corporation, 181 Misc. 233, 47 N.Y.S.2d 390, affirmed 267 App.Div. 758, 45 N.Y.S.2d 929; O'Brien v. O'Brien, 238 Mass. 403, 131 N.E. 177; 13 Fletcher on Corporations, § 5997. Such circumstances are here present. As observed by the learned referee, the defendant directors dominated and controlled the board; they were residents of New York; the corporation's business was done here; and, as provided by the by-laws and authorized by the certificate of incorporation, the corporate meetings were held in this State. Beyond that, the fictitious corporate person disappeared upon dissolution, and whatever assets it might have had at that time belonged thereafter, in equity at least, to the stockholders who are thus the equitable owners of this claim against defendants. Hence, as the referee remarked, 'the presence of a representative of the artificial person would add no material element to the litigation.'" See Carruthers v. Jack Waite Mining Co., 306 N.Y. 136, 116 N.E. 2d 286; 172 A.L.R. 691. Smith v. Lewis, 211 Cal. 294, 295 P. 37, states a contrary rule but there it does not appear that the records and books of the corporation were

in the hands of the defaulting corporate officers and unavailable to the shareholder.

[6] For another reason the appeal should not be dismissed on the last mentioned ground. Although the corporation was suspended for nonpayment of taxes January 4, 1952, the former appeal was decided on May 12, 1953, and the judgment herein was entered on January 24, 1956, defendants have at no time until the present motion to dismiss the appeal made any claim that the action could not proceed because of the suspension and it appears that the records and books of the corporation have been retained by defendants. It would thus seem that plaintiff, even assuming he could not maintain the action because of the suspension, should be given an opportunity of paying the taxes and reinstating the corporation.[3]

[7] Under the holding in the former decisions in this case, 41 Cal.2d 17, 256 P.2d 930; 41 Cal.2d 901; 256 P.2d 933, Norman was the legal owner of only 150 shares of the corporation here involved and Reed was the legal owner of 245 shares, 41 Cal.2d 17, 256 P.2d 930. By virtue of this situation Norman now contends that Reed could have assumed control of the corporation and has no right to bring a derivative action, see Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 119 P.2d 219, but this contention may not now be considered as it does not appear that plaintiff has assumed control of the corporation and he alleges that the defendants have control of all the books and records of the corporation. Although he may own the majority of the stock by reason of the holding above mentioned, he has alleged and maintained throughout this litigation that Norman has assumed complete control and management of the business of the corporation to the exclusion of plaintiff. That is a matter that should be addressed to the trial court; it may not appropriately be considered on a motion to dismiss the appeal.

For the foregoing reasons the motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

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48 Cal.2d 389

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Calvin TIPTON, Defendant and Appellant.

Cr. 5961.

Supreme Court of California,

In Bank.

April 19, 1957.

Rehearing Denied May 15, 1957.

Prosecution for murder. From judgment of conviction for first degree murder entered in Superior Court, Orange County, Robert Gardner, J., and from order denying motion for new trial, defendant appealed. The Supreme Court, Shenk, J., held that where defendant testified in response to interrogations by the trial judge that his statements were freely and voluntarily made, that no threats, duress or force were used, and that no offers of immunity were extended to him as an inducement in making his confessions, and defendant did not request an instruction on question as to whether the confessions were voluntary, defendant was not prejudiced by failure of trial court to submit the question of voluntary nature of confessions to jury.

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[3] "Any taxpayer which has suffered the suspension or forfeiture provided for in Section 23301 may be relieved therefrom upon making application therefore in writing to the Franchise Tax Board and upon payment of the tax and the interest and penalties for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest and penalties due under this part, and upon the issuance by the Franchise Tax Board of a certificate of revivor. Application for such certificate on behalf of any domestic bank or corporation which has suffered such suspension may be made by any stockholder or creditor or by a majority of the surviving trustees or directors thereof; application for such certificate may be made by any foreign bank or corporation which has suffered such forfeiture or by any stockholder or creditor thereof." Rev. & Tax.Code, § 23305.

Judgment and order denying new trial affirmed.

1. Homicide ⚷253(6)

Evidence of killing committed in perpetration of rape sustained conviction for first degree murder. West's Ann.Pen.Code, § 189.

2. Homicide ⚷311

Instruction, in prosecution for murder, that if jury desired death penalty for first degree murder, no reference should be made to punishment in verdict, but that punishment of life imprisonment, if that was desired, should be specifically stated in verdict was proper. West's Ann.Pen. Code, §§ 189, 190.

3. Criminal Law ⚷824(5)

In prosecution for murder where defendant testified in response to interrogations by trial judge that his confessions were freely and voluntarily made, that no threats, duress or force were used, and that no offers of immunity were extended to him as an inducement in making his confessions, and defendant did not request an instruction on question as to whether the confessions were voluntary, defendant was not prejudiced by failure of the court to submit question of voluntary nature of confessions to jury. West's Ann.Pen. Code, § 189.

4. Constitutional Law ⚷266

Where defendant, suspected of murder, went willingly with officers by prearrangement to military base where lie detector was explained to defendant who confessed after questioning and defendant was under no restraint at any time prior to confessions, and there was no showing that a warrant had not been issued prior to the questioning or that defendant was not taken within proper time before magistrate, admission of confessions voluntarily made did not deny defendant due process of law.

5. Criminal Law ⚷518(1)

A confession is not rendered inadmissible by a failure to advise a suspect of his right to remain silent, of his right to counsel and that his statements may be used against him.

6. Criminal Law ⚷519(1, 8)

A confession is not rendered inadmissible by absence of a suspect's counsel and friends, or by a delayed detention where the confession is not the product of that detention.

7. Criminal Law ⚷525

A confession is not rendered inadmissible by a low emotional and mental stability on the part of the suspect if he is nevertheless capable of understanding the meaning and effect of his confession.

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James F. Thacher, San Francisco, under appointment by Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal by the defendant John Calvin Tipton from a judgment of conviction and from an order denying his motion for a new trial. He was charged by information with the murder of Oletta Camille Johnson. The jury found him guilty of murder of the first degree and the death penalty was imposed.

There is no dispute as to the facts surrounding the commission of the crime. Prior to trial the defendant made three recorded confessions, each consistent with the others. At the trial he testified that the confessions were substantially correct. It appears from his confessions and his testimony that he resided alone in cabin No. 1 of an apartment court in Costa Mesa; that Mrs. Johnson resided across the court from him in cabin No. 11 with her soldier husband; that on March 28, 1956, the defendant had spent the day and evening drinking beer in a local tavern; that he arrived at his cabin about 11:00 p.m.; that he removed his clothing except his shorts and sat on his bed thinking about "sex"; that he had noticed Mrs. Johnson in the courtyard previously; that he obtained a large knife from his kitchen and concealing it in his shorts, crossed the courtyard to Mrs. Johnson's cabin and knocked on the door; that it was his intention to obtain sexual satisfaction by force if necessary; that when Mrs. Johnson opened the door he pushed his way inside the apartment; that she ordered him to go away and when he refused she became frightened and ran into the bedroom; that he followed her in, threw her on the bed, placed a pillow over her face and stabbed her in the chest with the kitchen knife; that she thereupon ceased to struggle; that he cut and tore her pajamas from her body and then committed thereon an act of sexual intercourse.

Mrs. Johnson's corpse was discovered by her husband shortly after midnight when he returned from guard duty at a nearby military base. Her death was due to perforations of the heart and lung, and occurred within a few minutes after she was stabbed.

At the trial the defendant was represented by the public defender. He pleaded not guilty and not guilty by reason of insanity. After the jury returned its verdict of guilty as charged the defendant waived a trial by jury on the plea of insanity. Expert witnesses for both the prosecution and the defense testified that the defendant was legally sane at the time of the offense and the court so found.

[1] There is no doubt but that the defendant's conduct constituted murder of the first degree, as a "wilful, deliberate, and premeditated killing," or one "committed in the perpetration or attempt to perpetrate * * * rape * * *." Pen.Code, § 189.

[2] It is contended by the defendant that the court committed prejudicial error by instructing the jury as follows: "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict, using a form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in the verdict, and you will say nothing about punishment in the verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

The defendant himself requested an instruction in the same language as the foregoing. The theory on which he now claims that the instruction was prejudicial is that section 190 of the Penal Code makes it the function and responsibility of the jury to select and to designate in its verdict which of the two punishments prescribed by that section shall be imposed in a given case; that by failing to expressly designate a particular penalty, the function is removed from the jury and conferred on the court, and that the court is not competent to fix the penalty.

The defendant's contention is not new. The instruction has been approved on numerous occasions but not without criticism and recommendations that it be not given. People v. Friend, 47 Cal.2d 749, 306 P.2d 463; People v. Brust, 47 Cal.2d 776, 306 P.2d 480; People v. Bollinger, 196 Cal. 191, 204–205, 237 P. 25. However, the instruction in and of itself has never been held to be erroneous. See People v. Crooker, 47 Cal.2d 348, 303 P.2d 753 (tried before our decisions in the Friend and Brust cases) and cases therein cited. And when as in the Brust case and in this case nothing otherwise appears in the record of the trial from which the jurors might be confused or placed in doubt as to their discretion and duty in fixing the penalty a just cause for reversal is not shown.

[3] It is next contended that the court committed prejudicial error in refusing to instruct the jury on the question whether the defendant's confessions were freely and voluntarily made. It is conceded that neither force nor threats of physical abuse were employed to obtain the confessions, but it is contended that due to the defendant's emotional instability and low mentality he was not capable of coping with the extended questioning and accompanying psychological effects thereof which preceded his first confession.

It appears that prior to his arrest the defendant voluntarily agreed to meet a police officer and go to a military base to take a lie detector test or to talk to the operator of the detector. The defendant met the officer at 9:30 in the morning of the appointed day, having arranged with his employer to be absent from work on that day. He had conversations with law enforcement officers on that day, but was under no restraint at any time. Three or four hours were spent explaining the lie detector to him and an hour and a half taken for dinner. At 7:30 p.m. the defendant admitted his guilt. Commencing about 9:48 p.m. he made a detailed statement containing the confession, which was repeated in material parts at 10:40 p.m. At about 10:30 the following morning he made a third statement, ending with the declaration that he was glad that it was all over and to have it off his conscience. Before the confessions were introduced in evidence there was preliminary proof that they were voluntarily made. Thereafter the defendant testified in response to interrogations by the trial judge that his statements were freely and voluntarily made; that no threats, duress or force were used, and that no offers of immunity were extended to him as an inducement in making his confessions. As stated, his testimony as a witness corroborated his prior confessions. No instructions designed to submit the question as to whether the confessions were voluntarily made were requested by the defendant, although they were requested by the prosecution.

In view of the record presented there is no reason to conclude that the defendant was prejudiced in any manner by the failure of the court to submit the question of the voluntary nature of the confessions to the jury. See People v. Wolfe, 42 Cal.2d 663, 669–670, 268 P.2d 475; People v. Byrd, 42 Cal.2d 200, 210–211, 266 P.2d 505.

[4–7] It is finally contended that the circumstances of the defendant's detention, interrogation, and confession were such that the admission of the confessions denied him due process of law. This contention is based primarily on the claimed failure of the investigating officers to have obtained a warrant for the defendant's arrest prior to the questioning which resulted in the confessions, and an asserted unnecessary delay in taking the defendant before a magistrate. There is nothing in the record to support a claim of a denial of due process. The record indicates that the defendant went willingly with the officers by prearrangement, and that he was free to leave at any time and to communicate with whomsoever he chose. There is no showing that a warrant had not been issued, or that the defendant had not been advised of his right to counsel and his right to remain silent, or that he was not within proper time taken before a magistrate. However, a confession is not rendered inadmissible by a failure to advise a suspect of his right to remain silent, of his right to counsel and that his statements may be used against him, People v. Hoyt, 20 Cal.2d 306, 314, 125 P.2d 29, or by an absence of a suspect's counsel and friends, People

v. Aguilar, 140 Cal.App. 87, 94, 35 P.2d 137, 142, or by a delayed detention, where the confession is not the product of that detention, Rogers v. Superior Court, 46 Cal.2d 3, 10, 291 P.2d 929, or by a low emotional and mental stability on the part of the suspect if he is nevertheless capable of understanding the meaning and effect of his confession, People v. Isby, 30 Cal.2d 879, 897–898, 186 P.2d 405. Such matters may be taken into consideration in determining whether a particular confession was voluntarily made. In the present case the voluntary nature of the confessions appears without question from other evidence.

Upon a review of the record no good reason is presented to justify a reversal.

The judgment and the order denying a motion for a new trial are affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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48 Cal.2d 334

In the Matter of the ESTATE of Joseph C. POISL, Deceased.

Thomas W. HUGHES, Petitioner and Appellant,

v.

Robert L. FERGUSON, as Executor of the Estate of Joseph C. Poisl, Deceased, Helen Kern, Clara Gottman, John Werner, Charles Werner, Emma Poisl, Defendants and Respondents.

L. A. 24262.

Supreme Court of California,
In Bank.
April 12, 1957.

Petition by attorney for executor for allowance of fees for extraordinary services. The Superior Court, Los Angeles County, Victor R. Hansen, J., rendered judgment allowing much less than amount claimed for such services, and petitioner appealed. On motion to dismiss appeal, the Supreme Court, Carter, J., held that right to appeal was not barred by acceptance of payment of fee allowed, where executor had agreed that payment and receipt of amount allowed would not bar appeal.

Motion to dismiss appeal denied.

Opinion, 303 P.2d 837, vacated.

1. Appeal and Error 🔑161, 162(3)

Generally, voluntary acceptance of the benefits of a judgment or order is a bar to prosecution of appeal therefrom, except where appellant is concededly entitled to the benefits accepted and a reversal will not affect the right to such benefits.

2. Executors and Administrators 🔑256(3)

Right of attorney for executor to appeal from judgment allowing much less than amount claimed as fee for extraordinary services rendered in opposing proceeding by widow to revoke as to her probate of will executed by deceased husband before marriage was not barred by acceptance of payment of fee allowed, where executor had agreed that receipt of payment of amount allowed would not bar appeal. West's Ann.Prob.Code, §§ 70, 1080.

3. Executors and Administrators 🔑91

Executor, as duly authorized representative of decedent's estate, was in charge of funds of estate subject to court's orders for payment of administration expenses and claims against estate and distribution to beneficiaries.

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Thomas W. Hughes, in pro. per., and Alfred L. Bartlett, Los Angeles, for appellant.

Ben M. Kochman, Los Angeles, for respondent Emma Poisl.

CARTER, Justice.

In this case, Hughes, the attorney for the executor under decedent's will in the above mentioned estate, petitioned the superior court administering probate law in the estate proceedings, to have it ordered that he be paid attorney's fees for extraordinary services performed in opposing the proceeding in the lower court and on appeal by decedent's widow to revoke the will of decedent as to her on the ground that she was not provided for as required by section 70 of the Probate Code, the will having been made before her marriage to decedent.[1] Objections were filed to the petition and, after hearing thereon, the court found that in the proceedings for revocation of the will the widow did not challenge the validity of the will but merely alleged that it was revoked under section 70 which was the same as a petition to determine heirship under section 1080 of the Probate Code; that Hughes performed all the above mentioned services, but the preliminary services of bringing the parties (the legatees under the will and the widow) before the court in the revocation proceedings was his only legal duty and such services were worth $1,000; that he had no duty to participate in the trial or appellate work in the revocation proceedings, and therefore fees for such services were not proper. Accordingly the court rendered its "judgment" that Hughes was "entitled" to a $1,000 fee for the extraordinary preliminary services. He appeals, asserting that he was entitled to compensation for the services performed on trial and appeal as well.

Defendant widow now moves to dismiss the appeal by reason of the acceptance by Hughes of the $1,000. On October 3, 1955, after the court indicated what its order would be, Hughes wrote to the executor that he intended to appeal but that the only ground of appeal would be that more fees should have been allowed him and that the $1,000 to be awarded would not be affected, quoting from Clarke v. Angelus Memorial Ass'n, 14 Cal.App.2d 750, 58 P.2d 974, to the effect that where the question on appeal is whether the recovery should be greater than that allowed by the lower court, the acceptance of the amount adjudged due did not bar the appeal. After the order for $1,000 attorney's fees above mentioned was made (but prior to its entry), $300 thereof was paid to Hughes by the executor on October 19, 1955, and the balance of $700 was paid on October 28, 1955. On receipt of the check for $300 by Hughes on October 24, 1955, he again wrote to the executor stating that it was accepted "without prejudice" to his "contemplated appeal from the order" allowing $1,000 because he sought a larger sum which was in accord with the case theretofore cited in the former (October 3, 1955) letter. At the time the balance of $700 was paid on October 28, 1955, he again advised the executor that it was accepted only on the condition specified in his former letters, he was not waiving his right to appeal, and would not sign or enter a satisfaction of judgment; this was "agreed" to by the executor, and no satisfaction of the $1,000 allowance has been made or entered.

The widow asserts that there was a voluntary acceptance of the fruits of the judgment ($1,000) barring the right to appeal. Hughes claims there was an agreement that the acceptance of the $1,000 should not be considered as barring the appeal and that in any event the judgment for $1,000, which was accepted, was severable from the claim for fees for the litigation itself, to which he was entitled in any case, and was not placed in jeopardy by the appeal; moreover the widow did not appeal from the $1,000 award.

[1] The latest statement by this court on the subject is as follows: "It is the general rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, since the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. [Citations.] An exception to the general rule exists where the appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to

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[1] The widow was unsuccessful in the lower court whose order was affirmed by the District Court of Appeal but reversed by this court, Estate of Poisl, 44 Cal.2d 147, 280 P.2d 789.

those benefits. [Citations.]" Mathys v. Turner, 46 Cal.2d 364, 365, 294 P.2d 947.

[2, 3] But here, from Hughes' undisputed affidavit, we have an agreement by the executor that the receipt of payment of the $1,000 award would not bar the appeal. Before anything was paid on the judgment Hughes advised the executor that he intended to appeal and that the payment and acceptance of the $1,000 would not affect his appeal because he was claiming more. Thereafter the executor paid $300 and was again advised to the same effect. The same occurred on the payment and acceptance of the $700 balance and it was agreed to by the executor. There would appear to be no reason why effect should not be given to that agreement. There should be no estoppel or waiver of the right to appeal because of it. No point is made of whether the executor rather than the widow could make such an agreement but it would appear that he had the right to do so inasmuch as the matter involved was the payment of money for claimed attorney's fees from the assets of the estate. There is no question that the executor was the duly authorized representative of the estate. As such he was in charge of the funds of the estate subject to the court's orders for payment of expenses of administration, claims against the estate and distribution to the beneficiaries of the estate.

While it has been held that a taking of possession after judgment in an eminent domain proceeding with the taker's reservation of the right to appeal does not, under the statutes there involved, preserve the right to appeal, Mt. Shasta Power Corp. v. Dennis, 66 Cal.App. 186, 225 P. 877, we find no case in this state holding that an agreement that an appeal shall not be barred by acceptance of the benefits of the judgment (as distinguished from a unilateral reservation by the appellant), will not preserve the right to appeal. In regard to acceptance of the benefits of the judgment as barring the acceptor's appeal, it is said in Gudelj v. Gudelj, 41 Cal.2d 202, 214, 259 P.2d 656, 663: "However, '(i)n order to bar the right of appeal on the ground of acquiescence, "the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute" '. Duncan v. Duncan, 175 Cal. 693, 695, 167 P. 141, 142." And it has been held that an agreement that the acceptance of the benefits of a judgment shall not bar the right of appeal will be recognized and preserves that right. See Succession of Nicholich, La.App., 167 So. 831; Lightner v. Board of Sup'rs, 156 Iowa 398, 136 N.W. 761; City of Seattle v. Liberman, 9 Wash. 276, 37 P. 433; see cases contra 169 A.L.R. 985, 1058.

For the foregoing reasons the motion to dismiss the appeal is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

48 Cal.2d 378

Carl M. FRAENKEL, d/b/a The Matthis Company, Plaintiff and Appellant,

v.

J. G. TRESCONY, Defendant and Respondent.

S. F. 19670.

Supreme Court of California,

In Bank.

April 19, 1957.

Rehearing Denied May 15, 1957.

Action against farmer for balance due under contract for construction of grain elevator by person who did not hold contractor's license. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for farmer, and builder appealed. The Supreme Court, Spence, J., held that grain elevator which was constructed on land owned by farmer in unincorporated town on main street adjacent to railroad tracks, about three and one-half miles from farm, was not on farm, under requirement that structure be constructed on farm to be within exemption of construction or operation incidental to farming from statutes precluding recovery for work done by one who does not have contractor's license.

Affirmed.

Schauer and Carter, JJ., dissented.

Opinion, 302 P.2d 462, vacated.

1. Licenses ⚷19(3)

Requirement that construction must be "located on farm" to be exempt from contractor's license law envisages location on land devoted to agriculture, as commonly understood to mean on land used for raising of crops or pasture or both, rather than location on property situated in predominantly industrial or commercial sector of town some miles from actual farm on which crops are produced. West's Ann.Bus. & Prof. Code, §§ 7026, 7028, 7031, 7049.

See publication Words and Phrases, for other judicial constructions and definitions of "Located on Farm".

2. Licenses ⚷19(3)

Grain elevator, which was constructed on land owned by farmer in unincorporated town, on main street adjacent to railroad tracks, about three and one-half miles from farm, was not "on farm" under requirement that structure be constructed "on farm" to be within exemption of construction or operation "incidental to farming" from statute precluding recovery for work done by one who does not have contractor's license. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7031, 7049.

See publication Words and Phrases, for other judicial constructions and definitions of "Incidental to Farming" and "On Farm".

3. Licenses ⚷19(3)

In exempting construction incidental to farming from contractor's licensing law the legislature did not intend to include every structure bearing a possible relation to farming industry without regard for its location in relation to the farm, and exemptions cannot be extended to office buildings, warehouses, grain elevators, or similar structures constructed at sites far removed from the farm, and perhaps in the center of cities or towns, even though such facilities might be construed for sole purpose of a single farmer in connection with his own extensive farming operations. West's Ann. Bus. & Prof.Code, §§ 7026, 7028, 7031, 7049.

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Carroll F. Jacoby and Jack Flinn, San Francisco, for appellant.

John W. Hutton, King City, for respondent.

SPENCE, Justice.

Plaintiff sought to recover the unpaid balance allegedly due from defendant for the construction of a grain elevator. Upon the ground that plaintiff failed to allege that he was a licensed contractor, Business & Professions Code, § 7031, defendant's demurrer to plaintiff's complaint was sustained without leave to amend. Plaintiff appealed and the judgment was reversed in order to afford plaintiff the opportunity to amend his complaint to show that the construction work was "incidental * * * to farming" so as to avoid the state licensing requirement. Bus. & Prof.Code, § 7049; Fraenkel v. Trescony, 40 Cal.2d 905, 256 P.2d 573. Plaintiff thereupon amended his complaint and the case was tried upon the single issue of whether the farming exemption applied. The trial court found that it did not and therefore plaintiff's failure to comply with the contractor's license law precluded his recovery. Bus. & Prof.Code, §§ 7026, 7028, 7031. From the adverse judgment accordingly entered, plaintiff now appeals.

At the trial the court and both parties treated the holding in Fraenkel v. Bank of America, 40 Cal.2d 845, 256 P.2d 569, a companion case on the first appeal, as stating the governing principle: "that the construction must be located on a farm and must be incidental to the farmer's own farming operations in order to be 'incidental to farming,' within the meaning of the exemption."

40 Cal.2d at page 849, 256 P.2d at page 571. Consistent with this interpretation of the statutory language, the trial court's judgment, based upon its determination that the construction in question did not qualify under the farming exemption, must be affirmed.

Plaintiff, a licensed mechanical engineer, and defendant entered into a written contract calling for plaintiff's construction of a grain elevator on a "cost plus ten per cent" basis. The elevator was built on property owned by defendant in the town of San Lucas. It was located on Main Street amidst business buildings and homes on town lots and adjacent to the Southern Pacific main line tracks. Nearby there were also commercially operated grain sheds and storage bins owned by another individual. The site for defendant's grain elevator was approximately three and one-half miles from defendant's farm and its only access therefrom was by public road.

The trial court found that the grain elevator was "not constructed on a farm, either actually or constructively"; that it "was designed with the intent that it would be usable primarily for the defendant's own produce, but also for the storage of the grain of others on a rental basis"; and that such structure was "incidental to both farming and commercial operation by the defendant." In line with these findings that the grain elevator was not located on a farm and was to be used to some extent for commercial purposes, the court concluded that the statutory farming exemption was of no avail to plaintiff and, in the admitted absence of the required contractor's license, plaintiff could not recover.

Plaintiff contends that the evidence does not support the above findings except that portion declaring that the primary purpose of the grain elevator was for the storage of defendant's own produce. In this regard, he cites these undisputed facts: that the size of the grain elevator, 1,000-ton capacity, was determined from the acreage and past harvests of defendant; that any excess storage space would be available for rent to others only in the event defendant should have a "short season"; that in actual use the first year's storage consisted of 800 tons of defendant's own grain and 200 tons on rental, and in the next year's storage the respective amounts were 700 tons of defendant's own grain and 300 tons on rental; that defendant did not have a warehouseman's license; and that defendant financed the construction of the grain elevator through a loan from the Commodity Credit Corporation with the understanding that such loans were allowed only for the purpose of erecting storage facilities for the farmer's own produce, and not for commercial or other purposes. Under these circumstances, plaintiff distinguishes this case from Machinery Engineering Co. v. Nickel, 101 Cal.App.2d 748, at page 751–752, 226 P.2d 78, 80, where a hay processing mill "[a]dmittedly * * * was not to be connected with any particular farm as a part thereof, or used in connection with any particular farm" but was "intended to be a commercial enterprise * * * to grind the hay of farmers generally, located in the area"; and from California Employment Comm. v. Butte County etc. Ass'n, 25 Cal.2d 624, at page 636, 154 P.2d 892, at page 897, where a warehouse was owned by an incorporated cooperative association, the storage facilities were available alike to both members and nonmembers, and the association as so licensed was held "in essence a commercial enterprise—a profitable *public warehouse business*".

Plaintiff urges that since the construction of the grain elevator was primarily for the purpose of storage of defendant's own produce, and defendant only contemplated the rental of excess storage space in an effort to operate his overall farming enterprise at maximum efficiency, the limited rental use would not reasonably constitute the grain elevator a commercial operation nor deprive it of its fundamental character as a structure incidental to defendant's own farming. However, the merits of plaintiff's argument on this point need not be here decided, for the record clearly supports the finding that the grain elevator was not "located on a farm" as required for application of the exemption. Fraenkel v. Bank of America, supra, 40 Cal.2d 845, 850, 256 P.2d 569, 571.

[1] Admittedly, the grain elevator was erected on a town site, which was approximately three and one-half miles distant from defendant's farm, and the only access between the two places was by a public road. The site was adjacent to the main railroad lines servicing the town; other nearby property was industrial or commercial in character rather than agricultural; and specifically, the parcel of land adjoining defendant's town property was occupied by a commercially operated grain elevator for the use of neighboring farmers. A farm is generally defined "as a tract of land used for raising crops or rearing animals—one devoted to agriculture, stock raising or some allied industry." Board of Supervisors v. Cothran, 84 Cal.App.2d 679, 682, 191 P.2d 506, 508; see, also, Hagenburger v. City of Los Angeles, 51 Cal.App.2d 161, 164, 124 P.2d 345. It is true that in keeping with modern methods and advancement in mechanized operations, present-day farming may encompass the use of multiple scattered tracts rather than a single parcel of land, and the requirements for the efficient functioning of a large farming enterprise cannot be measured in the light of farming conditions as they existed "a century or more ago." Irvine Co. v. California Emp. Comm., 27 Cal.2d 570, 582, 165 P.2d 908, 915. But despite such changes in the prevailing concept of a farming enterprise, still a structure "located on a farm" would reasonably envisage location on land devoted to agriculture as commonly understood to mean on land used for "the raising of crops, or pasture, or both" 35 C.J.S. p. 746, rather than location on property situated in a predominantly industrial or commercial sector of a town some miles from the actual farm on which the crops are produced.

[2] Plaintiff argues that since defendant was a farmer and the owner of a farm, and the grain elevator was designed primarily for the storage of defendant's own grain, such grain elevator thereby became part of defendant's farm and was thus "located on a farm." Such argument completely eliminates one of the two conjunctively required factors of the farming exemption as construed in Fraenkel v. Bank of America, supra, 40 Cal.2d 845, 849, 256 P.2d 569. From the mere fact that the construction is designed primarily for the storage of a farmer's own farm products, it does not automatically follow that the construction is thereby "located on a farm." As was said in Fraenkel v. Bank of America, supra, 40 Cal.2d at page 850, 256 P.2d at page 572, it is only "if the grain elevator was built on defendant's farm *and* designed to function as an incidental part of his own farming operations * * * [that] there would be a factual basis for holding such structure to be within the terms of the exemption as a 'construction or operation incidental to * * * farming.'" (Emphasis added.)

[3] To hold otherwise, and permit the farming exemption to apply to construction work which is not performed on a farm, would seem to run counter to the purposes of the contractor's licensing law enacted for the safety and protection of the public respecting structural improvements to real property wherein special skill, training and ability are required. Loving & Evans v. Blick, 33 Cal.2d 603, 609, 204 P.2d 23; Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37. In exempting construction "incidental to farming" from the state licensing requirements, the Legislature manifestly did not intend to include every structure bearing a possible relation to the farming industry and without regard for its location in relation to the farm. It therefore seems clear that the exemption should not be extended to office buildings, warehouses, grain elevators or similar structures constructed of sites far removed from the farm, and perhaps in the center of cities or towns, even though such facilities might be constructed for the sole use of a single farmer in connection with his own extensive farming operations. Rather, it is only where the particular structure is

"located on a farm" and "designed to function as an incidental part" of the farmer's own farming operations, Fraenkel v. Bank of America, supra, 40 Cal.2d 845, 850, 256 P.2d 569, 571, that such structure thereby reasonably becomes "dissociated from the objects and purposes of the licensing law" ibid., 40 Cal.2d at page 849, 256 P.2d at page 571, and the farming exemption applies. Here the trial court found from the evidence that the grain elevator was not constructed "on a farm," and accordingly plaintiff, as an unlicensed contractor, was properly held to be precluded from maintaining the present action.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

In my view the majority opinion errs egregiously in holding, implicitly, that the defendant by his own act, in concert with a third person, *subsequent to the execution of the contract with plaintiff,* may retroactively render plaintiff's contract with defendant unlawful, and may then invoke his own wrong to defeat plaintiff's right of recovery after the latter's faithful performance of the contract. Such contract, on any reasonable view of the evidence, appears to me to have been lawful when made, lawful in object, and lawful in performance. The only possibly unlawful dealing in connection with it appears to have been defendant's conduct in renting to third persons a portion of the completed elevator storage space and thereby and to that extent apparently engaging in a commercial rather than a strictly farming activity. The principal question argued on appeal is whether the work called for by the contract comes within the farming exemption created by Business and Professions Code, § 7049, hereinafter quoted.

For a clear comprehension of the legal problem involved the salient facts of the controversy should be borne in mind.

At all times concerned plaintiff has been a "registered professional engineer," skilled in the design and construction of grain elevators, but not "licensed as a contractor." Defendant is engaged in farming some 5,000 acres of land. Plaintiff contracted with defendant to "prepare plans, blueprints and specifications for a grain elevator and storage facility of an approximate capacity of 800 tons of barley," to "sub-contract for the customer" certain specified work, to "furnish all machinery, equipment and materials," and to "inspect and supervise all work performed by others and to furnish a superintendent." The basis of plaintiff's compensation was to be "cost plus ten per cent." It is conceded (at this stage of the litigation) that the terms of the contract bring plaintiff within the definition of a contractor as that term is defined in Business and Professions Code, § 7026, hereinafter quoted. Such concession does not, however, establish that the contract was either unlawful or unenforcible, as will be hereinafter shown.

It is to be emphasized that the controlling issue before us is *not* whether after completion of the structure defendant may have put it to some unlawful use but is whether the contract upon which plaintiff sues was lawful when executed.

The elevator was constructed on land owned by defendant where it would be most efficient in defendant's farming operations; i.e., where it would *not* use up arable land of the main agricultural tract and where it *would* be adjacent to a railroad so that the marketing of defendant's farm produce would involve a minimum of handling. That the railroad's tracks and nearest station happen to lie some 3½ miles from the land on which defendant's grain is grown does not appear to me to be important. The important thing to the farming operation is that the elevator be adjacent to the railroad tracks and station. So located, the farm produce as harvested could be picked up and transported directly to the elevator for temporary storage and direct loading from it onto railroad cars. The tonnage capacity for the elevator was determined from defendant's acreage and past harvests.

That fact, as will appear from the law hereinafter developed, is consistent with—and only with—an intention by plaintiff to use his engineering and construction skills lawfully in contracting with defendant to build an elevator to be used by defendant in his farming operation.

It is not disputed that the primary purpose of building the elevator was the efficient marketing (temporary storage and loading for shipment) of defendant's farm produce. We may infer that *defendant*, intending to operate for the greatest possible profit and to that end to pare losses in bad crop years, had in mind also that, when his own crop was short, he might derive some benefit himself—and possibly confer some on neighbors—by renting surplus space. In actual use it appears that the first year's storage consisted of 800 tons of defendant's grain and 200 tons on rental; the next year defendant required space for 700 tons and found rental for 300 tons. But in my view the use to which defendant put the elevator after its construction (as well as any secret intention he may have harbored upon entering into the contract) is wholly immaterial in this litigation between plaintiff and defendant. There is no showing that plaintiff in entering into the contract with defendant had guilty knowledge of the latter's unlawful intentions, if he then had any, as to use of the completed structure.

This litigation is in itself strong evidence of defendant's alertness and willingness to the end of turning a tidy penny. The trial court found that the contract price of construction was $21,238.95; that during the course of construction defendant paid plaintiff $8,979.94, but has refused to pay any part of the balance. Defendant argues in support of his refusal to pay—and the majority give his legal position their judicial blessing—that the elevator is not located on defendant's farm, that since its construction defendant has used it in some part for commercial rental as well as for his own farming operations, that plaintiff is licensed only as a "professional engineer," that he does not possess a building contractor's license, and that therefore under certain provisions of the Business and Professions Code plaintiff cannot require defendant to pay for what he received.

The pertinent provisions of the Business and Professions Code are as follows:

Section 7026 defines "contractor" as "any person who undertakes to * * * construct * * * any building * * * or other improvement * * * or other structures * * *."

Section 7028 provides that "It is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, *unless such person is particularly exempted from the provisions of this chapter.*" (Italics added.)

Section 7031 provides that "No person engaged in the business * * * of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

Section 7049, however, provides that "This chapter [which contains the last quoted sections] does not apply to any construction or operation incidental to * * * farming, dairying, agriculture, viticulture, horticulture * * * except when performed by a licensee under this chapter." Furthermore, section 7050 provides that the chapter "does not apply to an owner who contracts for a project with a licensed contractor or contractors" (see also § 7030) and section 7051 declares that such chapter "does not apply to a licensed architect or a registered civil or professional engineer acting solely in his professional capacity * * *." The majority expressed the view (in Fraenkel v. Bank of America (1953), 40 Cal.2d 845, 848 [1], 256 P.2d 569) that section 7049 exempts "any construction or operation incidental to * * * farming * * * agriculture" but they now take the position that the marketing of farm produce is not an incident of farming insofar as it entails the use of a grain elevator which is not located on the parcel of land on which the grain is grown. More specifically, the majority say that plaintiff's other arguments "need not be here decided, for the record clearly supports the finding that the grain elevator was not 'located on a farm' as required for application of the exemption."

Regardless of the applicability of the other quoted sections dealing with exemptions, it is my view that farming includes marketing the produce of the farm, that a farmer should not be penalized for operating efficiently, and that neither should he be permitted—unless the law is altogether clear and compulsory to that end—to invoke the contractors' license law in such a situation as this in order to achieve unjust enrichment. His defense here is an affirmative defense; he invokes the statute to defeat what otherwise appears to be a just and enforcible claim. Section 7050, hereinabove quoted, suggests that if plaintiff has violated the law by entering into the contract then so also has defendant, for defendant entered into the construction contract with plaintiff, a non-licensed contractor. If defendant at the time of contracting for plaintiff's services intended that the construction should serve any purpose other than one legitimately incidental to his farming operation he violated the law. Is he taking the position now that he confided such intention to plaintiff and conspired with him to commit a crime? How else can he prevail in his defense?

If we construe the law fairly, and particularly if we give any weight whatsoever to the presumption of innocence and the rule of construction against extending a statute in order to find guilt of crime (People v. Valentine (1946), 28 Cal.2d 121, 143 [20], 169 P.2d 1; People v. Smith (1955), 44 Cal.2d 77, 79 [2] [3], 279 P.2d 33, we should conclude that neither plaintiff nor defendant was guilty of a crime in entering into the contract. Section 7049, above quoted, does not require that the "construction or operation" which is the subject of exemption be conducted on land which is part of, or contiguous to, the parcel on which the crop is grown. The exemption rather, by its express terms is inclusive of "*any* construction or operation *incidental to* * * * *farming,* dairying, *agriculture,* viticulture, horticulture * *." (Italics added.) The intention of the Legislature to grant a broad exemption extending throughout the area of farming and its incidental operations appears clear. (See Kelly v. Hill (1951), 104 Cal.App.2d 61, 65, 230 P.2d 864.) The word "agriculture," in its commonly accepted meaning, includes not only "the production of plants and animals useful to man [but also] * * * to a variable extent the preparation of those products for man's use and their disposal by marketing * * *" (Webster's New International Dictionary, Second Edition.) It seeems to me that the grain elevator, located exactly where it is, is part and parcel of defendant's farming operation. At least there is no evidence sufficient to establish that plaintiff, in entering into the contract with defendant, had knowledge or notice that the contemplated construction was other than incidental to defendant's farming operation. The elevator is not a part of the main farm crop growing area, but certainly it is a part of the farm in the same sense that harvesting the crop, collecting it, storing it and marketing it are a part of and incidental to farming. Surely the fact that defendant, after performance of the contract by plaintiff, rented some of the storage space in the elevator to third persons should not be considered as against plaintiff.

For the reasons above stated, I would reverse the judgment.

CARTER, Justice.

I dissent.

I concur in the views expressed in the dissenting opinion of Mr. Justice SCHAUER and for the reasons there stated and also for the reasons stated in my concurring opinion in Fraenkel v. Bank of America, 40 Cal.2d 845, at page 851, 256 P.2d 569, I would reverse the judgment.

Rehearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

150 Cal.App.2d 99

William MULLER, Plaintiff and Appellant,
v.
Charles REAGH and Lelah Muller, Defendants and Respondents.
No. 17091.

District Court of Appeal, First District, Division 1, California.
April 15, 1957.

Tort action was brought for actual and punitive damages. The Superior Court, County of San Mateo, Louis B. DeMatteis, J., entered an order transferring the cause to the Municipal Court, on ground that the Superior Court lacked jurisdiction, and the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where plaintiff sought recovery of punitive damages in the amount of $35,000, Superior Court had jurisdiction and should not have transferred the action to Municipal Court, though actual damages of plaintiff may have been small.

Order reversed.

See also, 306 P.2d 593.

1. Damages ⚷87(2)

In a tort action, punitive damages are recoverable though actual damages are no more than nominal. West's Ann.Civ.Code, § 3294.

2. Courts ⚷121(9)

Where plaintiff sought recovery of punitive damages in the amount of $35,000 in tort action, Superior Court had jurisdiction, and should not have transferred the action to Municipal Court, though actual damages of plaintiff may have been small. West's Ann.Civ.Code, § 3294.

3. Courts ⚷487(1)

Where Superior Court did not determine until trial of tort action that it allegedly lacked jurisdiction, Superior Court had authority to retain the cause and was not required to transfer it to Municipal Court. West's Ann.Code Civ.Proc. § 396.

4. Appeal and Error ⚷94

Order of Superior Court transferring cause to Municipal Court, on ground that Superior Court lacked jurisdiction, was an "appealable order," though Municipal Court was sitting less than fifty feet away. West's Ann.Code Civ.Proc. §§ 397, 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

◆

William Muller, Redwood City, appellant in pro. per.

Charles Reagh, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff has appealed from an order transferring the cause to the municipal court upon the ground that the superior court lacks jurisdiction.

(1) *Does it appear from the complaint that the superior court lacks jurisdiction?*

The following are the significant allegations of the complaint:

According to the first count, defendant Lelah Muller converted four unexecuted forms, three agreement forms and one deed form. The three agreement forms have an "intrinsic" value of $150. The deed form has an "intrinsic" value of $10 and an "extrinsic" value of $13,000. Plaintiff has already been damaged to the extent of $1,000 in defendant's quiet title suit which Lelah Muller has brought against him predicated upon the use by her of said agreement forms and the deed form and that such damages will increase to an unascertained amount, which plaintiff requests permission to insert in the complaint when ascertained. Defendant Reagh has participated in the institution and maintenance of the quiet title suit to the damage of plaintiff in the sum of $13,000. By reason of the premises plaintiff has suffered bodily and mental stress and has been unable to work and by reason thereof has already been damaged in the sum of $2,000 which damages will accrue and increase and plaintiff requests permission to insert the full amount thereof when ascertained. Plaintiff has suffered exemplary and punitive damages in the amount of $35,000. In the prayer he asks for $13,000 as general damages, $160 as special damages, $3,000 as compensatory, and $35,000 as exemplary and punitive damages.

In the second count plaintiff pleads fraud and deceit, incorporating by reference all of the allegations of the first count and alleging that Lelah obtained the deed form and the agreement forms from him by fraud and deceit. Here, he alleges that he is damaged in the sum of $13,160, the value of the unexecuted forms.

In the third count plaintiff pleads an action for claim and delivery of the four unexecuted forms. He alleges they are the value of $13,160.

Defendants support the order of transfer upon the theory that "inspection of the complaint shows that by no stretch of the imagination could unexecuted forms be worth $13,000, no matter what the amount claimed as their value." That is not to say that no damages, not even nominal damages, might be recoverable for the tort allegedly committed. Nor does it signify that the item of $2,000, or some portion of it, might not be recoverable for the alleged bodily and mental stress allegedly suffered by the plaintiff.

[1] Accordingly, actual damages in some amount are potentially recoverable. This brings into play the element of punitive damages. "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civ.Code, § 3294. It follows, of course, that punitive damages are recoverable only in case actual damages are recovered, but that does not mean that for that purpose actual damages need be more than nominal. Foster v. Keating, 120 Cal. App.2d 435, 455, 261 P.2d 529, and authorities there cited.

Plaintiff alleges he has suffered punitive damages in the amount of $35,000. He might, conceivably, recover much less than that but who can say he has not pleaded a case for an amount sufficient to meet the jurisdictional requirements of the superior court?

[2] It appears, therefore, that the plea of punitive damages when added to the plea of actual damages (however small the latter might be construed to be), brings the case within the jurisdiction of the superior court. The following significant observations were made in Schwartz v. California Claim Service, 52 Cal.App.2d 47, 56–57, 125 P.2d 883, 889: "While it would appear that we are viewing a small bird with an extraordinarily large tail, we think that the prayer for punitive damages of $5,000 must be regarded as an appendage of the demand of $50 as actual damages and that the complaint therefore stated sufficient facts to give the superior court jurisdiction. The rule is that jurisdiction depends upon the amount that is claimed in good faith, which implies that the court may disregard allegations of a pleading which have been made in obvious bad baith (Becker v. Superior Court, 1907, 151 Cal. 313, 318, 90 P. 689), but the single fact that a complaint may have a demand for exemplary damages in an amount which appears to the court to be out of all proportion to the gravity of the allegedly malicious acts of the defendants would not establish bad faith."

[3] Moreover, it appears from the settled statement on this appeal that the determination that it lacked jurisdiction was made by the superior court "at the trial,"[1] a circumstance which pursuant to the fifth

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[1] In this regard the settled statement declares: "* * * the case came on for trial before a jury in said court, all necessary parties being present. During the first hour of said trial and during the voir dire examination of prospective jurors, counsel for the defendants, Charles Reagh, stated that he desired to make a motion to the court. Judge Dematteis stated that he would hear the motion in his chambers at the first recess.

Thereafter, at the first recess, in the

paragraph of section 396 of the Code of Civil Procedure gave that court authority to retain the cause and not transfer it to the municipal court. Wexler v. Goldstein, 146 Cal.App.2d 410, 304 P.2d 41. Accordingly, even if the superior court's interpretation of the complaint had been correct, it would have had jurisdiction to proceed with the trial but of course would have had the authority, in the exercise of the legal discretion vested in it, to order a transfer.

Defendants question the appealability of the order of transfer, saying "the *place* of trial could hardly be said to be *changed* by moving the trial to another court sitting less than fifty feet away." They say there appears to be no California case in point and assert that plaintiff's remedy would be by writ of mandate, citing Robinson v. Superior Court, 35 Cal.2d 379, 218 P.2d 10. True, the Supreme Court there entertained mandate even though it decided there was a remedy by appeal. It did so in view of the fact that until then there had been no certainty whether or not the order there in question was appealable. It does not follow that whenever there is uncertainty an aggrieved party must pursue mandate only.

It happens that our reviewing courts have upon occasion entertained appeals from orders like the order here involved, notably in these cases: Weaver v. Pasadena Tournament of Roses Ass'n, 1948, 32 Cal.2d 833, 198 P.2d 514, affirming a superior court order transferring a cause to a justice's court; Roberts v. Western Pac. R. Co., 1951, 104 Cal.App.2d 816, 232 P.2d 560, affirming an order transferring an action from the superior court in San Francisco to the municipal court of San Francisco (petition for a hearing by the Supreme Court denied 104 Cal.App.2d at page 821, 232 P.2d 560). It is true that in neither of these cases do we find a discussion of the appealability of the order. That might mean that such a question did not occur to the court or it may mean that the court considered the appealability of the order too clearly manifest to require comment. We think the latter is the correct view.

[4] Whatever may have been the situation prior to 1933, since that date there can have been no serious doubt in view of the legislative changes made that year in section 397 of the Code of Civil Procedure. From 1872 until 1933 section 397 declared that "the court may * * * change the place of trial in the following cases: 1. When the county designated in the complaint is not the proper county; * * *." In 1933 "court" was substituted for "county" so that subdivision (1) of the section now reads "When the court designated in the complaint is not the proper court." That quite logically characterizes an order transferring a cause from one court to another (at least when predicated upon lack of jurisdiction in the former and possession of jurisdiction in the latter) as "an order * * * changing * * * the place of trial" as used in section 963 of the code, and thus an appealable order. These are factors which, it would seem, were not brought to the attention of the court in Arganbright v. Good, 46 Cal.App.2d Supp. 877, 116 P.2d 186.

Plaintiff discusses at some length the question whether or not Lelah Muller, by filing an answer after the rendition of an order dismissing the complaint as to her, waived the dismissal and reentered the case as a party-defendant. However, that question is not pertinent to any of the issues upon this appeal.

The order is reversed.

PETERS, P. J., and BRAY, J., concur.

absence of the jury and before the jury was impaneled, Charles Reagh moved that the case be transferred to the Municipal Court * * * on the ground that the Superior Court did not have jurisdiction to try the case because under the complaint on file herein no possible judgment could be obtained which was within the jurisdiction of the Superior Court * * * After argument thereon * * * the court ruled that it did not have jurisdiction * * *" and thereupon granted the motion for transfer.

Rebecca RILEY, as administratrix of the Estate of Susan Ann Blair, Deceased, Plaintiff and Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, Defendant and Respondent,

and

Naomi Blair Ruoff and Leon U. Everhart, Real Parties in Interest.*

Civ. 22251.

District Court of Appeal, Second District, Division 2, California.

April 17, 1957.

Rehearing Denied May 10, 1957.

Hearing Granted June 12, 1957.

Petition for writ of certiorari to review order of superior court awarding fees to ex-guardian and her attorney. The District Court of Appeal, Richards, J. pro tem., held that order approving guardian's report of closing expenses and ordering her discharge and exoneration of her bond terminated jurisdiction of probate court over guardianship estate, and that court had no jurisdiction thereafter to award fee and expenses to guardian and fee to her attorney on petition filed in guardianship proceeding after discharge of guardian.

Order awarding fees and expenses annulled.

1. Guardian and Ward ⚿159

Where guardian's final account and petition for fees requested fees for herself and her attorney in specified amounts together with such additional attorney's fees as might be fixed by court and order approving final account, thereby approving fees in specified amounts for guardian and her attorney, was silent as to any additional fee to attorney, such silence was in legal effect a denial of petition for additional attorney's fees.

2. Guardian and Ward ⚿165

Petition filed in guardianship proceeding, seeking additional compensation from estate of deceased ward for services rendered to guardianship estate by guardian and her attorney, sought relief in rem, and power to award such compensation depended upon court's jurisdiction over guardianship estate at time petition was filed and order made awarding compensation.

3. Guardian and Ward ⚿13(1)

Guardianship proceedings are in rem and are part of what are generally described as probate proceedings.

4. Guardian and Ward ⚿13(1)

In a guardianship proceeding, court acts in a special proceeding by virtue of power conferred upon it by statute and not as an equitable tribunal in exercise of general equity powers.

5. Executors and Administrators ⚿513(8)
Guardian and Ward ⚿163

In probate proceedings over estate of a decedent or in guardianship proceedings, jurisdiction over property of estate terminates upon decree of distribution and discharge of the personal representative, except so far as retention of jurisdiction is essential to compel compliance with order of distribution.

6. Executors and Administrators ⚿510(6)
Guardian and Ward ⚿161

In probate proceedings over estate of a decedent or in guardianship proceedings, appeal from order of final distribution merely transfers jurisdiction of probate court to reviewing court and does not continue the jurisdiction of probate court, and only in event of a reversal of order of final distribution is jurisdiction of probate court revived.

7. Guardian and Ward ⚿163

Order approving guardian's report of closing expenses and ordering her discharge and exoneration of her bond terminated jurisdiction of probate court over guardianship estate, except for limited purpose of enforcement, and court had no jurisdiction thereafter to award fee and expenses to guardian and fee to her attorney on petition filed in guardianship proceeding after discharge of guardian.

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* Opinion vacated 316 P.2d 956.

Leon U. Everhart and Montgomery G. Rice, Pasadena, for Real Parties in Interest.

Pines & Walsh and Roy B. Woolsey, Los Angeles, for petitioner.

RICHARDS, Justice pro tem.

We granted certiorari in this matter to review an order of the respondent court awarding fees to an ex-guardian and to her attorney pursuant to a petition filed and order made after the termination of the guardianship proceedings and discharge of the guardian.

On August 31, 1951, the guardian filed her first and final account, report, and petition for fees of $1,750 for herself and $1,800 for her attorney. On September 27, 1951 her account was approved allowing the fees as prayed for and ordering her discharge upon turning over the guardianship estate assets to the administratrix of the estate of the deceased ward. Two months later the guardian petitioned to vacate the order of September 27, 1951, and on January 21, 1952 the petition to vacate was granted and the order settling the final account and for fees was vacated. On April 22, 1952, the guardian filed her supplemental first and final account, amended report, and petition for fees and in this petition she requested the same fee of $1,750 for herself as in the prior petition and the same fee of $1,800 for her attorney together with such additional attorney's fees as might be fixed by the court.

[1] Without encumbering this opinion with numerous interim proceedings, it appears that in January, 1953 the guardian distributed the major portion of the guardianship estate to the administratrix of the deceased ward. More than a year after the filing of the supplemental account and petition for fees as above stated, an order was made on June 11, 1953 surcharging the guardian in the amount of $19,794.47 and ordering the guardian to distribute the remainder of the estate and to render an account of her closing expenses. The order of June 11, 1953, surcharging the guardian, approved her final account, thereby approving fees of $1,750 for the guardian and fees of $1,800 for her attorney, the prior payment of which was disclosed by an audit on file; however, that order was silent as to any additional fees to her attorney and such silence was in legal effect a denial of the petition for additional attorney's fees. Townsend v. Angellotti, 129 Cal. 466, 62 P. 59; Daniels v. Daniels, 143 Cal.App.2d 430, 439, 300 P.2d 335. In October, 1954, the guardian filed her report of closing expenses and petition for her discharge and in 1955, she filed a supplement thereto, but in neither of these petitions was there any request for the payment of additional fees to the guardian or to her attorney.

On March 25, 1955, after a contested hearing, the court approved the guardian's report of her closing expenses and ordered her discharge and the exoneration of her bond. The administratrix appealed from that order and on March 14, 1956 it was affirmed. In re Blair's Estate and Guardianship, 139 Cal.App.2d 832, 294 P.2d 521. It is appropriate to note that in its opinion, the District Court of Appeal, in referring to the order of March 25, 1955, said 139 Cal.App.2d at page 836, 294 P.2d at page 524: "This closing account was obviously intended to and should have set the entire matter at rest for all time. Such, indeed, is its legal effect." A petition for rehearing was denied as was a petition for hearing by the Supreme Court and the remittitur issued on May 14, 1956.

However, the matter was not set at rest, for on June 14, 1956, the guardian filed a petition for fees for her services covering a period of five years, alleging the reasonable value thereof at $5,000, of which she had received $1,750 on account. The same petition sought additional fees for the services of her attorney covering the same period of time and alleged the reasonable value of his services at $12,000, of which $1,800 had been paid on account and the petition likewise sought the recovery of $273.44 expenses incurred in the above-mentioned appeal and prayed that all of these amounts be declared a lien on the property of the ward then in the possession of the administratrix of the estate. Objections to this petition were filed by the administratrix and after a contested hearing, the court on November 27, 1956, granted the petition and allowed the fees and expenses as prayed and declared a first and prior lien against the property and estate of Susan Ann Blair, deceased, in the amount of $11,450 and ordered the administratrix of that estate to pay that amount to the petitioning ex-guardian.

[2–7] As previously noted the ex-guardian and her attorney are now seeking compensation from the assets of the probate estate of the deceased ward for services rendered to the guardianship estate and are seeking such compensation by proceedings within the guardianship estate and not in the probate estate. The relief they seek in the guardianship estate is *in rem* in character and the power to make such award was dependent upon the court's jurisdiction over the guardianship estate at the time the petition was filed and the order made. Guardianship proceedings are *in rem* and are part of what are generally described as probate proceedings. In re Di Carlo's Estate and Guardianship, 3 Cal.2d 225, 234, 44 P.2d 562, 99 A.L.R. 990, and in a guardianship proceeding the court does not act as an equitable tribunal in the exercise of general equity powers; it acts in a special proceeding and by virtue of power conferred on it by statute. 24 Cal.Jur.2d 374; Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 51, 19 P.2d 1018. It is well settled that in probate proceedings over a decedent's estate, and analogically applicable to guardianship proceedings, jurisdiction over the property of the estate terminates upon the decree of distribution and the discharge of the personal representative, except so far as the retention of jurisdiction is essential to compel compliance with the order of distribution, Estate of Baird, 181 Cal. 742, 744, 186 P. 351; Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625; Estate of Reiss, 68 Cal.App.2d 128, 130, 155 P.2d 862, and that an appeal from an order of final distribution does not continue the jurisdiction of the probate court but merely transfers such jurisdiction to the reviewing court, and only in the event of a reversal of the order is jurisdiction of the probate court revived. Estate of Baird, supra, 181 Cal. at pages 744–745, 186 P. at pages 351, 352. It follows that the jurisdiction of the probate court over the guardianship estate of Susan Ann Blair terminated with the order of March 25, 1955 approving the guardian's report of closing expenses and ordering her discharge and the exoneration of her bond, except for the limited purpose of enforcement and that, therefore, the respondent court was without jurisdiction on November 27, 1956 to grant the petition of June 14, 1956 and to then award fees and expenses to the guardian and fees to her attorney as sought in said petition.

The authorities relied upon by the guardian and her attorney, Estate of Clanton, 171 Cal. 381, 153 P. 459; Estate of Schluter, 209 Cal. 286, 286 P. 1008; and In re Forthmann, 118 Cal.App. 332, 5 P.2d 472, each deal with the power of the court to impress the property of a guardianship estate, whether actually or constructively in the possession of the guardian, with a lien for fees and in each of these cases the order imposing such lien was made at a time when the court had jurisdiction over the guardianship estate and in none of them is it suggested that after the final termination of the guardianship proceedings, the court may revest itself with jurisdiction and impose a lien upon property no longer in the actual or constructive possession of the guardian.

The order of November 27, 1956 awarding fees and expenses to the guardian and fees to her attorney is annulled.

FOX, Acting P. J., and ASHBURN, J., concur.

150 Cal.App.2d 109

Vincent FIGLIA, a minor, by his guardian ad litem, Vincenzo Figlia, Plaintiff and Appellant,

v.

Hazel B. WISNER, Defendant and Respondent.

Civ. 17217.

District Court of Appeal, First District, Division 2, California.

April 15, 1957.

Action for injuries sustained by 14 year old boy when he was pushing his bicycle across crosswalk, at intersection, and approaching automobile struck either him or his bicycle, throwing him. The Superior Court, County of Santa Clara, W. W. Jacka, J., rendered judgment for the defendant, and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that evidence showing that boy knew of approach of automobile and that motorist could not see him because her vision was obscured by a stopped automobile but that boy continued to cross street looking straight ahead supported implied finding that either boy had been contributorily negligent or that motorist had exercised due care.

Judgment affirmed.

1. Negligence ⚷136(9, 25)

Whether violation of statute proximately contributed to accident and whether violation was justifiable under circumstances are questions of fact, except in case where reasonable men can draw but one inference from the facts.

2. Appeal and Error ⚷930(1)

Reviewing court was required to accept evidence most favorable to verdict.

3. Automobiles ⚷244(7, 55)

In action for injuries sustained by 14 year old boy when he was pushing his bicycle across crosswalk, at intersection, and approaching automobile struck either him or his bicycle, throwing him, evidence showing that he knew of approach of automobile and that motorist could not see him because her vision was obscured by a stopped automobile but that boy continued to cross street looking straight ahead supported implied finding that either boy had been contributorily negligent or that motorist had exercised due care. West's Ann. Vehicle Code, § 560(a, b).

4. Automobiles ⚷217(2, 5)

A pedestrian is not required to keep looking right and left as he crosses street but is required to exercise reasonable care while crossing street in marked crosswalk and to continue to be alert and to safeguard against injury, throughout his passage. West's Ann. Vehicle Code, § 560(a, b).

5. Appeal and Error ⚷1002

Conflict in evidence resolved by jury is not to be considered on appeal.

6. Damages ⚷208(1)

In action for injuries allegedly sustained by 14 year old boy when he was pushing his bicycle across crosswalk, at intersection and approaching automobile struck either him or his bicycle, throwing him, in view of conflict in evidence as to whether bicycle or boy had been struck and as to whether injuries were sustained jury could properly have based verdict for defendant on theory that boy had not been injured.

7. Appeal and Error ⚷216(1)

Where plaintiff had tendered no instructions on last clear chance, he could not successfully complain on appeal that issue had not been submitted.

◆

Dante H. Giannini and Peter Anello, San Jose, for appellant.

Ropers & Majeski, Redwood City, for respondent.

KAUFMAN, Presiding Justice.

Plaintiff, guardian ad litem appeals from a jury verdict in favor of the defendant in an action for personal injuries to plaintiff's minor son, Vincent Figlia.

The accident occurred at about 3:30 p. m. on November 6, 1953, at the intersection of First and Virginia Streets in the City of San Jose. First Street is a street 60 feet wide, running north and south with a parking lane on each side, and four lanes of traffic, two northbound and two southbound. Virginia Street is a street about 40 feet wide running east and west. At the time of the accident, there were no traffic signals in operation at the intersection, only two arterial stop signals. Before stepping off the southwest curb of the intersection, Vincent Figlia (hereinafter referred to as plaintiff), who was a minor of the age of 14 at the time of the accident, looked to his right (south) and to his left (north). At this time, he saw two southbound cars; one about half a block away in the outside lane; another (the defendant's) about one block away in the inside lane next to the center dividing double line. The defendant was driving south and was half way over the south line of the north pedestrian crosswalk when the plaintiff began to move off the curb. The plaintiff was moving in an easterly direction across First Street in the south pedestrian crosswalk, walking at a fast pace, pushing his bicycle with one hand and carrying a package of coffee with the other. After he had crossed the west parking lane, he again looked north and observed that the southbound car in the outer lane had stopped in the intersection to let him cross; his view of the defendant's car was blocked by the stopped vehicle; he also looked south and noted that the northbound cars had stopped to let him cross.

Plaintiff testified that he knew of the car in the inside southbound lane, and realized that the driver of this car could not see him either. He continued in the crosswalk, looking straight ahead until he heard the defendant's brakes. As he turned around, he was hit. The defendant testified that she first saw the plaintiff as he began to move off the curb at which time she was about 18 feet away and traveling at a rate of 10 to 12 miles an hour. She did not blow her horn or give any warning, but testified that she applied her brakes as soon as she realized the plaintiff was not looking in her direction and succeeded in stopping her vehicle at the point of impact, which was judged to be 20 or 25 feet east of the curb. The plaintiff testified that he was wheeling his bicycle with his right hand and was struck by the defendant's car on the left and thrown about 8 feet. The defendant testified that only the front wheel of the bicycle was struck by her vehicle. One witness to the accident testified that the plaintiff was wheeling his bicycle with the left hand and that the defendant's car struck only the bicycle as a result of which the plaintiff was thrown about 8 feet.

The plaintiff contends that the judgment should be reversed as the defendant was negligent as a matter of law; that he himself was not negligent in failing to assume that the defendant would violate the law, and that even if he was negligent his negligence was not a bar to recovery as his negligence was not the proximate cause of the accident, and the defendant had the last chance to avoid the accident.

[1] Plaintiff argues that the defendant was negligent as a matter of law as she violated Motor Vehicle Code, Section 560, which is as follows: "(a) *Pedestrians' right of way.* The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter. (b) *Overtaking vehicle stopped at crosswalk.* Whenever any vehicle has stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle." The rule is that whether the violation of a statute proximately contributed to an accident and whether such violation was justifiable under the circumstances are questions of fact except in a case where reasonable men

can draw but one inference from the facts. Satterlee v. Orange Glen School Dist., 29 Cal.2d 581, 177 P.2d 279; Finney v. Wierman, 52 Cal.App.2d 282, 126 P.2d 143; Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1; Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531.

[2-4] In Gray v. Brinkeroff, 41 Cal.2d 180, 258 P.2d 834, and Lafrenz v. Stoddard, 50 Cal.App.2d 1, 122 P.2d 374, relied upon by the plaintiff, the failure of the defendant to see the plaintiff could be attributed only to negligent inattention. On appeal, we must accept the evidence most favorable to the verdict of the jury, and we cannot say here that the evidence does not support their implied finding on either the defendant's exercise of due care, or the plaintiff's contributory negligence. The question of whether the plaintiff was guilty of contributory negligence was properly left to the jury. Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; Pinello v. Taylor, 128 Cal.App. 508, 17 P.2d 1039; Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396. Plaintiff relies on Gray v. Brinkeroff, supra; Schulman v. Los Angeles Ry. Corp., 44 Cal.App.2d 122, 111 P.2d 924, and Foerster v. Direito, 75 Cal.App.2d 323, 170 P.2d 986, for the proposition that one who is exercising ordinary care may assume until and unless the contrary reasonably appears that another is exercising and will continue to exercise ordinary care and that he will obey the law. While a pedestrian is not required to keep looking right and left as he crosses the street, Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; Davis v. Renton, 99 Cal.App. 264, 278 P. 442; Schulman v. Los Angeles Ry. Corp., supra, it is the duty of a pedestrian to exercise reasonable care while crossing a street in a marked crosswalk and to continue to be alert and to safeguard against injury and such duty continues throughout his passage. Jeffs v. LaGore, 131 Cal.App.2d 181, 280 P.2d 140; O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159. In the instant case, the plaintiff knew of the defendant's vehicle and knew that he could not be seen by the driver of this vehicle, but he continued to cross the street, looking straight ahead. In Callahan v. Gray, 44 Cal.2d 107, 279 P.2d 963, the plaintiff-pedestrian was struck in the crosswalk; she had seen the defendant's car before crossing, but did not continue to watch the car but looked ahead at the door of the restaurant to which she was going. The court upheld the jury's verdict for the defendant.

In Shoemake v. Wilsey, 43 Cal.2d 686, 277 P.2d 17, the plaintiff said he observed the defendant's car all of the time. There was conflicting evidence as to whether the plaintiff had run in front of the defendant's vehicle. The jury found for the defendant. Here, there is also some conflict in the evidence as to whether the plaintiff was proceeding at a normal or fast pace.

[5] A conflict on the evidence resolved by the jury in the defendant's favor cannot be considered on appeal.

[6] Plaintiff's third contention is that his negligence, if present, would not bar recovery as his negligence was not the proximate cause of the injury and the defendant had the last chance to avoid the accident. As there is conflicting testimony whether the plaintiff or his bicycle were hit, and the nature and extent of his injuries, the jury could have concluded that he was not injured as a result of the accident.

[7] No instructions on last clear chance were offered by the plaintiff at the trial. He cannot now complain that the issue should have been submitted to the jury. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760; Ornales v. Wigger, supra. Furthermore, this case would not appear to be a proper one for the application of the doctrine. Doran v. City & County of San Francisco, 44 Cal.2d 477, 283 P.2d 1; Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915.

In view of the foregoing the judgment must be affirmed.

Judgment affirmed.

DOOLING, Justice (concurring) DRAPER, Justice (concurred.)

I concur in the judgment. The defendant testified that when her car was entering the north cross-walk there were no pedestrians in the south cross-walk and all cars in the vicinity were in motion. At that time she saw plaintiff leave the curb and immediately put on her brakes but did not stop her car in time to avoid striking plaintiff's bicycle. This testimony presented a question of fact as to whether or not the provisions of section 560 Vehicle Code were applicable. If the jury, as we must assume in favor of the verdict, decided these fact questions in favor of defendant the arguments of appellant based on that section of the Vehicle Code are not supported by the record.

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150 Cal.App.2d 274

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Victor L. DE CASAUS, Defendant and Appellant.

Cr. 5665.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Rehearing Denied May 13, 1957.

Hearing Denied June 12, 1957.

Defendant was convicted of involuntary manslaughter and from a judgment in the Superior Court, Los Angeles County, Clement D. Nye, J., the defendant appeals. The District Court of Appeal, Moore, P. J., held that the evidence sustained the conviction; that the speed law is not unconstitutional; that defendant was correctly sentenced to one year in jail for each offense; and that requested instructions were properly refused.

Judgment affirmed.

1. Automobiles 🔑355(13)

Evidence sustained conviction of involuntary manslaughter, where defendant while under the influence of intoxicants drove his automobile at a grossly excessive speed along the freeway and caused the deaths of six persons.

2. Criminal Law 🔑1159(2)

Where the evidence is sufficient to carry the case to the jury, its verdict will not be disturbed by the appellate court on the ground of insufficiency of evidence.

3. Automobiles 🔑356

In prosecution for involuntary manslaughter, where defendant while under influence of intoxicants and driving at a grossly excessive speed killed six persons, decision as to whether the highway was too rough, too congested, or too narrow for the accused to drive in a safe manner at his speed was one for the trial court to make based upon the evidence. West's Ann.Vehicle Code, § 510.

4. Constitutional Law 🔑258
Criminal Law 🔑13

The statute fixing the basic speed law is not unconstitutional as too vague, indefinite and uncertain and as violating the due process clause. West's Ann.Vehicle Code, § 510; U.S.C.A.Const. arts. 1, 4; Amend. 14.

5. Criminal Law 🔑984

Where defendant while under the influence of intoxicants drove his automobile at a grossly excessive speed and killed six persons, contention that the killing of such persons was only one act and did not authorize six accusations and convictions of manslaughter could not be sustained, and hence defendant was properly sentenced to one year in jail for each offense. West's Ann.Pen.Code, § 19a.

6. Criminal Law 🔑1208(3)

The statute respecting confinement on conviction of misdemeanor means conviction of "a" misdemeanor and is not intended to limit imprisonment in county jail to a period of one year where several misdemeanors have been committed and sentences run consecutively. West's Ann.Pen. Code, § 19a.

7. Criminal Law ⚿829(1)

Defendant's proffered instructions which were repetitious of instructions the court actually read to the jury were properly refused.

8. Criminal Law ⚿814(1)

An instruction which would have had jury directed to ignore publicity the case had received from publicity channels and be solely guided by the evidence the jury heard in the courtroom was properly refused, where there was no showing that jury had read or heard stories from other sources, or that there was any need for the instruction, and where in addition the court told the jury they must determine the facts from the evidence produced before them.

◆

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted under six counts of involuntary manslaughter. Dissatisfied with the verdict and the sentence, he seeks a reversal of the judgment on the grounds of insufficiency of the evidence, errors in refusing instructions, errors in rulings at the trial and excess of penalty.

Evidence Sufficient

Driving a two-toned 1955 automobile, appellant left his office on North Main Street, Los Angeles, at 8:25 p. m. on September 26, 1955, headed for Imperial Valley. After 8:30, just east of Soto Street on the San Bernardino Freeway going eastward, he cut in front of the witness Jeffrey who was going at 55 miles per hour in the center lane. Having passed a car in the third or inner lane, appellant returned to it and his left front wheel brushed against the center divider. Proceeding rapidly, he swerved into the center lane again to circumvent another car and when he returned to the third lane he brushed the center divider again. Appellant passed the witness Crook while moving at about 85 miles per hour in the center lane, and passed out of sight, but as Mr. Crook rounded the curve he saw something go over the center divider in much dust and smoke, out of which came a car whose driver fell out dead while still in the westbound side of the boulevard. Mrs. Hallstrom parked on the apron when she observed appellant's car overtaking her, speeding and swerving. She saw him twice sideswipe a station wagon, and on the second swipe saw him take it "across the divider," filling the air with smoke, sparks, dust and debris. The station wagon was driven by one Robert Golden. He, his wife and three children were killed.

David Hearn, returning to Los Angeles from Phoenix, entered the freeway at Rosemead. His car was one of the four in the accident. He suffered a broken wrist, injured knee, contusions and bruises. His wife received a broken ankle, a severed tendon, a concussion and cuts on the face; their daughter's arm was broken, her face and arms cut; their five-year-old son received a broken arm.

Appellant's machine came to a standstill four feet from the curb on the *westbound* lanes. When the witness Jeffrey arrived, he approached appellant and called to him to stop, as the latter walked away saying he was going to see his brother. He could not explain the blood on his face but merely said: "I don't know how this happened. They stopped suddenly and I had to drive over the divider." Mr. Jeffrey returned appellant to the officers.

William L. Spackler, age 24, had been driving on the freeway toward Los Angeles when his ivory-colored sedan apparently collided with the Golden car from across the center divider. His body was seen by the witness Crook when it fell from his car. He had died from a two-inch wound in the neck which severed the jugular vein and carotid artery; a hemorrhage due to rupture of the spleen and liver; also he suffered fractures of the thigh bone and both collar bones, an evulsion of the left ear, five broken ribs, a collapsed lung, a pint of blood in pleural and peritoneal cavities. Near Spackler was the Golden family, except the body of Mrs. Golden which lay on the floor of her station wagon.

Officers Sillings and Miller perceived the accident at 8:47 p. m.; parked their patrol car; saw defendant with Jeffrey; looked at the horrible results of the accident; radioed for patrol units and ambulances. When they returned to the spot where they had left appellant, he had departed. He was walking up the shoulder of the eastbound lane, 25 feet away from the paved highway. Officer Miller ordered him to occupy the rear seat in the patrol car. Appellant produced his driver's licenses of California and New Mexico. The odor of alcohol was prevalent. Sillings was of the opinion that appellant was under the influence of alcohol. He had no brother in that vicinity.

The officers scanned the premises in search of evidence of reckless driving. Officer Agatha found a single skid mark from one wheel, 141 feet long in the third lane going west. It veered slightly to the left. The highway divider, he found, is a raised barrier six inches high and ten feet wide dividing the freeway. Appellant told Agatha he was involved in the accident and pointed to his own machine across the freeway and said he was not sure what caused the accident; that he had had a couple of drinks at his office prior to leaving.

The proof was that it was not raining; the streets were dry; the weather clear, visibility good. Officer Agatha testified that there were lights enough to illuminate the roadway "so everything can be seen clearly"; that the right rear wheel of Golden's station wagon was flat and there was expert proof that the break of the tire resulted from external force.

After the officers observed the strong odor of alcohol, they asked appellant to take the sobriety test. He willingly complied, but his responses were unsatisfactory. He pointed out to them his own car and stated that he was on the way to Albuquerque. When asked whether he knew that his automobile was in the westbound side of the freeway, appellant did not know. He said he had left his office; entered the freeway headed east; followed a group of cars; somebody hit him in the rear; he could not stop but swung to the left.

Officers Winkelman and Weimer visited with appellant and took him to the Angelus Emergency Hospital. He was moving his neck around and rubbing it. He told them he had had two Scotch and Sodas in a bar on Main Street near his office in Los Angeles. They advised him that in view of a definite alcoholic odor on his breath, it might be to his advantage to have a blood alcohol test to determine his blood's alcoholic content. By reason of the overcrowded condition at the Angelus, they took appellant to the Beverly Hospital. As they drove along, appellant repeated his statement about having imbibed two Scotch and Sodas at a bar on Main Street and remarked that they were at that time two blocks from the bar and would pass it. Officer Winkelman testified that as he spoke they were seven miles from Main Street, Los Angeles.

At the Beverly Hospital, Dr. Goff removed blood from appellant's arm at 11:30 p. m. It was analyzed by DeLoss R. Paul, a biochemist, for the presence of ethanol. It contained 0.180 of one per cent ethyl alcohol by weight volume. Mr. Paul testified that when a person's blood contains above 0.150 per cent alcohol, he is under its influence and could *not* "operate an automobile as an ordinarily prudent and cautious person." In cross examination, he said, by the "time anyone has a definite concentration in the blood, all people will react the same."

In August 1955 appellant's reflexes had been normal. On October 25, 1955, one month after the accident, he was treated for back strain and numerous contusions.

Appellant denied practically all the substantial testimony offered by the People; testified that after he had driven onto the freeway, he stayed in the center lane; traveled around fifty or 55 miles per hour; did not drive next to the divider, was in the center lane, the car to his left as he went into the turn turned abruptly in front of appellant, he slammed on his brakes; was hit in the rear and propelled backward. When the machine swerved, he came forward and fell out right at the center lane, "I mean the eastbound shoulder." He testified that his car never sideswiped any other automobile; did not strike any other vehicle; Jeffrey did not call him; he did not tell Jeffrey he had driven over the divider; he exercised reasonable care at all times.

The evidence proved that neither the rear of appellant's vehicle nor its bumper had been damaged. The left front fender was buckled into a "V" shape. The impact was so severe that the left door would not open. The hood was pushed away from the body and up in the air. The witness Tobey introduced paint scrapings to prove that appellant's machine contacted the car of Hearn, and that the Golden station wagon had collided with Spackler's sedan, and Hearn's car hit the right front door of the Goldens' station wagon.

[1] From the evidence and the inferences arising therefrom, it is abundantly established that appellant, while under the influence of intoxicating liquor, drove his automobile at grossly excessive speed along the freeway eastward from Los Angeles and thereby caused the deaths of six persons. By his exhaustive and able argument, he presents no sound reason for holding that the evidence was insufficient.

[2] Appellant's argument is such a discussion as would have been appropriately addressed to the jury. If it had been, they had rejected it and adopted evidence which justifiably established his guilt. In that event, the judgment will not on that ground be disturbed. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Clark, 106 Cal.App.2d 271, 280, 235 P.2d 56; People v. Freeman, 16 Cal.App.2d 101, 60 P.2d 333; People v. Miller, 112 Cal. App. 535, 537, 297 P. 40.

Appellant contends that where the operator of an automobile is suddenly stricken by an illness and becomes unconscious, he is not liable for a subsequent accident while his vehicle is out of control, citing Moore v. Capital Transit Co., 96 U.S.App.D.C. 335, 226 F.2d 57. By analogy he applies that case to the factual situation claimed by him. He says that he was thrown from his car as the immediate result of its being struck in the rear, that he had no control over the car from the moment it crossed the divider and collided with the other cars while it was driverless, and that he is not responsible for its movements after he was thrown out. Conceding this to be correct from a legal standpoint, it can avail appellant nothing for the jury rejected the factual basis upon which the argument rests.

It is contended that the evidence does not show that at any time while appellant was driving his automobile, it killed any of the persons found dead on the freeway after he had finished his ride. But from the established facts such act and result were properly inferred. The exercise of the deductive processes is as important in weighing evidence as is the act of receiving direct proof of a pertinent act.

[3] Appellant contends that the statute, Vehicle Code § 510, fixing the basic speed law is unconstitutional; that it is too vague, indefinite and uncertain; that it permits every juror to guess for himself "as to whether the speed is greater than is reasonable, or prudent"; that it violates due process of law as provided by Articles I and IV of, and the Fourteenth Amendment to, the Constitution of the United States, citing Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 739, 227 P.2d 449; Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 8 L.Ed. 888, etc. He forgets that the decision as to whether a highway was too rough, too congested, or

too narrow for the accused to drive in a safe manner at his speed in excess of 75 miles per hour is one for the trial court to make based upon the evidence. Every motorist who drives at a rapid speed does so knowing that his judgment will be reviewed by the trial judge, in the event such motorist should be accused of negligent or reckless driving.

[4] Where the evidence justifies it, there is no inhibition upon a court's finding that a motorist drove on a highway at 85 miles an hour; that it was crowded with vehicles or pedestrians or had chuck holes at every step and that a reasonable person would have driven at a speed not in excess of a lesser number of miles per hour. The contention that the basic speed law is unconstitutional cannot be sustained. Ex parte Daniels, 183 Cal. 636, 647, 192 P. 442, 21 A.L.R. 1172; In re Leach, 215 Cal. 536, 544, 12 P.2d 3.

[5] The contention that the killing of six people by only one act does not authorize six accusations and convictions of manslaughter cannot be sustained. People v. Majors, 65 Cal. 138, 3 P. 597; People v. Defoor, 100 Cal. 150, 34 P. 642; People v. Lagomarsino, 97 Cal.App.2d 92, 217 P.2d 124; People v. Holman, 72 Cal.App.2d 75, 100, 164 P.2d 297; Fricke's California Criminal Law, Sixth Edition, p. 389; 20 A.L.R. 341; 113 A.L.R. 222. In the Holman case, supra, after the defendant had set fire to a hotel and 22 people burned to death, he was properly convicted of homicide as to all 22. In the Lagomarsino case, supra, where the defendant robbed many people, he was properly convicted of robbery for each victim of his crime.

[6] It follows, therefore, that contrary to appellant's contention, he was correctly sentenced to one year in jail for each offense. Section 19a was not intended to limit imprisonment in the county jail to a period of one year where several misdemeanors have been committed and the sentences run consecutively. People v. Carr, 6 Cal.2d 227, 228, 57 P.2d 489; see General Casualty Co. v. Justice's Court, 41 Cal.App.2d 784, 788, 107 P.2d 663. "Conviction of misdemeanor" as used in section 19a, Penal Code, means: conviction of *a* misdemeanor.

[7, 8] The court properly rejected seven of appellant's proffered instructions for the reason that they were repetitious of instructions which the court actually read to the jury. By his eighth rejected instruction he would have had the jury directed to ignore the publicity the case had received from the newspapers, radio and other news-casting agencies but to be solely guided by the evidence they had heard in the court room. The court properly refused to read such instruction. No showing had been made that the jury had read or heard stories from other sources or that there was any reason to suspect they had, or that there was any other need for the instruction. Besides, the court told the jury that they must determine the facts from the evidence produced before them.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

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150 Cal.App.2d 230

Dorothy D. TALIAFERRO, Plaintiff and Respondent,

v.

Eugene A. TALIAFERRO, Defendant and Appellant.

Civ. 17185.

District Court of Appeal, First District, Division 2, California.

April 18, 1957.

Divorce proceeding. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered order setting aside final decree of divorce, and husband appealed. The District Court of Appeal, Dooling, J., held that, where wife secured interlocutory divorce decree in prior divorce action and final divorce decree in subsequent action, final decree entered in the subsequent action superseded the interlocutory decree in the prior action and rendered such interlocutory decree functus officio, and, therefore, final decree which husband had entered in prior action nunc pro tunc as of date prior to final decree in subsequent action was properly set aside.

Order affirmed.

1. Divorce ⚿165(3)

Where wife secured interlocutory divorce decree in prior divorce action and final divorce decree in subsequent action, final decree entered in the subsequent action superseded the interlocutory decree in the prior action and rendered such interlocutory decree functus officio, and, therefore, final decree which husband had entered in prior action nunc pro tunc as of date prior to final decree in subsequent action was properly set aside.

2. Judgment ⚿543

Where same cause of action has been twice litigated by the parties, the later judgment is conclusive.

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E. A. Taliaferro, in pro. per.

Frisbie & Hoogs, Berkeley, for respondent.

DOOLING, Justice.

This is an appeal from an order setting aside a final decree of divorce.

Appellant and respondent were married in 1927. On July 7, 1932, respondent secured an interlocutory decree of divorce from appellant in an action filed in the City and County of San Francisco (hereinafter called the San Francisco action). No final decree was entered in this action until December 20, 1954, when appellant without notice to respondent filed the necessary affidavit to secure the entry of a final decree of divorce upon the interlocutory decree of July 7, 1932, and a final decree of divorce was entered thereon *nunc pro tunc* as of July 8, 1933. Thereafter respondent moved to set this final decree aside and the court granted her motion. It is from this order that the appeal is taken.

In the meantime on September 7, 1943, respondent had filed a second action for divorce against appellant in Contra Costa County (hereinafter called the Contra Costa action). Appellant and respondent just prior to the filing of this action entered into a property settlement agreement. An interlocutory decree was granted to respondent in this action and thereafter a final decree of divorce was entered therein in January 1945.

[1, 2] While appellant presents several points for reversal of the order setting aside the final decree in the San Francisco action he is in no position to urge them in the face of the final decree of divorce in the Contra Costa action. When a final decree of divorce was entered in the Contra Costa action it became a binding adjudication of the rights of the parties. That judgment superseded the interlocutory decree of divorce in the San Francisco action under the settled rule that where the same cause of action has been twice litigated by the parties the later judgment is conclusive. Standard Oil Co. of California v. John P. Mills Organization, 3 Cal.2d 128, 139, 43 P.2d 797; Wood v. Pendola, 1 Cal.2d 435, 439, 35 P.2d 526; California Bank v. Traeger, 215 Cal. 346, 351, 10 P.2d 51; Perkins v. Benguet Consol. Min. Co., 55 Cal.App.2d 720, 744, 132 P.2d 70, certiorari denied 319 U.S. 774, 63 S.Ct. 1435, 87 L.Ed. 1721.

When the existence of the final judgment in the Contra Costa action was called to the attention of the San Francisco superior court for the first time on the motion to set aside the final decree procured by appellant in the San Francisco action the court properly entered the order here appealed from since the rights of the parties had been adjudicated by the final decree in the Contra Costa action, and the interlocutory decree in the San Francisco action had thereby been rendered *functus officio.*

Order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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150 Cal.App.2d 281

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Cohoda Danny B. WADE, Defendant and Appellant.
Cr. 5762.

District Court of Appeal, Second District, Division 2, California.
April 18, 1957.

Prosecution on three counts of petty theft with prior conviction of a felony. The Superior Court, Los Angeles County, John G. Barnes, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Moore, P. J., held that evidence sustained conviction.

Affirmed.

1. Larceny 🔑60

In prosecution on three counts of petty theft, testimony of two women of ownership of two purses containing money allegedly stolen was sufficient to warrant implied finding that such money belonged to them.

2. Criminal Law 🔑562

In a criminal prosecution, the law merely requires production of material and substantial evidence in proof of a charge.

3. Larceny 🔑55

Evidence sustained convictions on three counts of petty theft. West's Ann.Pen. Code, § 667.

4. Criminal Law 🔑322

In the absence of evidence that officers who searched apartment with defendant had no search warrant, it would be presumed that they were armed with such warrant.

5. Judges 🔑53

Where defendant in a criminal proceeding did not promptly file an affidavit of prejudice after a remark of trial judge allegedly showing prejudice, such objection would be deemed waived. West's Ann.Code Civ.Proc., § 170, subd. 5.

6. Judges 🔑51(3)

An affidavit of prejudice must state the facts showing that prejudice existed in mind of trial judge. West's Ann.Code Civ.Proc., § 170, subd. 5.

7. Judges 🔑51(1)

In order to take advantage of statute providing for the filing of an affidavit of prejudice, the party's affidavit must be filed so that the judge might file his answer thereto to the end that another judge may try the disqualification upon the proofs presented. West's Ann.Code Civ.Proc., § 170, subd. 5.

8. Judges 🔑51(4)

In prosecution on three counts of petty theft with prior conviction of felony, nothing appeared in the record to indicate any prejudice on part of trial judge.

Cohoda Danny B. Wade, in pro. per.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant has appealed a judgment convicting him of three counts of "Petty Theft with Prior Conviction of a Felony, to wit, Attempted Grand Larceny, Second Degree" in violation of section 667 of the Penal Code. The same party appealed another judgment which has been affirmed this day. People v. Wade, Cal.App., 309 P.2d 843.

Appellant was accused of three separate felonies, to wit, petty theft with a prior felony conviction. The losses sustained by the victims were $53, $19, and $1. With each charge it was alleged that prior thereto he had been convicted of attempted larceny and had served a term in prison in New York. Despite his motion under section 995, the information was in all respects valid. In bringing the judgment to this court, he is confronted with some salutary rules that apply to all appeals from convictions of crime, laid down in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 780, and in prior and subsequent decisions. "It must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." See People v. Perkins, 8 Cal.2d 502, 510, 66 P.2d 631; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821; People v. Borrego, 211 Cal. 759, 765, 297 P. 17; People v. Arenas, 128 Cal.App.2d 594, 600, 275 P.2d 811.

[1-3] The evidence was abundant. Exhibit 5 was the purse of Miss Contreras. She recognized it as her own. Exhibit 6 was the purse of Miss Olsen. She had owned it over a year when it disappeared. The testimony of the two women of their ownership of the two purses was sufficient to warrant the implied finding that the merchandise was theirs, People v. Smallfield, 131 Cal.App.2d 324, 325, 280 P.2d 497, and their testimony that they did not give anyone consent to remove the items from their possession was not disputed. As to appellant's contention that certain purses were not sufficiently identified as the property of the complaining witnesses, the law merely requires the production of material and substantial evidence in proof of the charge. People v. Parry, 105 Cal.App.2d 319, 323, 232 P.2d 899. Miss Contreras saw appellant at the place where she worked (Division of Highways) and soon thereafter observed that her purse was gone. Miss Olsen's testimony was identical. The witness Bateman testified that he took a camera to room 1343-C in the Federal Building. He gave a dollar bill to Mr. Fuller, an internal revenue inspector, who inserted it in a wallet which was placed in a purse in a desk. The purse was tied to a string which was connected with a microswitch; it was connected to a cord which operated the camera. The camera was set for the purpose of detecting some unauthorized person who might enter the desk in room 1343-C. Bateman watched the latter room from room 1343-A, twelve feet from room 1343-C. The flash went off and at once appellant ran speedily out of the room in view of Mr. Bateman. The latter had given no one permission to take the dollar, but it had disappeared. Officer Thor, having obtained a photograph of appellant, took him into custody and drove him to the home of Miss Green, girl friend of appellant. She gave the officer a large number of purses including the purses of Misses Contreras and Olsen. (Exhibits 5 and 6.) Appellant was there and stated that he had purchased both articles and had given them to Miss Green. He admitted to the officer that he had been in the State Highway Department Administration Building but denied that he had ever been in the Federal Building or the Capitol Records Building. As Officer Thor and appellant made their way to the county jail, they passed the Sheriff's Administrative Facilities, and appellant asked the officer to look through a window into a room and see a purse sitting on a desk. Thereupon he said to Officer Thor: "Do you see how easy it is? Do you see how easy it is? Now, do you blame me?"

The foregoing testimony is sufficient, coming from living witnesses in the courtroom, to warrant the finding that appellant stole the purses and the dollar bill.

Illegal Search and Seizure

[4] Appellant invokes the doctrine of illegal search and seizure against an imaginary condition. There is no evidence that

the officers (Thor and Sergeant Williams) who called at Miss Green's apartment with appellant had no search warrant. On the contrary, in the absence of such evidence, it must be presumed that they were armed with such warrant. Hatjis v. Superior Court, 144 Cal.App.2d 426, 301 P.2d 44. Neither was there any evidence or fact from which it might be inferred, that Miss Green's abode was appellant's residence. On arrival there, Miss Green admitted the officers and appellant and she freely presented the purses to the officers. No claim was made at the trial that the apartment was appellant's residence and when the officer referred to it as Miss Green's he was not corrected by appellant. Such proof reasonably warranted a finding that it was Miss Green's apartment.

Trial Judge Prejudiced

[5–8] Appellant does not show diligence with reference to the matter of the alleged statement of the trial judge to the effect that he had said to a public defender in the course of respondent's presenting its case, that he had already decided appellant was guilty. If such fact had occurred, it was appellant's duty at once to file an affidavit of prejudice. Code Civ.Proc. § 170(5). Also, an affidavit of prejudice must state the facts showing that prejudice existed in the mind of the judge. People v. Darby, 114 Cal.App.2d 412, 438, 250 P.2d 743. In order to take advantage of section 170(5), supra, a party's affidavit must be filed so that the judge may file his answer thereto to the end that another judge may try the disqualification upon the proofs presented. Nothing appears in the record to indicate any prejudice. The trial judge was kind and attentive and "strongly" urged appellant at the commencement of the trial to accept the services of a lawyer, *gratis.* The statement of the judge at the conclusion of the trial cannot be evidence of prejudice at the commencement of the trial. He had heard the evidence of the People and had observed the behavior of appellant during the trial, had actually found him guilty, and had considered the report of the probation officer. It was the judge's duty at that time to draw such conclusions about appellant's character as may have been justified by the record.

The judgment is affirmed.

FOX and ASHBURN, JJ., concur.

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150 Cal.App.2d 286

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Cohoda Danny WADE, Defendant and Appellant.

Cr. 5824.

District Court of Appeal, Second District, Division 2, California.
April 18, 1957.

Prosecution for receiving stolen property, burglary, and grand theft with a prior conviction and petty theft with a prior conviction. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered judgment of conviction, and, after revocation of defendant's parole, sentenced him to imprisonment, and he appealed. The District Court of Appeal, Moore, P. J., held that where defendant pleaded guilty to certain charges, and made no effort to revoke such plea, there was no basis for interference with court's judgment of conviction.

Judgment affirmed.

Criminal Law 🔑273

Where defendant pleaded guilty to certain charges, and made no effort to revoke such plea, there was no basis for interference with court's judgment of conviction. West's Ann.Pen.Code, § 496.

Cohoda Danny Wade in pro. per.

Edmund G. Brown, Atty. Gen., Lynn Henry Johnson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused by amended information in five counts charging: Count 1, violation of section 496, Penal Code, receiving stolen property; Count 2, burglary; Count 3, grand theft with a prior conviction in New York of attempted grand larceny and of having served a term in the State Prison; Counts 4, 5 and 6, petty theft with a prior conviction in New York of a felony, to wit, attempted grand larceny, second degree, for which he allegedly had served a term therefor in the state prison.

December 7, 1954, he pleaded guilty to Count 1 including the alleged prior conviction of attempted grand larceny. Sentence was suspended. He was given probation for a period of five years with conditions attached. On June 29, 1956, when he was convicted of having committed three petty thefts, his probation was revoked. The other counts of the information having been dismissed, he was thereupon sentenced to imprisonment in the State Prison for the term prescribed by law. He appealed from the judgments convicting him of the three petty thefts, Cal.App., 309 P.2d 841, and filed his opening brief in the instant action. Just what appellant seeks in either appeal is not wholly clear.

To the charge of having received stolen property, he pleaded guilty in open court. He makes no effort to revoke that plea. It was a part of the case when the judge suspended the execution of appellant's sentence. Not only did he declare his guilt of having violated section 496, but he pleaded guilty also to a prior conviction in the Court of General Sessions of the State of New York of having attempted grand larceny, a felony in that state, and to having served a term in her state prison. There is no conceivable basis for interfering with such a judgment.

After his probation had been revoked in this action, he declined the services of counsel in the trial court for further proceeding and did not ask for the appointment of defense counsel on this appeal. The appeal is inane.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

Grace Marie VATER, Plaintiff and Appellant,

v.

COUNTY OF GLENN, a political subdivision of the State of California; Glenn-Colusa Irrigation District, a corporation, Defendants,

Glenn-Colusa Irrigation District, a corporation, Respondent.*

Civ. 8988.

District Court of Appeal, Third District, California.

April 12, 1957.

Hearing Granted June 7, 1957.

Action against county and irrigation district for death of occupants of automobile which fell from bridge spanning main canal of irrigation district. The Superior Court, Glenn County, W. T. Belieu and Curtiss E. Wetter, JJ., rendered judgment adverse to plaintiff, and she appealed. The District Court of Appeal, Warne, J. pro tem., held that the doctrine of sovereign immunity applies even where personal injuries result from creation of nuisance by sovereign acting in governmental capacity, and held that neither Water Code section headed "Liability for damage resulting from operation of district or from negligence or misconduct of officers or employees," nor any of the seven following sections was intended to impose any new liability upon irrigation district, acting in governmental capacity, to suit sounding in tort.

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* Opinion vacated 323 P.2d 85.

Affirmed.

1. Eminent Domain ⚷266

Wrongful death action against county irrigation district was not one for "property damage", maintainable on theory of a "taking", within meaning of constitution.

See publication Words and Phrases, for other judicial constructions and definitions of "Property Damage".

2. States ⚷191(1.9)

Doctrine of sovereign immunity applies even where personal injury or death results from creation or maintenance of nuisance by sovereign acting in governmental capacity.

3. Waters and Water Courses ⚷228¾

Liability provisions of the Water Code were not intended to impose any new liability upon irrigation district, acting in governmental capacity, to suit sounding in tort. West's Ann.Water Code, §§ 22725–22732.

◆

Goldstein, Barceloux and Goldstein, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Chico, for appellant.

Geis & Byrd, Willows, for respondent Glenn-Colusa Irrigation District.

WARNE, Justice pro tem.

Plaintiff brought an action against the County of Glenn and the Glenn-Colusa Irrigation District for damages for the alleged wrongful death of her husband and son, who were killed when the car in which they were riding fell from a bridge spanning the main canal of the irrigation district. Plaintiff alleges that the bridge was built and maintained without erecting proper warning signals, lights or barriers to protect travelers from falling into the canal. The second amended complaint also alleges that the bridge was built in 1910 either by the irrigation district or its predecessors, and that its construction and maintenance constituted a dangerous and defective condition and a nuisance per se. It is alleged that the bridge crosses the canal at an angle to the road, and that the change of direction is not apparent until one is about to cross the bridge. The charge is also made that if the bridge was not erected by the defendant irrigation district then said defendant was negligent in not correcting said dangerous and defective condition.

A demurrer by the defendant Glenn-Colusa Irrigation District to this complaint was sustained and judgment in favor of the district was entered.

Plaintiff then made a motion to vacate the judgment on the ground of mistake, inadvertence, surprise, and excusable neglect. The motion was denied without prejudice, and plaintiff was allowed ten days to file a third amended complaint or to state whether she would rely on her second amended complaint. Plaintiff elected to file a proposed third amended complaint. The allegations of this complaint are substantially the same as the second amended complaint with the exception that it is therein alleged that said irrigation district or its predecessors constructed said bridge across the main canal connecting the northerly and southerly segments of its private road, and that said private road was negligently constructed so that it appears to be an extension of County Road R, so that a traveler would think that he was still on the county road, and that said bridge on said road constituted a dangerous condition and a nuisance per se.

The trial court denied the motion to vacate said judgment. Plaintiff appeals from the order sustaining defendant Glenn-Colusa Irrigation District's demurrer to her second amended complaint, without leave to amend; from the judgment entered thereon in favor of said irrigation district; and from the order denying her motion to vacate and set aside said judgment.

[1] Appellant contends that the doctrine of sovereign immunity has no application to personal injuries resulting from the creation of a nuisance and in support thereof cites the case of Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379, in an attempt to show that a wrongful death action is one for property damage. Appellant's theory of liability is expressly refuted in Brandenburg v. Los Angeles County Flood Control District, 45 Cal.App.2d 306, 114 P.2d 14, wherein the parents of a minor child contended that they had a cause of action against a state agency for the wrongful death of their minor child under the express authority of Article 1, Section 14, of the State Constitution. The Brandenburg case decided that the plaintiff's minor son, for whose death recovery was sought, was not "property" of which there was a taking within the meaning of the Constitution, and that the state, therefore, had not consented to being sued for the negligence of its agents therein. Clement v. State Reclamation Board, 35 Cal.2d 628, 645, 220 P.2d 897. The Brandenburg case, supra, was also cited with approval in Barlow v. Los Angeles County Flood Control District, 96 Cal.App.2d 979, 982, 216 P.2d 903, 905, where the court stated:

> "Defendant Flood Control District is not one of the public corporations made liable by the statute for injuries or death due to the dangerous or defective condition of its property, hence there was no error in the order sustaining the demurrer of the district without leave to amend."

[2] Appellant argues that the doctrine of sovereign immunity has no application to personal injuries or death resulting from the creation or maintenance of a nuisance by the sovereign power. In support thereof, she cites cases from other jurisdictions so holding. See Annotation, 75 A.L.R. 1196–1199. We do not believe that the rule as stated in those cases applies in California since this state has on several occasions through its courts ruled that an irrigation district or other sovereign power and public agency, when acting in a governmental capacity, is immune from causes of action sounding in tort. Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal.App. 234, 212 P. 706; Nissen v. Cordua Irrigation District, 204 Cal. 542, 269 P. 171; Morrison v. Smith Bros., Inc., 211 Cal. 36, 40, 293 P. 53; Talley v. Northern San Diego County Hospital District, 41 Cal.2d 33, 39, 40, 257 P.2d 22. Glenn-Colusa Irrigation District is a governmental agency.

Appellant in further support of her position that the doctrine of sovereign immunity has no application to the maintenance of a nuisance by the sovereign when the sovereign is acting in a governmental capacity cites the following cases: Bloom v. City and County of San Francisco, 64 Cal. 503, 3 P. 129; Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Davie v. Board of Regents, 66 Cal.App. 693, 227 P. 243; and Madison v. City and County of San Francisco, 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141. These cases were not decided upon the issue of nuisance.

The Bloom case, supra, was based upon a cause of action against the City and County Hospital of San Francisco for conducting refuse over land of the plaintiff through a trough, which, being defective and rotten, burst and discharged the contents over plaintiff's premises. The complaint alleged that though often notified through its Board of Supervisors, the defendant neglected and refused to abate the nuisance, and that by reason thereof plaintiff and his son became sick and suffered pain and expense and loss of time, and they demanded damages. The jury brought in a general verdict in favor of plaintiff for $1,800. The Supreme Court sustained the judgment on the ground that "the city and county of San Francisco had such *proprietorship* of the city and county hospital as rendered it liable for damages in the case as presented in the transcript." (Emphasis added.)

While the "nuisance in the Bloom case also arose from negligent operations," the case "was not decided on the ground of governmental nuisance. It was expressly based on the city's 'proprietorship.'" Beard v. City and County of San Francisco, 79 Cal.App.2d 753, 756–757, 180 P.2d 744, 746; see also Chafor v. City of Long Beach, 174 Cal. 478, 487, 163 P. 670, L.R.A.1917E, 685.

The case of Perkins v. Blauth, supra, next cited by appellant, was clearly decided upon the theory of inverse condemnation and not upon any theory of liability for nuisance in and of itself. As stated by the court at page 789 of 163 Cal., at page 53 of 127 P.:

> "Wherever the injury complained of is the taking or damaging of private property for public use without compensation then under the guarantee of the federal constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. Amendment Const.U.S., art. 5."

We find no similar factual case in the California reported cases to support appellant's contention.

Mr. Prosser, in his work on Torts at page 779, in treating the subject of municipal immunities, states:

> "One anomaly is the generally accepted view that the municipality is liable if it can be found to have created or maintained a nuisance, even though it be in the course of an otherwise 'governmental' function. The origin of this seems to be found in the idea that the creation of a private nuisance amounted to a taking of land without compensation, or that the city, as a landowner, was necessarily a proprietor, and subject to the responsibilities of one toward other landowners. If this was the explanation, it was soon lost to sight when the principle was extended to public nuisances where neither consideration is involved. Since liability for nuisance rests in many cases upon nothing more than negligence, for which in theory the municipality is not liable, the result has been a rather hopeless attempt to distinguish between the two, which has added confusion to the law of both nuisance and municipal corporations. It seems reasonable to say that there is no sound reason behind the distinction itself, and that resort to the more or less undefined concept of nuisance is merely one method by which the courts have retreated from municipal nonliability."

[3] Appellant next contends that the State Legislature by enacting Water Code sections 22725 to 22732 created liability of irrigation districts for dangerous or defective conditions. We do not believe this to be so. We think that counsel for respondents in their brief have correctly interpreted the meaning of the above Water Code sections. A careful examination of the various sections in question clearly reveals that section 22727 does not create liability against an irrigation district itself acting in a governmental capacity, but only as against the officers, employees and agents of said district. Section 22725 is headed "Liability for damage resulting from operation of district or from negligence or misconduct of officers or employees." Section 22726 is headed "Liability for negligence of agent or employee: Notice of inefficiency or incompetency." It is to be noted that both of these sections deal with the subject of liability. Section 22727, the section upon which appellant relies as creating a new tortious liability against an irrigation district is entitled "Claim for damages: Form and filing: Service on secretary." This section is clearly only procedural in nature. Upon examination of the three sections together, it seems clear that the legislature in the first two sections intended to delineate liability and in the third section to implement the liability so delineated. Sections 22728 and 22729 carry forward the legislative intent developed in the previous sections by specifying the necessary content of a claim filed pursuant to section 22727 and make compliance a precedent condition to suit. Upon a careful examination of these Water Code sections, therefore, it is quite apparent that section 22727 upon which appellant relies was never intended to create any new liability, but was enacted as a sim-

ple procedural condition precedent to liability under the prior sections.

The next two following sections of the Water Code not only substantiate the conclusions set forth above, but section 22731 states in so many words the legislative intent as to the possible creation of liability by the preceding sections.

Section 22730 holds that: "When an officer of a district is held liable for any act or omission done or omitted in his official capacity and any judgment is rendered thereon, the district shall pay the judgment without obligation for repayment by the officer."

Section 22731 is entitled "Construction of article as creating liability." It provides: "Nothing in the preceding portion of this article shall be construed as creating any liability except as provided in Section 22730 unless it would have existed regardless of this article."

Appellant makes reference to the fact that section 22732 provides that a district is authorized to carry insurance to cover any liability of the district or its officers. Mention of this section was apparently made to create the inference that the districts themselves are liable for tortious actions while acting in a purely governmental capacity. As we have seen, such is not the case. Section 22732 allows a district to carry insurance to cover any liability of the district for tortious causes of action when the district is acting or operating in a "proprietary" capacity, or to cover a district's liability under a proper cause of action based upon inverse condemnation, or to cover its liability to respond to a judgment against its agents.

In view of the fact that an irrigation district acting in a governmental capacity was immune from suits sounding in tort prior to enactment of these Water Code sections in 1935, and in view of the further fact that Water Code section 22731 states that nothing in this article shall create a new liability except as provided in section 22730, which section only provides for the payment by the district of any judgment obtained against an officer, it seems abundantly clear from the wording of the statute itself that the legislature did not intend by enacting Water Code sections 22725 et seq., to impose any new liability upon irrigation districts acting in a governmental capacity for suits sounding in tort.

Furthermore, in the case of Powers Farms v. Consolidated Irrigation District, 19 Cal.2d 123, 127, 119 P.2d 717, 720, where the court was considering the Irrigation Districts Liability Law (Stats.1935, p. 2250; Deering's Gen.Laws, Vol. 1, p. 1932, act 3886*l*, sec. 2), the predecessor to the sections of the Water Code here in question, it is stated:

> "Section 3 imposes a limited liability on the district by obligating it to pay certain judgments against its officers. This, according to Section 4, is the only new liability created by the act."

Appellant's contention that Water Code sections 22725 et seq., establish a statutory cause of action in tort against an irrigation district while it is operating in a governmental capacity, as well as against its directors, officers and employees, is also refuted by examination of Government Code sections 1950 et seq., and Government Code sections 53050 et seq. Sections 1950 et seq., of the Government Code dealing with liability of public officers present statutes practically identical with those found in Water Code sections 22725 et seq. Sections 53050 et seq., of the Government Code are sections dealing with and relating to the tort liability of local agencies. These sections definitely refer to the liability of the "local agency," and make no mention of anv liability of the directors, officers or employees of said local agency. It seems quite clear upon viewing and construing these three sets of sections together, Water Code sections 22725 et seq., Government Code sections 1950 et seq., and Government Code sections 53050 et seq., that the first two sets of sections relate only to the liability of directors, officers and employees of the two types of sovereigns, while the third section delineates liability of the local agency or sovereignty itself. Certainly, if the legislature had intended to create tort liability against an irrigation district itself while the district was operating in a governmental capacity, it would have used language similar to that expressed in sections 53050 et seq., of the Government Code imposing liability upon the sovereign, rather than using language similar to Government Code sections 1950 et seq., which impose liability upon the officers only.

We conclude that there is no merit in any of appellant's contentions.

The order sustaining defendant Glenn-Colusa Irrigation District's demurrer to plaintiff's second amended complaint, the judgment in favor of said district and the order denying plaintiff's motion to set aside said judgment are all affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 253

SOUTHERN CALIFORNIA GAS COMPANY, a California corporation, Plaintiff and Respondent,

v.

VENTURA PIPE LINE CONSTRUCTION CO., a corporation, Defendant and Appellant.

Civ. 22047.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Rehearing Denied May 13, 1957.

Hearing Denied June 12, 1957.

Action by indemnitee against indemnitor to recover sum paid to grantor of easement for grantor's expenses in defending a wrongful death action against grantor, whom indemnitee had agreed, without indemnitor's knowledge, to protect against all claims for damage to person or property arising from exercise of easement rights. From adverse judgment of the Superior Court, Los Angeles County, Victor R. Hansen, J., the indemnitor appealed. The District Court of Appeal, Ashburn, J., held that the evidence was insufficient to support finding that parties to indemnity agreement contemplated and intended that indemnitor would be required to protect indemnitee against a claim within the scope of the agreement between indemnitee and grantor, but not within scope of the indemnity agreement.

Judgment reversed.

1. Indemnity 🔑6

Indemnity agreement must be construed, in case of ambiguity, most strongly against party who caused uncertainty to exist. West's Ann.Civ.Code, § 1654.

2. Evidence 🔑597

Possibilities or guesses as to possibilities do not rise to dignity of substantial evidence.

3. Appeal and Error 🔑842(8)

Construction of agreement to indemnify plaintiff against certain claims in performance of contract was a matter of law in absence of evidence on subject, and trial court's finding was not binding upon reviewing court.

4. Indemnity 🔑6

Indemnity agreements are to be construed like any other contract with a view to determining actual intention of parties, and no artificial rules of interpretation are applicable.

5. Contracts 🔑168

In absence of substantial parol evidence tending to solve an ambiguity, terms of writing will not be extended by implication.

6. Indemnity 🔑8

An indemnitee cannot recover beyond terms of indemnity contract, and a voluntary payment made by indemnitee, without regard to his legal liability, is not recoverable thereunder.

7. Indemnity 🔑8

Normal implication is that an indemnity agreement does not extend to losses for which indemnitee is not liable as a matter of law.

8. Indemnity ⚷8

Agreement to indemnify against certain losses arising out of performance of contract extends to all claims for damages asserted against indemnitee upon any cause of action asserted to rest upon liability of indemnitee to plaintiff, regardless of whether claim is meritorious.

9. Indemnity ⚷15(7)

In action by indemnitee against indemnitor to recover money paid to grantor of easement for grantor's expenses in defending a wrongful death action against grantor, whom indemnitee had agreed, without knowledge of indemnitor, to protect against all claims from damage to persons or property arising from exercise of easement rights, evidence was insufficient to support finding that parties to indemnity agreement contemplated and intended that indemnitor would be required to indemnify against a claim within scope of the agreement between indemnitee and grantor, but not within scope of indemnity agreement. West's Ann.Civ.Code, § 1648; West's Ann.Labor Code, § 3601.

◆

Sims & Wallbert, Harry E. Sackett and Raoul Francoeur, Los Angeles, for appellant.

Overton, Lyman & Prince, Fred S. Lack, Jr., Ernest E. Johnson, Los Angeles, for respondent.

ASHBURN, Justice.

Action upon written indemnity agreement given to plaintiff by defendant. Judgment for plaintiff in trial court. Defendant appeals, asserting that the liability imposed upon it was outside the scope of its agreement,—a loss against which it had not agreed to protect plaintiff.

General Petroleum Corporation owned certain land which was partially occupied by pipe lines. Plaintiff being desirous of laying a pipe line of its own across this land, General Petroleum granted an easement for that purpose gratis. In the document granting same plaintiff Southern California Gas Company agreed to indemnify the grantor against any and all claims for damage to persons or property arising from exercise of the easement rights and to do so irrespective of any negligence of the grantor.

The Gas Company thereafter hired defendant Ventura Pipe Line Construction Co. to install the said pipe line. In paragraph 15 of their agreement the Construction Company gave an indemnity as follows: "(a) The Contractor [Construction Company] shall indemnify the Company [Gas Company] against, and save and hold it harmless from, all liability and claims, demands, damages and costs of every kind and nature, for injury to or death of any employee or representative of the Contractor and of any Sub-Contractor, resulting from or in any manner arising out of or in connection with the performance of the work under this contract, including, without limitation, injuries to or deaths of said employees or representatives resulting from negligence on the part of the Company or the Company's employees or representatives."

Sub-paragraph (b) provides that the Contractor shall indemnify the Company against claims for injury or death of all other persons (including employees of the Company) or for injury to property including that of the Company, but excluding "from this paragraph injuries to or deaths of persons, and injury, destruction, loss or consequential damage to or of property, resulting solely from negligence on the part of the Company's employees or representatives."

[1] The first quoted indemnity, paragraph (a), extends only to injury or death of an employee or other representative of the Contractor, but does not exclude claims based on negligence of the Company's men. Sub-paragraph (b) extends to all persons other than Contractor's representatives, but excludes claims based on Company's

negligence. This paragraph and its departures from (a) show meticulous care in preparation of the instrument, which was drawn by plaintiff and hence is to be construed in case of ambiguity "most strongly against the party who caused the uncertainty to exist." Civ.Code, § 1654.

It was stipulated "that no employees or representatives of the plaintiff advised defendant of the General Petroleum contract, or its terms other than to refer to the area that defendant was to work in as being a right of way obtained from General Petroleum."

In the progress of the work one Fisher, an employee of the Construction Company, struck and broke an oil and gas line which ignited and caused his death. Mrs. Fisher sued General Petroleum Corporation for wrongful death alleged to be due to its negligence. Neither Gas Company nor Construction Company was made a party. General Petroleum called on Gas Company to defend; it agreed to pay the expenses of the defense. The Gas Company then called on the Construction Company to assume the defense and it declined to do so. The trial resulted in a verdict for plaintiff, which was reversed on appeal, in Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, 267 P.2d 841. The reasonable expense of the defense was $15,259.77, which sum the Gas Company paid to General Petroleum. Demand for reimbursement having been made on Construction Company and rejected, this suit was brought for recovery of same.

The trial judge found: "Plaintiff and defendant herein at the time of, in connection with, and as a part of, the execution of said Ventura Contract contemplated and intended, among other things, that defendant herein would become liable to indemnify plaintiff herein under that portion of said Ventura Contract quoted in paragraph 5 hereof, for any liability of plaintiff herein under a separate contract or otherwise, to indemnify: * * * the said General Petroleum Corporation (then known by defendant herein to be the owner of the property upon which part of the work under said Ventura Contract would be performed) under facts such as found herein." Defendant appeals, claiming that its obligation to protect Gas Company does not extend to contractual indemnity undertaken by Gas Company in favor of a third party, which indemnity agreement was unknown to defendant at the time it gave its own indemnity.

[2, 3] The transcript indicates that the quoted ruling was intended as one of law and so it was in fact. There was no evidence on the subject except the quoted written stipulation and the deposition of defendant's President, Mr. Dolph Lowe, who testified that, although he assumed there was a right-of-way agreement between the Gas Company and General Petroleum Corporation, "I had no idea what their agreement was with General Petroleum." Circumstances relied upon by plaintiff to raise an inference contrary to this testimony were not sufficient for that purpose; they at best raised an inference of a guess on Mr. Lowe's part as to the possibility of an indemnity agreement such as the one which actually existed. Possibilities or guesses as to possibilities do not rise to the dignity of substantial evidence. Robinson v. Board of Retirement, 140 Cal.App.2d 115, 118, 294 P.2d 724. The construction of this agreement is therefore a matter of law and the trial court's finding is not binding upon a court of review. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825.

[4, 5] An indemnity agreement is to be construed like any other contract with a view to determining the actual intention of the parties; no artificial rules of interpretation apply. United Air Lines v. Western Air Lines, 132 Cal.App.2d 308, 315, 282 P.2d 118; Van DerHoof v. Chambon, 121 Cal.App. 118, 131, 8 P.2d 925. Counsel have been unable to cite cases directly in point, and our own research has been equally unrewarding. It is well settled, however, that in the absence of

substantial parol evidence tending to solve an ambiguity, the terms of the writing will not be extended by implication.

[6, 7] "This court held, and the rule is well settled, that an indemnitee cannot recover beyond the terms of the indemnity contract, and that a voluntary payment made by the indemnitee, without regard to its legal liability, is not recoverable thereunder. [Citation.] The general rule is stated in 31 C.J. 430: 'An indemnity against losses does not cover losses for which the indemnitee is not liable to a third person, and for which he improperly pays.'" Missouri Pac. R. Co. v. Sonken-Galamba Corporation, Mo.App., 274 S.W. 930, 932. "It is a general rule governing the construction of contracts that unless a contract is ambiguous, its meaning must be determined from the words used; and courts will not, because a more equitable result might be reached thereby, construe into the contract provisions that are not therein. [Citation.] In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. [Citation.] * * * It seems clear that by such language the agreement to indemnify appellant was specifically limited to acts or omissions by appellee, its agents, servants or employees. Any other construction would require the addition of words not used and add thereto conditions and terms about which the contract is silent." Westinghouse Electric Elevator Co. v. La Salle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E.2d 604, 606, 607. The normal implication is that an indemnity agreement does not extend to losses for which the indemnitee is not liable as a matter of law. (Missouri Pac. R. Co. v. Sonken-Galamba Corporation, supra, 274 S.W. 930, 932; Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co., 126 Wash. 565, 219 P. 9, 10; State ex rel. Macri v. City of Bremerton, 2 Wash.2d 243, 97 P.2d 1066, 1069.

Cited cases dealing with exemption of the indemnitee's own negligence from the scope of the instrument throw little light upon our present problem, except as they indicate a judicial disposition to reject efforts to extend an indemnitor's obligation by implication of unexpected results. See Basin Oil Co. v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 594–595, 271 P.2d 122; also Annotation in 175 A.L.R. at 30.

Section 1648, Civil Code, furnishes a touchstone for this case. It says: "*Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

[8] While it is true that an indemnity such as that given by defendant extends to all claims for damages asserted against the indemnitee upon any cause of action asserted to rest upon liability of the indemnitee to the plaintiff regardless of whether the claim is meritorious, Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 630, 40 P.2d 311; Ritchie v. Anchor Casualty Co., 135 Cal.App.2d 245, 250, 286 P.2d 1000, Fisher's suit did not make any claim of negligence (or other ground of liability) on the part of any one other than General Petroleum.

[9] The objective of contract paragraph 15 seems plain. Customarily employees are covered by Workmen's Compensation and this Contractor had agreed to carry same; the right thereto affords an exclusive remedy against the employer, Labor Code, sec. 3601; Duprey v. Shane, 39 Cal.2d 781, 789–790, 249 P.2d 8; but a right of action against a negligent third party is not affected by the payment of compensation by the employer or his insurer, Labor Code, § 3852. Subparagraph (a) was designed to place the entire responsibility for injury or death of an employee of the Contractor upon that employer and to relieve plaintiff Gas Company of the third party liability in case of its own negligence. Sub-paragraph (b)

which relates to personal and property damage suffered by persons other than Contractor's employees requires that the Gas Company meet its own liability in case of negligence on its part. The concept of legal liability pervades both (a) and (b). Unless the Gas Company itself was negligent it could not be liable to Mrs. Fisher for her husband's death and hence not liable directly or derivatively to General Petroleum Corporation. The only basis for such liability is the contract between those two companies. Protection against liability arising in that manner cannot be implied with respect to an indemnitor who has no knowledge of the basic document which alone could create the obligation. That type of liability on the part of Gas Company is not within the scope of defendant's agreement with the Gas Company, because it was not one of "those things concerning which it appears that the parties intended to contract."

It is reasonable to infer that plaintiff's lawyers in drafting the agreement would have covered the present situation had it desired or expected such protection. Plaintiff knew of its own existing agreement with General Petroleum Corporation but defendant was not informed of it. Had plaintiff wished such protection it should have mentioned the matter to the other contracting party, but it remained silent. If plaintiff had any such undisclosed intention or understanding it should not be heard now to say that defendant should have guessed that such was the case.

Our view is fortified somewhat by the cited case of Bryne v. City of Gloucester, 297 Mass. 156, 8 N.E.2d 170. But there is an important factual departure from this case, for the contract between the indemnitee and the third party involved in the Bryne case was made after the indemnity agreement was executed, whereas it was already in existence in the instant case. However, the Bryne decision does stand for the proposition that an indemnitor is not to be held obligated to protect against unknown and unexpected risks. At page 172 of 8 N.E.2d the court said: "We think the parties, when they made the original contract, must have intended that the contractor should indemnify the city against the legal consequences which in the light of then existing conditions and from the nature of the work might naturally follow from the contractor's acts, but not against new and unexpected liabilities which the city might voluntarily assume by future agreements without the contractor's consent."

We conclude that there is no substantial evidence to support the quoted finding that the parties to this case contemplated and intended that defendant would be required to indemnify plaintiff against a claim such as the one now asserted.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

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150 Cal.App.2d 215

STATE COMPENSATION INSURANCE FUND, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California and Margaret E. Seagrave; Margaret E. Seagrave, Guardian ad litem for William Thomas Seagrave, Jr., Respondents.

Civ. 22225.

District Court of Appeal, Second District, Division 2, California.

April 17, 1957.

The State Compensation Insurance Fund brought a proceeding to review an award of workmen's compensation death benefit made by the Industrial Accident Commission of the State of California. The District Court, Richards, J. pro tem., held that where, since there was a surviving widow of deceased employee, who was a member of State Employees' Retirement System, and no surviving children under 18 years of age, so that widow would receive entire special death benefit under State Employees' Retirement System Act in amount in excess of death benefits under the Workmen's Compensation Act, Industrial Accident Commission was not authorized to make any workmen's compensation death benefit award to 18 year old dependent son of deceased employee, in view of statutory provision that there shall be no award under the Workmen's Compensation Law in event a widow or minor children under 18 years of age will receive an award under the State Employees' Retirement System, which is equal to or greater than award under Workmen's Compensation Law.

Award of death benefit annulled and vacated.

Workmen's Compensation ⚷463

Where, since there was a surviving widow of deceased employee, who was a member of State Employees' Retirement System, and no surviving children under 18 years of age, so that widow would receive entire special death benefit under State Employees' Retirement System Act in excess of death benefits under the Workmen's Compensation Act, Industrial Accident Commission was not authorized to make any workmen's compensation death benefit award to 18 year old dependent son of deceased employee. West's Ann.Gov. Code, §§ 21363, 21364; West's Ann.Labor Code, § 4707.

Donald Gallagher and Loton Wells, San Francisco, for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondents.

RICHARDS, Justice pro tem.

This is a proceeding to review an award of workmen's compensation death benefit made by the respondent Commission to an 18-year-old dependent minor son of a deceased employee.

William Seagrave was employed by the City of Long Beach, a contracting agency of the State Employees' Retirement System, as a school crossing guard and in such capacity was a member of the Police Department of Long Beach and a "local safety member" of the State Employees' Retirement System. The employee suffered a heart attack resulting in his death. After proceedings before it, the Industrial Accident Commission held that the heart attack and death were industrial and that the decedent had left surviving him his widow and 18-year-old son, who were both totally dependent on the deceased employee at the time of his injury and death. The Commission awarded to the widow and son the maximum combined death benefit of $8,750 under the California Workmen's Compensation Law, the benefit to be divided equally between them. The Commission also held that the widow should not be paid any part of the workmen's compensation death benefit in the event she should be entitled to a greater special death benefit under the State Employees' Retirement Law, but that in any event the son should be paid his one-half of the workmen's compensation death benefit regardless of whether the widow became entitled to any special death benefit under the State Employees' Retirement Law.

In a separate proceeding based on a petition filed by the State Employees' Retirement System under Gov.Code sec. 21363, the Commission held that the deceased employee was a "local safety member" of the State Employees' Retirement System at the time of his injury and death within the meaning of that section, and that his injury and death were industrial. It is conceded by the parties to this proceeding that under the foregoing section the widow will be paid a special death benefit in excess of the death benefit under the Workmen's Compensation Law.

The only point raised by the petition is that the award by the Commission of one-half of the death benefit to the 18-year-old dependent minor son was erroneous and that in making said award the Commission exceeded its jurisdiction. The power of the Commission to make the award to the minor son hinges on the interpretation of Labor Code sec. 4707.[1]

Petitioner contends that since there was a surviving widow and no surviving children under 18 years of age, the widow will receive the entire special death benefit under the State Employees' Retirement System Act, Gov.Code, sec. 21364, and therefore under the clear and unambiguous language of Labor Code sec. 4707 the Commission was not authorized to make any workmen's compensation death benefit award, one-half of which the Commission awarded to the dependent son under Labor Code sec. 4707. The respondent Commission, on the other hand, however, contends that since no special death benefit is payable to a child over 18 years of age under the State Employees' Retirement Law, Labor Code sec. 4707 should not be construed as depriving dependent children over 18, or collateral dependents, of workmen's compensation death benefits merely because the surviving wife or children under 18 are otherwise provided for under the provisions of the State Employees' Retirement Law.

Labor Code sec. 4707 clearly provides that there shall be no award under the Workmen's Compensation Law in the event a widow or minor children under 18 years of age will receive an award under the State Employees' Retirement System, which is equal or greater than the award under the compensation law. This section does not merely provide that there shall be no award to the widow but expressly proscribes any award under the Workmen's Compensation Law in the event of an equal or greater award under the Retirement System. The respondent Commission in this matter has in effect made two awards; one award under the Workmen's Compensation Law and a second award under the Retirement System which is in direct contravention of the provisions of section 4707. The unambiguous provisions of that section preclude us from holding that the Legislature intended a dependent minor child over the age of 18 years to receive a death benefit award under the compensation law in the event an award is made to the widow under the Retirement System. If the purpose of the Legislature was in accordance with respondents' contention, it must be accomplished by an appropriate amendment to section 4707 and not by judicial legislation.

The award of respondent Commission with respect to the death benefit awarded to the surviving minor son is annulled and vacated.

MOORE, P. J., and ASHBURN, J., concur.

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[1] "No benefits, except reasonable expenses of burial, not exceeding four hundred dollars ($400) shall be awarded under this division on account of the death of an employee who is a member of the State Employees' Retirement System unless it shall be determined that a special death benefit, as defined in the State Employees' Retirement Law, will not be paid by the State Employees' Retirement System to the widow or children under 18 years of age, of the deceased, on account of said death, but if the total death allowance paid to said widow and children shall be less than the benefit otherwise payable under this division such widow and children shall be entitled, under this division, to the difference." Labor Code, sec. 4707.

150 Cal.App.2d 197

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Othello W. HOOD and (Mrs.) Rickie Lewis, Defendants and Respondents.

Cr. 5832.

District Court of Appeal, Second District, Division 2, California.

April 16, 1957.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, Herbert V. Walker, J., granted defendant's motion to set aside the indictment and the people appealed. The District Court of Appeal, Fox, J., held, inter alia, that where a parole officer received information from one of her parolees that defendant had given such parolee narcotics, and such officer passed information regarding defendant's narcotic activities to defendant's parole officer, who relayed the information to the police department, police were reasonably justified in relying on such source of information even though the information passed through several hands, rather than from informant directly, and therefore, arrest of defendant was legal, and heroin thrown out of a bathroom window by defendant and retrieved by officers was properly received in evidence and established reasonable or probable cause sufficient to sustain his indictment.

Order vacating indictment as to each defendant reversed.

1. Arrest ⚷63(4)

"Reasonable or probable cause" for believing a defendant was committing a public offense, means generally, such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty. West's Ann.Pen.Code, § 995.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

2. Arrest ⚷63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admissible at a trial on issue of guilt, and such information may be hearsay, or may consist of information communicated by a reliable informant.

3. Arrest ⚷63(4)

Criminal Law ⚷395

Indictment and Information ⚷10.2(2)

Where a parole officer received information from one of her parolees that defendant had given such parolee narcotics, and such officer passed information regarding defendant's narcotic activities to defendant's parole officer, who relayed the information to the police department, police were reasonably justified in relying on such source of information even though the information passed through several hands, rather than from informant directly, and therefore, arrest of defendant without a warrant was legal, and heroin thrown out of a bathroom window by defendant and retrieved by officers was properly received in evidence and established reasonable or probable cause sufficient to sustain his indictment.

4. Arrest ⚷63(4)

Where police officers, acting on information received through an informant as to a defendant's unlawful possession of heroin entered a locked bathroom, and found defendant undressed except for boxer-trunks, and found codefendant in such bathroom fully clothed, and had seen a package later discovered to contain heroin thrown out the window, such circumstances justified a reasonable inference that codefendant either had joint dominion and control of the contraband with defendant or that she was aiding and abetting defendant and constituted reasonable or probable cause for her arrest and indictment.

5. Indictment and Information ⚷137(4)

An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

6. Criminal Law ⚷565

Where officer who arrested defendants charged with unlawful possession of heroin testified that he retrieved a package that was thrown out of the window of a room in which defendants were discovered, and marked the same with his initials and a date, such testimony was sufficient to establish the date on which the alleged offense was committed. West's Ann.Health & Safety Code, § 11500.

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Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

Charles H. Matthews, Los Angeles, for respondents.

FOX, Justice.

Defendants were indicted for possession of heroin in violation of section 11500, Health and Safety Code. Their motion under section 995, Penal Code, to set aside the indictment was granted. The People have appealed from that order.

Shortly before the arrest of the defendants, Helen Delores LaVigne, who was a state parole officer, received information from one of her parolees that defendant Hood, who was also a parolee, had given her narcotics and that he was dealing in narcotics. The parolee also gave Miss LaVigne Hood's exact address, his living arrangement, a good description of his car, and where he could be located generally. Miss LaVigne considered that the source of her information was trustworthy because she had received other information which, upon investigation, had proved to be accurate. Miss LaVigne passed this information on to Albert E. Gustin, who was the supervising parole officer of Hood. Mr. Gustin called the Narcotic Detail of the Los Angeles Police Department and gave them the information he had acquired from Miss LaVigne.

With this information, Officer MacGregor, of the Narcotic Division, went to the apartment house where Hood lived, at about 9:30 in the evening. Hood occupied an upstairs apartment. While going upstairs, the officers met Hood's mother. They identified themselves and asked whether Othello Hood was at home; she advised them that he was there, and in the bathroom. After entering the apartment, one of the officers knocked on the bathroom door and inquired, "Is Othello there"? There was no response. The officers, however, heard a sound, such as a screen or window being opened. At that time, one of the officers ran to the bedroom window, which is on the same side of the house as the bathroom; he forced open the screen and stuck his head out of the window. The windows between the bathroom and the bedroom were only about three feet apart. The officer observed an arm coming out of the bathroom window and throwing an object, which landed on a car and bounced off to the sidewalk. The officer ran back to the bathroom door, forced it open, identified himself, and placed defendants under arrest.

The arm that was thrust out of the window appeared to be a man's arm because of its size. When the officer entered the bathroom Hood was standing by the window. The arm that the officer observed at the window looked more like his arm than that of his companion, Mrs. Lewis, whose arm was comparatively thin. Mrs. Lewis was fully clothed, standing by the wash basin. Defendant Hood was completely unclothed except for boxer-trunks which he was wearing.

The officer then retrieved the package which he had observed being thrown from the window. It was found to contain heroin. Hood made a statement to the effect, "I don't see how you saw me throw it."

Defendants make two contentions: (1) that their arrest "was not lawful," and (2) that "the evidence is not sufficient to show that the offense charged was committed within the period of the statute of limitations."

[1, 2] Defendants' position is that their arrest was unlawful on the ground that the officers did not have sufficient information to establish "reasonable or probable cause" for believing that they were committing a public offense. Reasonable or probable cause has been considered in many recent cases. Generally speaking, it means "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty." In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568; People v. Novell, 54 Cal.App.2d 621, 623, 129 P.2d 453; People v. Smith, 141 Cal.App.2d 399, 402, 296 P.2d 913; People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45. "It is settled that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would necessarily be admissible at the trial on the issue of guilt." People v. King, 140 Cal.App.2d 1, 5–6, 294 P.2d 972, 975; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. Such information may be hearsay. People v. Easley, 148 Cal.App.2d 565, 307 P.2d 10. It has frequently been held that "A valid arrest may be made solely by reason of information communicated by a reliable informant." People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064, 1065; People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24; People v. Gonzales, 141 Cal.App.2d 604, 606, 297 P.2d 50; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Soto, supra, 144 Cal.App.2d at page 299, 301 P.2d 45.

The Arrest of Hood

[3] Applying these principles to the case at hand, it is apparent that a sufficient showing was made to establish reasonable or probable cause for the arrest of Hood. Parole Officer LaVigne received information from one of her parolees that Hood had given her narcotics and that he was dealing in the contraband. Her informant also provided his exact address, his living arrangements, a description of his car, and where he ordinarily could be found. Officer LaVigne considered her informant trustworthy because previous information provided by this parolee had proved to be correct. Since Hood was on parole and under the supervision of Parole Officer Gustin, Miss LaVigne passed the information regarding Hood's narcotic activities along to him. Instead of taking Hood into physical custody, as he might properly have done, People v. Denne, 141 Cal.App.2d 499, 297 P.2d 451, Gustin relayed his information to the Narcotic Detail of the Police Department. The police were reasonably justified in relying on this information because it came from an official source, viz., the parole officer who had the suspect under supervision. Defendant, however, would deprecate the reliability of the information because it passed through several hands before it reached Officer MacGregor. The fact that the information did not come from the informant directly to the officer who made the arrest does not prevent reliance on its trustworthiness since it reached him through official channels. The arrest of Hood was therefore legal. Since the arrest of Hood was lawful, the heroin which was thrown out of the bathroom window and retrieved by the officers was properly received in evidence. It was therefore error to set aside the indictment as against Hood. See Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23.

The Arrest of Mrs. Lewis

[4] The arrest of Mrs. Lewis presents a different situation. The officers had no prior information connecting her with narcotics. Just what her relation was to defendant Hood does not appear. However, she was with him, in the restricted space of a bathroom under the unusual circumstance of the door being locked. Hood was undressed except for the boxer-trunks which he was wearing. When the officers knocked on the door neither Mrs. Lewis nor Hood made any response. On the other hand, Hood, who was standing near the window

when the officers entered, had disposed of a package containing heroin by throwing it out of the window. These circumstances justify a reasonable inference that the defendant Lewis either had joint dominion and control of the contraband, People v. Bagley, 133 Cal.App.2d 481, 483, 284 P.2d 36; People v. Cuevas, 131 Cal.App.2d 393, 398, 280 P.2d 831; People v. Lama, 129 Cal.App.2d 391, 393, 276 P.2d 816, or that she was aiding and abetting Hood. Penal Code, sec. 31. On the question of joint possession, the observation of the court in People v. Basco, 121 Cal.App.2d 794, 796, 264 P.2d 88, 89, is here apposite: "A person may be so closely interested in and connected with the unlawful possession of narcotics by another as to furnish support for a finding that there was a joint possession."

[5] The rule with respect to setting aside an indictment is stated in Bompensiero v. Superior Court, 44 Cal.2d 178, 193, 281 P.2d 250, 254: "An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." To the same effect is People v. Van Randall, 140 Cal.App.2d 771, 775, 296 P.2d 68. Applying this principle to the facts and circumstances surrounding the arrest of defendant Lewis, it is clear the officers had reasonable or probable cause to arrest her. It was therefore improper to set aside the indictment.

[6] Defendants' argument that the evidence does not show that the offense was committed within the statutory period is completely answered by the testimony of Officer MacGregor. He testified that he retrieved the package that was thrown out of the window and marked it with his initials and the date, which "date is 8–22–56." This is sufficient to establish the date on which the alleged offense was committed.

The order vacating the indictment as to each defendant is reversed.

MOORE, P. J., and ASHBURN, J., concur.

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150 Cal.App.2d 88

In the Matter of the ESTATE of Ida EVANIS, Deceased.

Laura O. BROOKS, Administratrix of the Estate of Ida Evanis, Deceased, Petitioner and Respondent,

Charles M. Quinn, Margaret Vanderschoot, William W. Quinn, Robert Boro and Laura O. Brooks, Legatees and Respondents,

v.

Yackie EHRHARDT, Lottie Perry, Amelia Hopkins, Ethel Rumsey, Olga Chauvin, Anthony Miller, Elva Miller and Floyd Schwall, Objectors and Appellants.

Civ. 8993.

District Court of Appeal, Third District, California.

April 12, 1957.

Estate proceedings involving controversy over a decree of distribution entered by the Superior Court, Sacramento County, Malcolm C. Glenn, J., from which objectors appealed. The District Court of Appeal, Peek, J., held that where wife conveyed her separate property to her and her husband as joint tenants and at same time husband placed community property that had been in his name alone, in joint tenancy, and husband died, upon wife's death intestate and without issue or spouse, the property which was her original separate property retained its character as such separate property, and funds and realty derived when wife sold such property was properly distributed to her relatives.

Affirmed.

Husband and Wife ⟹274(1)

Where wife conveyed her separate property to her and her husband as joint tenants and at same time husband placed community property which had been in his name alone in joint tenancy, and husband died, upon wife's death intestate and without issue or spouse, the property which was her original separate property retained its character as such, and funds and realty derived when wife sold such property was properly distributed to her relatives. West's Ann.Prob.Code, §§ 225, 229.

William A. White, Sacramento, for appellants.

Mento, Buchler & Littlefield, Sacramento, for respondent.

PEEK, Justice.

The present controversy arises out of a decree of distribution wherein the court determined certain property to be the separate property of the decedent. For the reasons hereinafter stated we hold that, under the circumstances, the decree should be sustained.

John C. and Ida Evanis were married in 1926. At the time of the marriage Ida owned a parcel of real property which is referred to by the parties as the Michigan Bar property. During the marriage John purchased in his name alone a parcel of property referred to by the parties as the Blue Ravine property. On August 3, 1936, Ida conveyed the Michigan Bar property to herself and John as joint tenants, and on the same day John conveyed the community property to himself and Ida as joint tenants. John died on January 4, 1946, intestate and without issue. Following his death Ida sold the Michigan Bar property, purchased another parcel of real property with a portion of the proceeds of that sale and retained the balance. Ida died intestate and without spouse or issue on June 13, 1953. By the decree of distribution, the funds and the real property derived from the proceeds of the sale of the Michigan Bar property were distributed to Ida's relatives. These are the only items involved in this contest.

The appellants, who are the surviving sisters and children of deceased sisters of John, contend that since the trial court found "that the exchange of joint tenancy deeds * * * constituted the consideration therefor," John thereby acquired a joint tenancy interest in the property; that the creation of the joint tenancy operated to change the origin of the title so that the property had its source or origin as the separate property of both spouses. Therefore, they say, such property was distributable in equal shares to them and to Ida's relatives under the provisions of section 229 of the Probate Code.

The respondents, the surviving brother and children of a predeceased brother and sister of Ida, contend that section 229 is inapplicable and therefore the property was distributable to them under the provisions of section 225 of the Probate Code on the ground that the property had its source as Ida's separate property.

No question is raised concerning the finding that the Michigan Bar property was the separate property of Ida or that the Blue Ravine parcel was community property. The sole source of conflict arises out of the finding of "consideration" for the "exchange of joint tenancy deeds." The fact that John took title thereto in his name alone is immaterial. His interest and that of Ida in that parcel were equal in every respect. Merely because they transmuted the character of their holding from community to joint tenancy by execution of the deeds of August 3, it does not follow that John thereby purchased an interest in the separate property of Ida. Actually there was no exchange of joint tenancy deeds. Necessarily, then, a finding that the "exchange of joint tenancy deeds" constituted the consideration therefor, is wholly unsupported by the record, is not a true finding but rather an erroneous conclusion of law wholly contrary to the facts upon which it is purported to have been based. Under such facts and circumstances it would appear that the sole question herein presented comes squarely within the rule enunciated in Re Estate of Abdale, 28 Cal.2d 587, 592, 170 P.2d 918, 922, that the phrase "'was separate property'" as used in section 229, must be "* * * interpreted as referring to the character of the property before it was placed in joint tenancy." Thus section 229 is inapplicable under the record before us and hence the decree of the trial court is proper.

The decree is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

150 Cal.App.2d 377

Application of Nestor A. MICHELENA, for a Writ of Habeas Corpus.

Cr. 5880.

District Court of Appeal, Second District, Division 2, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Habeas corpus proceeding. The District Court of Appeal, Richards, J. pro tem., held that a finding of ability to comply "to a greater extent" with an order requiring payment of specific monthly amounts for support of wife and minor children was not a finding of ability to pay any specific delinquent monthy installment and was so vague, indefinite and uncertain as to lead to conjecture amount, if any, which husband had ability to pay, and was not sufficient finding of ability to comply with court's order to sustain adjudication of contempt.

Petitioner discharged, and his bond exonerated.

1. Husband and Wife ⚷299(4)

An adjudication of contempt of court for failure to comply with support provisions of judgment cannot be sustained in absence of unequivocal finding of ability to comply with court's order.

2. Contempt ⚷63(1)

No presumptions or intendments may be indulged in support of contempt order, and findings and judgment are strictly construed to favor accused.

3. Husband and Wife ⚷299(4)

Finding of ability to comply "to a greater extent" with order requiring payment of specific monthly amounts for support of wife and minor children was not a finding of ability to pay any specific delinquent monthly installment and was so vague, indefinite and uncertain as to lead to conjecture amount, if any, which husband had ability to pay, and was not a sufficient finding of ability to comply with court's order to sustain adjudication of contempt.

Newman & Newman, Los Angeles, and J. H. Morris, Hollywood, for petitioner.

Harold W. Kennedy, County Counsel and Robert C. Lynch, Deputy County Counsel, Los Angeles, for respondent.

Saul Ross, Los Angeles, for Maria J. Michelena.

RICHARDS, Justice pro tem.

On June 25, 1953, in a separate maintenance action in the Los Angeles Superior Court, a judgment for support was entered against the defendant, who is the petitioner herein, directing him, among other things, to pay to the plaintiff the sum of $400 per month for her support and $125 per month for the support of each of two minor children. After a hearing on September 27, 1955, of an order to show cause in re contempt for defendant's failure to comply with the support provisions of the judgment, the court commissioner found that the petitioner was delinquent in the sum of $10,320 as of April 30, 1955, but no finding was made by the commissioner as to defendant's ability to pay the delinquent amount or any definite part thereof and, based on the commissioner's findings, the respondent court found "that the defendant had the ability to comply with said order of court to a greater extent; that the defendant failed to comply with said order of court; and that his failure to comply was wilful"; adjudged him in contempt of court; sentenced him to serve five days in the county jail and suspended the execution of the sentence on condition that he make future payments as they became due. On February 10, 1956, pursuant to a subsequent order to show cause why the suspension of sentence should not be revoked, the respondent court ordered that "So much of the suspension of sentence as amounts to confinement of 3 days in the County Jail is vacated and that portion of the sentence is ordered executed." Thereafter, the court revoked the suspension of two of the five days' sentence; revoked the stay of the sentence and remanded the defendant to the custody of the sheriff to serve five days pursuant to the adjudication of contempt dated February 27, 1955.

[1, 2] The sole question for consideration is whether the court's finding that petitioner "had the ability to comply with said order of court to a greater extent" is sufficiently definite to constitute a finding that petitioner had the ability to pay any or all of the delinquent monthly payments aggregating $10,320. An adjudication of contempt cannot be sustained in the absence of an unequivocal finding of ability to comply with the court's order. In re Cowden, 139 Cal. 244, 73 P. 156; Bailey v. Superior Court, 215 Cal. 548, 552, 11 P.2d 865; In re Lande, 96 Cal.App. 2d 926, 931, 216 P.2d 909; In re McCausland, 130 Cal.App.2d 708, 709, 279 P.2d 820. No presumptions or intendments may be indulged in support of the contempt order and the findings and judgment are strictly construed to favor the accused. Raiden v. Superior Court, 34 Cal.2d 83, 86, 206 P.2d 1081; Ruppe v. Superior Court, 127 Cal.App. 118, 121, 15 P.2d 197; In re Felthoven, 75 Cal.App.2d 465, 470, 171 P.2d 47.

[3] In the instant matter, the finding of ability to comply with the court's order was qualified by the phrase "to a greater extent". This is a relative phrase, and not subject to interpretation with any exactitude. A finding of ability to comply "to a greater extent" with an order requiring payment of specified monthly amounts is not a finding of ability to pay any specific delinquent monthly installment and is so vague, indefinite and uncertain as to leave to conjecture the amount, if any, which the petitioner had the ability to pay and is not a sufficient finding of ability to comply with the court's order to sustain the adjudication of contempt. In re Scroggin, 103 Cal.App.2d 281, 283, 229 P.2d 489.

The writ is granted, the petitioner is discharged and his bond is ordered exonerated.

FOX, Acting P. J., and ASHBURN, J., concur.

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150 Cal.App.2d 431

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Willie LAWTON, Defendant and Appellant.

Cr. 5767.

District Court of Appeal, Second District, Division 1, California.

April 24, 1957.

Hearing Denied June 19, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Louis H. Burke, J., of violating narcotics laws, and he appealed. The District Court of Appeal, Doran, J., held that there was evidence to sustain conviction.

Affirmed.

1. Searches and Seizures ⚷3(1)

Defendant could not successfully complain of unlawful search and seizure where arresting officers had recovered heroin from yard where it had been thrown by defendant.

2. Poisons ⚷9

Conviction for narcotics law violation was sustained by evidence. West's Ann. Health & Safety Code, § 11500.

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Samuel C. McMorris, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged with the violation of Section 11500 of the Health and Safety Code. A prior conviction which was also alleged, was admitted.

As recited in respondent's brief, "On January 10, 1956, Harry Dorrell, a Los Angeles City Police Officer attached to Narcotic Division, in response to information received concerning the appellant, drove to a point from which he could view the area of appellant's automobile, a 1947 Cadillac. Officer Dorrell was aided in his observations by a pair of 7 x 50 binoculars. About noon on January 10, 1956 Officer Dorrell saw appellant, whom he had seen many times before, walk over to a small wall near his automobile, over which there was growing an ice plant. He saw him reach out and lift the plant where it hung on the wall. He then saw him reach beneath the ice plant with his right hand, and when he withdrew it, he saw him pat the ice plant on the top. Officer Dorrell continued his watch until 2 p.m. when he saw the appellant leave in the black Cadillac. He followed the Cadillac for a few blocks and then returned. Underneath the ice plant, where he had seen the appellant place his hand, Dorrell found a small package of tin foil. He opened it and found that it contained eight white paper bindles. He removed one bindle, marked it, and placed it in his wallet. He took the other seven bindles, put them back in the tin foil, sprinkled fluorescent powder on the bindles and on the package, and replaced the package in its original position. The powder Officer Dorrell sprinkled on the bindles and on the package contained a substance which would fluoresce when placed under an ultraviolet light. After replacing the package, Officer Dorrell washed his hands at a service station, called the police station, and returned to his vigil. At 5 p.m., Sgt. Trembly of the Los Angeles City Police Department, Narcotic Division, joined Officer Dorrell and together they watched the vicinity of the ice plant. Officer Dorrell pointed to the particular plant in question and Sgt. Trembly picked it up, exposing the tin foil package. Trembly did not touch it. Following this examination, Officer Dorrell and Sgt. Trembly went directly across the street and lay in the weeds. Officer Dorrell checked his hands with the ultraviolet light and found no traces of powder. At 9:15 p.m. the appellant returned, parked his car about 100 feet north of the ice plant and walked toward the plant. In the car at the time were Oscar Alcorn and Johnetta Mester. When appellant reached the plant, he lifted it, reached beneath it with his left hand, stood up, and walked back toward his car. When appellant reached the driveway, Sgt. Trembly ran across the street yelling, 'Willie, you are under arrest.' Before either Sgt. Trembly or Officer Dorrell could reach him, the appellant made a strong motion with his left hand, 'over his head as if throwing an object, this was in an eastern direction.' The appellant was handcuffed and a fluorescent light was thrown on his hands. Appellant said he could see the powder but could not account for its presence. Officer Dorrell walked to the ice plant and observed that the package was no longer there.

"Between 6:15 p.m., when Sgt. Trembly first saw the package under the ice plant, and 9:15 p.m., when they saw the appellant approach the plant, Officer Dorrell and Sgt. Trembly kept a constant watch on the area. During that time they saw no other person approach the ice plant. Following the arrest of appellant, Officer Dorrell, Sgt. Trembly and other officers who had been called to the scene, searched the area and found, in the back yard of an adjacent house, the package that had been under the ice plant. It was found about 60 feet from the place appellant was standing when he made his throwing motion. Officer Dorrell pointed out the package to appellant, picked it up and examined it. It was in the same condition it was when Officer Dorrell had covered it with fluorescent powder and replaced it under the ice plant. Appellant told the officers, 'It is not a fair way to catch me * * *. You didn't catch me, anything in my person.' The bindles in the package contained heroin."

[1, 2] Appellant contends, "that the conviction herein should be reversed for the following reasons: (I) Evidence obtained as a result of an unreasonable search and seizure was introduced, to the prejudice of defendant's constitutional rights, state and federal. (II) The verdict and judgment are contrary to law and the evidence, in that the evidence was insufficient to sustain a conviction as a matter of law. (III) Judicial error was committed in the introduction (a) of evidence adduced by leading questions; (b) in the denial of pro*ferr*ed evi-

dence of bias of the principal prosecuting witness; (c) and in the admission of inadmissible hearsay in the form of an alleged confession or admissions. (IV) Federal and state requirements of due process were violated, and the principles forbidding self-incrimination in the respective constitutions were violated, by the involuntary recording of statements of defendant, obtained as a result of unreasonable search and seizure and recorded without his consent."

Appellant's contentions as above noted, lack support in the record both as to the law and the facts. There is no evidence of unlawful search and seizure for, as above noted, the officers recovered the so-called bindle in the yard where it had been thrown. Nor does the record support appellant's contention that the, "verdict and judgment are contrary to law and the evidence". The evidence was properly received and is sufficient, as a matter of law, to support the verdict. The record reveals no prejudicial errors with regard to introduction and admission of evidence.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

150 Cal.App.2d 417

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leola MORELAND, Defendant and Appellant.

Cr. 5804.

District Court of Appeal, Second District, Division 1, California.

April 23, 1957.

Defendant was charged with robbery and was convicted of grand theft from a person. The Superior Court, Thomas L. Ambrose, J., rendered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that testimony of complaining witness that defendant stepped up to him and tried to solicit him and that when he said no, she held knife blade against his body, took $16 from his wallet and returned wallet to him and walked away toward hotel where she was later arrested, was not so inherently improbable and unbelievable as to be insufficient to support conviction for grand theft from person.

Affirmed.

Larceny ⚷65

Testimony of complaining witness that defendant stepped up to him and tried to solicit him and that when he said no she held knife blade against his body, took $16 from his wallet and returned wallet to him and walked away toward hotel where she was later arrested, was not so inherently improbable and unbelievable as to be insufficient to support conviction for grand theft from person.

Jefferson & Jefferson, Bernard S. Jefferson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment. As recited in respondent's brief, "In an information filed by the District Attorney of Los Angeles County, appellant was charged with the crime of Robbery, in that she did wilfully, unlawfully, feloniously and by means of force and fear take from the person and immediate presence of George W. Chown Sixteen Dollars ($16) in money. The information also charged appellant with the prior convictions, in the State of Texas, of the crime of Assault to Commit Robbery, a felony, in 1937, and the crime of Robbery, a felony, in 1939.

"Appellant was duly arraigned, entered a plea of Not Guilty and denied the prior convictions as alleged.

"At time of trial all parties joined in waiver of trial by jury. The People's cause was submitted on the transcript of the preliminary hearing. Appellant took the stand and testified in her own behalf. The Court found appellant Guilty of the crime of Grand Theft From the Person, a felony, a lesser and necessarily included offense, and found the allegations of the two prior convictions to be true." * * *

"On the evening of April 27, 1956, Mr. George W. Chown was walking on Ceres Street toward 5th Street in Los Angeles. When he approached the Rock Island Hotel on Ceres Street, the appellant, who had been sitting on a box in the doorway of the hotel, stepped up to him and tried to solicit him. Mr. Chown said 'No', but appellant stepped closer and he felt a scratching below his ribs, whereupon he looked down and saw that the appellant was holding in her left hand a knife blade against his body. Mr. Chown stood still while appellant reached with her right hand into his left hip pocket and withdrew his wallet. Appellant took Sixteen Dollars ($16) from the wallet, returned the wallet to Mr. Chown, and walked off toward the hotel.

"Mr. Chown proceeded to the Police Building, at First and Los Angeles Streets.

"Later that evening appellant was arrested at the front door of the Rock Island Hotel. The next morning she related to investigating Officer Eastmanson that she had been in front of the Rock Island Hotel most of the previous day and had 'turned one trick' that day. She stated that it took place shortly after noon and was her only contact with a white person that day. She denied contacting or seeing Mr. Chown in the afternoon.

"At the trial appellant testified that Mr. Chown was that person with whom she had the 'date', on April 27, 1956."

Appellant contends that the testimony of Mr. Chown, the complaining witness, is inherently improbable and unbelievable, and therefore insufficient to support the judgment.

As pointed out by respondent, "With regard to the prosecution's testimony pointed out in appellant's brief, the most that can be said of it is that perhaps others in the same situation might have reacted in some other manner than did the complaining witness. This is a far cry indeed from testimony 'so obviously and so inherently improbable as to leave the court no recourse without self-stultification except to reverse the judgment'.

"Appellant feels that her contention of inherent improbability of the evidence is supported by the fact that she was convicted of the lesser and included offense of Grand Theft from the Person, rather than the crime of Robbery set forth in the indictment. Appellant's argument is to the effect, that for the court not to find her guilty of robbery it 'had to entirely disbelieve the testimony of the complaining witness as to appellant's use of a knife to take his money and resulting fear on the part of Mr. Chown.' (the complaining witness), and 'having so disbelieved Mr. Chown there is no reasonable basis for the court's finding of the crime of grand theft from the person.'"

Evidently the trial court believed that the element of force and fear, essential for the crime of robbery was not sufficiently proven, but that the evidence presented did warrant and require the conviction of appellant for the lesser and included offense of grand theft from the person.

As contended by respondent, "Thus even if the Court rejected that portion of the testimony regarding the appellant's use of a knife and the resultant fear of the witness, the remainder of the evidence presented was sufficient to support the conclusion of the trial court that appellant was guilty of the crime of Grand Theft from Person."

That the evidence supports the judgment there is no question.

Judgment affirmed.

WHITE, P. J., and FOURT, J., concur.

PACIFIC PIPELINE CONSTRUCTION COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION of the State of California, Defendant and Appellant.

Civ. 21789.

District Court of Appeal, Second District, Division 1, California.

April 16, 1957.

Rehearing Denied May 15, 1957.

See 311 P.2d 85.

Hearing Granted June 12, 1957.

Suit for refund of sales tax, interest and penalties paid under protest. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, White, P. J., held that transfer of some of the machinery and equipment of one corporation to another in exchange for machinery and equipment of transferee corporation pursuant to agreement for reorganization of both corporations and territorial division of business was not exempt from sales tax under West's Ann.Rev. & Tax.Code, § 6367, as an occasional sale as defined in section 6006.5 (a, b).

Judgment reversed.

1. Licenses ⚷15.1(5)

Where transfer of machinery and equipment by one corporation to another engaged in same business in exchange for machinery and equipment of transferee corporation pursuant to agreement for reorganization of both corporations and territorial division of business was made within same 12-month period as four other sales of similar property, such transfer was one of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit and was not exempt from sales tax as an "occasional sale" of property not held or used by seller in course of activity for which he is required to hold a seller's permit. West's Ann.Rev. & Tax.Code, §§ 6006.5(a), 6019, 6051, 6367.

See publication Words and Phrases, for other judicial constructions and definitions of "Occasional Sale".

2. Licenses ⚷15.1(5)

Transfer of machinery and equipment by one corporation to another pursuant to agreement for reorganization of both corporations, regardless of whether real or ultimate ownership was substantially similar after such transfer, was not exempt from sales tax as an "occasional sale", defined as transfer of all or substantially all property held or used in the course of an activity requiring a seller's permit, in absence of finding or evidence that transferor actually liquidated any part of its business or that transfer involved all or substantially all of property held or used by transferor in connection with any activity. West's Ann.Rev. & Tax.Code, §§ 6006.5(b), 6051, 6367.

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Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Dan Kaufmann, James C. Maupin, Deputy Attys. Gen., for appellant.

Thomas A. Wood and Larwill & Wolfe, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant Board of Equalization appeals from a judgment that it "pay to plaintiff, Pacific Pipeline Construction Company, the principal sum of $6,491.78 together with interest", etc. The judgment was rendered in an action by which plaintiff sought to have refunded to it a certain sales tax, interest and penalties paid under protest.

The parties agree that, although other issues were tried in the action, the sole question to be decided on this appeal is whether the transfer by plaintiff corporation on March 14, 1949, to Pacific Pipeline & Engineers, Ltd., a corporation, of machinery and equipment valued in excess of $200,000 was subject to sales tax. The crux of the question, however, is whether the sale made by plaintiff was within the exemption granted by Section 6367 and defined by Section 6006.5 of the Revenue and Taxation Code—the occasional sale exemption.

Upon substantial evidence, the court found:

"That prior to February 24, 1949, plaintiff and another corporation, Engineers, Ltd., jointly owned another California Corporation, Pacific Pipeline and Engineers, Ltd. That prior to February 24, 1949, Pacific Pipeline and Engineers, Ltd., a California corporation was engaged in the pipeline construction business.

"That on February 24, 1949, G. W. Abernathy, Roy Price, Alfred B. Swinerton and Richard Walberg entered into an agreement whereby they effected, or provided for, a reorganization of the Pacific Pipeline and Engineers, Ltd., and of the plaintiff and for a territorial division of 'pipeline business' between said corporations. Reference is made to Plaintiff's Exhibit 15, being a copy of said agreement, for the details thereof. That in pursuance of said agreement and to carry out the proposed plan of reorganization and division of business, said Pacific Pipeline and Engineers, Ltd., and the plaintiff, on March 12, 1949, entered into an agreement for the exchange of certain properties. That under said agreement the plaintiff transferred to said other corporation certain equipment, being personal property, thereafter valued by defendant at $201,230.50, and in return for a valuable consideration consisting of certain property transferred to plaintiff by said other corporation. For the details of said exchange agreement, reference is made to plaintiff's Exhibit 16, being a copy thereof.

"* * * That said transfer of property, as provided for in said exchange agreement, was not a sale of property at retail such as is contemplated by and referred to in Section 6051 of The Revenue and Taxation Code, but was an occasional sale within the meaning of that term as used in Sections 6367 and 6006.5 of the Revenue and Taxation Code, and as contemplated by the pertinent law of California.

* * * * * *

"* * * The distribution of said machinery and equipment was not a taxable transaction and the said tax thereon was unlawful, invalid and paid under protest by plaintiff."

Appellant relies upon the facts that a large part of respondent's business—the wrapping and coating of new pipe in its yard—was subject to sales tax; that respondent was a retailer licensed by appellant to make sales; that respondent regularly reported and paid taxes, except upon the other items involved in the instant action, as to all of which judgment was in favor of appellant; and that respondent had sold some other used equipment to other buyers during the preceding years.

Appellant also relies upon the construction of Section 6051 of the Revenue and Taxation Code by the following decisions: Bigsby v. Johnson, 1941, 18 Cal.2d 860, 118 P.2d 289; Northwestern Pacific R. Co. v. State Board of Equalization, 1943, 21 Cal. 2d 524, 133 P.2d 400; Los Angeles City High School District v. State Board of Equalization, 1945, 71 Cal.App.2d 486, 163 P.2d 45; Market Street R. Co. v. California State Board of Equalization, 137 Cal.App. 2d 87, 290 P.2d 20 (decided in 1955, involving a sale made in 1944); and Sutter Packing Co. v. State Board of Equalization, 1956, 139 Cal.App.2d 889, 294 P.2d 1083.

Bigsby v. Johnson, 18 Cal.2d 860, 118 P.2d 289, 290, involved a $25 sale of used equipment by a printing establishment. Plaintiff there urged that, since the sale "was merely incidental to his principal business and was made in order to salvage the investment upon machinery that he could no longer use, it was not the kind of sale that the legislature intended to tax". The Supreme Court, in 1941, 18 Cal.2d at page 863, 118 P.2d at page 291, held that "our statute creates no exemption covering the situation".

Northwestern Pacific R. Co. v. State Board of Equalization, 21 Cal.2d 524, 133 P.2d 400, involved two sales of rolling stock for the aggregate price of about $80,000, one sale to plaintiff's parent company, Southern Pacific Railroad, and the other to Pacific Motor Trucking Company, another corporation owned and operated by Southern Pacific. It had long been the practice of these corporations to transfer surplus and retired rolling stock or operating equipment from one company to another at its depreciated value. Judgment for the refund of the tax to the plaintiff was reversed with directions. The court, in 1943, 21 Cal.2d at page 528, 133 P.2d at page 402, said:

"This case is not distinguishable from Bigsby v. Johnson, 18 Cal.2d 860, 118 P.2d 289 * * *

"* * * While for reasons considered desirable plaintiff corporation may departmentalize its business, it cannot by such process set up for tax purposes a distinction between the types or kinds of sales made by it where the effect would be to cause some of its sales to escape *the tax aimed at all of such sales.*" (Emphasis added.)

At page 529, of 21 Cal.2d, at page 403 of 133 P.2d: "Such transfers, and others of a similar nature to follow, may not be regarded as casual or isolated sales. They were 'retail sales' within the meaning of the act in that they entailed the transfer of 'title or possession' to a consumer for a 'purpose other than for resale.' * * *"

And, in said Northwestern Pacific R. Co. decision, supra [21 Cal.2d at page 531, 133 P.2d at page 404], the following language is quoted with approval from the decision in Superior Coal Co. v. Department of Finance, 377 Ill. 282, 36 N.E.2d 354: "'* * * Ownership of capital stock in one corporation by another does not, itself, create an identity of corporate interest between the two companies, nor render the stockholding company the owner of the property of the other, nor create the relation of principal and agent, representative, or alter ego between the two. United States v. Delaware, L. & W. R. Co., 238 U.S. 516, 35 S.Ct. 873, 59 L.Ed. 1438 * * *. Nor does the identity of officers of two corporations establish identity of the corporations. * * *'"

In Los Angeles City High School District v. State Board of Equalization, 71 Cal.App.2d 486, 488, 163 P.2d 45, 46, the judgment against the School District in its action for refund of sales taxes paid under protest on its sale of personal property no longer useful to it was affirmed in 1945 for the reason that the cases of Bigsby v. Johnson, supra, and Northwestern Pacific R. Co. v. State Board of Equalization, supra, "are decisive of the issues".

Market Street R. Co. v. California State Board of Equalization, 137 Cal.App.2d 87, 290 P.2d 20, was an appeal by the Railway from a judgment denying it a refund of sales taxes paid under protest on its sale of its operative properties to the City of San Francisco. The transfer was made September 29, 1944. At page 97 of 137 Cal. App., at page 26 of 290 P.2d, the court said:

"The main thesis of Market is that liquidation sales were never intended to be within the scope of the act—that the sales tax is imposed on the privilege of *engaging* in business, not on the privilege of *going out* of business.

"The answer to this problem must be sought in the terms of the statute. Exemptions from taxation must be found in the statute. It is not for the courts to say that, *although the statute applies to all sales of tangible personal property by a retailer, not sold for resale by the buyer,* the statute does not apply to this sale by a retailer because of some undisclosed general 'intent'. [Emphasis added.]

"In the instant case, the statute, as it read in 1944, clearly applied to the sale to the City of that portion of the operating assets consisting of tangible personal property."

Effective since June 19, 1947, Section 6367 of the Revenue and Taxation Code, provides: "There are exempted from the taxes imposed by this part the gross receipts from *occasional sales* of tangible personal property * * *". (Emphasis added.) On the same date, Section 6006.5 became effective. It provides:

"'Occasional sale' includes:

"(a) A sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit;

"(b) Any transfer of all or substantially all the property held or used by a person in the course of such an activity when after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer. For the purposes of this section, stockholders, bondholders, partners, or other persons holding an interest in a corporation or other entity are regarded as having the 'real or ultimate ownership' of the property of such corporation or other entity."

Sutter Packing Co. v. State Board of Equalization, supra, is the only decision cited by appellant which considered a transfer made after the effective date of said Sections 6367 and 6006.5 of the Revenue and Taxation Code. It was an action seeking refund of sales tax paid under protest on a sale made June 1, 1949 of all of plaintiff's furniture, fixtures, machinery and other equipment to a single non-affiliated purchaser for the price of $700,000. Judgment for defendant was affirmed on appeal by the District Court of Appeal and a hearing was denied by the Supreme Court. Mr. Justice Kaufman, speaking for the court 139 Cal.App.2d at page 894, 294 P.2d at page 1087, said: "* * * In the instant case the property was sold to a stranger, hence this exemption [Revenue & Taxation Code, Sec. 6006.5, sub. (b).] does not apply.

"Subsection (a) of Section 6006.5 provides that an occasional sale includes 'a sale of property not held or used by a seller in the course of an activity for which he is required to hold a seller's permit, provided such sale is not one of a series of sales sufficient in number, scope and character to constitute an activity requiring the holding of a seller's permit.' The machinery and equipment which was sold, appellant says, had been used in the food processing business, an activity for which a seller's permit was not required. Rev. & Tax.Code, Sec. 6359. Appellant maintains that the second condition of section 6006.5 [subdivision] (a), has also been met, namely, that this sale was not one of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit.

"Whether or not the retail sale made here can be considered exempt from the tax, depends finally upon the interpretation of the language 'one of a series of sales sufficient in number, scope and character to constitute an activity requiring * * * a seller's permit'. The sales prior to the sale here in question undoubtedly required such a permit. * * * There appears to be nothing, however, inherently different in the nature of the items sold in the final sale than in the earlier sales of used equipment * * *. Appellant says that this was truly an occasional sale since the sale of the entire assets could happen only once. However, the same may be said for each smaller item sold. Similar sales might be made, and appellant herein had, in fact, made a similar sale of all of its equipment and machinery in the plant in 1945."

While the Sutter Packing Co. decision, supra, was made in 1956, the action involved a transfer made in 1949. The transfer now engaging our attention was also made in 1949, before Section 6019 of the Revenue and Taxation Code was enacted, limiting to two the number of casual or occasional sales that would be exempt during any twelve-month period.

Plaintiff's (respondent's) Exhibit 13 is a list of sales of used equipment (other than the transfer here being considered), which were made by plaintiff from 1947 to 1950. Such sales include about 50 motor vehicles, 3 trailers, 4 generators, 2 tar pots, 2 cranes, a steam cleaner, a compressor, and a dynometer. A number of each of the above items is also included in the $200,000 transfer which gave rise to the instant appeal. Those other sales include two sales in October and November 1948 and two in April 1949. The transaction here being considered took place March 14, 1949 and was well within the same twelve-month period as those four other sales.

[1] As in the Sutter Packing Co. case, supra, and Northwestern Pacific R. case, supra, the transfer involved in the instant appeal was " 'one of a series of sales sufficient in number, scope and character to constitute an activity requiring a seller's permit' ". Therefore, the transaction is not exempt from tax under the provisions of Section 6006.5(a) of the Revenue and Taxation Code.

No case has been cited by either party to the instant appeal and our research has discovered none wherein subsection (b) of Section 6006.5 of said code has been considered. In order that a transfer may be exempted from sales tax under said subsection, the requirements are: (1) that the transfer include "all or substantially all of the property held or used" by the transferror in the course of an activity for which he is not required to hold a seller's permit; and (2) that "after such transfer the real or ultimate ownership of such property is substantially similar to that which existed before such transfer". There is some testimony in the record on the instant appeal that would support a finding that the real or ultimate ownership was substantially similar after said transfer.

Respondent's allegations and proof and the court's finding in respect to the portion of respondent's assets involved in the transfer is that the transfer was an exchange of "certain properties", and "certain equipment". The respondent's allegations and proofs are that "plaintiff, at all times herein mentioned was, and now is, engaged in the business of coating and reconditioning of pipe and installation and maintenance of pipelines". The court found "that at all of said times mentioned, plaintiff was engaged in the business of receiving, unloading, and storing pipe and of roto-blasting, wrapping, coating and reconditioning pipe, and the installation and maintenance of pipe lines".

[2] While the court found that the agreement between certain individuals effected "a reorganization of the Pacific Pipeline and Engineers, Ltd., and of the plaintiff and for a *territorial division of 'pipeline business'* between said corporations" (emphasis added), and that the transfer involved in the instant appeal was made to carry out said agreement, it also found that "plaintiff transferred * * * certain equipment, being personal property, thereafter valued by defendant at $201,230.50". The record on this appeal contains no finding or evidence that the plaintiff transferror actually liquidated any part of its business, or that the transfer involved *"all or substantially all"* of the property held or used by it in connection with any "activity". Said transfer was not exempt from sales tax under the provisions of Section 6006.5(b) of the Revenue and Taxation Code.

Judgment is reversed.

DORAN and FOURT, JJ., concur.

150 Cal.App.2d 114

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Joseph SILVESTRI, Defendant and
Appellant.
Cr. 3269.**

District Court of Appeal, First District,
Division 2, California.
April 15, 1957.

As Modified on Denial of Rehearing
May 15, 1957.

Hearing Denied June 12, 1957.

Prosecution for unlawful possession of heroin. The Superior Court, Santa Clara County, William F. James, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that instruction permitting jury to determine existence of probable cause for arrest of defendant was prejudicial error in view of fact that only evidence against defendant was that obtained by search of defendant, and reasonableness of the search and arrest were dependent on the existence of probable cause for arrest based on uncontroverted evidence as to circumstances surrounding such arrest.

Judgment reversed.

1. Arrest 🔑63(4)

In determining whether an officer had reasonable and probable cause for believing a person whom he arrested had committed a crime, court will look only at the facts and circumstances presented to the officer at the time he was required to act. West's Ann.Pen.Code, § 836, subd. 3.

2. Criminal Law 🔑814(3), 1172(6)

In prosecution for unlawful possession of heroin, instruction permitting jury to determine existence of probable cause for arrest of defendant was prejudicial error in view of fact that only evidence against defendant was that obtained by search of defendant, and reasonableness of the search and arrest were dependent on the existence of probable cause for arrest based on uncontroverted evidence as to circumstances surrounding such arrest. West's Ann.Health & Safety Code, § 11500.

3. Searches and Seizures 🔑3(1)

If a search without a warrant is unreasonable, it cannot be justified by what it turns up.

4. Criminal Law 🔑814(5)

In prosecution for unlawful possession of heroin, giving of instruction pertaining to fact that if defendant was under influence of a narcotic in a public place in the presence of officers he would have been guilty of a public offense committed in their presence was improper. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law 🔑394

A defendant makes a prima facie case of lack of probable cause when he establishes that an arrest without a warrant or search without a warrant has been made, and burden of proper justification for such arrest or search rests on the prosecution. West's Ann.Pen.Code, § 836, subd. 3.

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Nathan Cohn, Lawrence Shostak, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of possessing heroin in violation of Health & Safety Code, § 11500.

At approximately 7:30 p. m. on January 4, 1956, the defendant, Joseph Silvestri was standing on the corner of First and Willow Streets, in San Jose, with his brother, Ralph Silvestri. Ralph Silvestri was ill and vomiting. This caught the attention of Police Officer Barnett who then approached the defendant and his brother and inquired who they were and what they were doing in San Jose. The defendant and his brother stated that they had come to San Jose to contract for decorating work with one Ragone. On their way back into town from Ragone's house the lights of their car went out. Therefore, they left the car at a service station at Second and Key Streets and planned to return to San Francisco by bus. Officer Barnett then left, but decided to check their car. When he arrived at the service station at Second and Key Streets, he observed a traffic violator and went to cite him. After Officer Barnett left the defendant and his brother called a taxicab to take them to the bus depot. They had just entered the taxicab when they were accosted by Officers Ballard and Sims, and were again questioned. After telling Officers Ballard and Sims what they had told Officer Barnett, the defendant and his brother proceeded to the bus depot.

Officer Ballard testified that his reason for stopping the defendant and his brother was "that they looked suspicious to us." Officer Ballard further testified that the Green Frog Market had been robbed on the evening of January 3, 1956, by a man who was described as "Five eight, around 35 to 40; Italian or Portuguese descent, with pock marks on his face," and that in mentally checking this description, the defendant and his brother seemed to fit, although neither one had pockmarks. Officers Ballard and Sims also had information about a 1930 or 1934 grey Dodge coupe without license plates which had been used to "case" a Lucky Market on December 27, 1955. After questioning the defendant and his brother, the officers proceeded to check the defendant's car which was a 1936 grey or tan Dodge coupe with license plates. After looking at the car, the officers radioed Officer Barnett, informed him of the robbery of the Green Frog Market and agreed to meet him at the bus depot for further questioning of the defendant and his brother. First, the defendant and his brother were questioned in front of the bus depot by all three officers. Then, the defendant and his brother were questioned separately, as one of the officers believed there were discrepancies in their answers. Officers Sims and Ballard questioned the defendant and Officer Barnett questioned Ralph Silvestri. Officer Ballard testified that at this time he observed that the pupils of defendant's eyes were contracted and that this indicated to him that the defendant was possibly under the influence of a narcotic drug. The answers of the defendant and his brother caused the officers to feel that they were not telling the truth. After a cursory search for weapons, the defendant and his brother were apparently arrested without a warrant as robbery suspects and taken to the San Jose police station, the defendant was searched by Officer Ballard and an object later identified as a heroin capsule was found in a package of cigarettes belonging to the defendant. The defendant first denied any knowledge of the capsules in the cigarette package and then admitted that they contained heroin and that he had been using the drug for three years. The defendant was then booked for possessing heroin in violation of section 11500, Health

& Safety Code. On trial, the defendant pleaded not guilty. During the trial the only evidence introduced was that of the prosecution. The defendant made appropriate and timely objections to the introduction of testimony and evidence, and was overruled by the court. His contentions on appeal are as follows:

(1) The trial court erred in instructing the jury to determine whether there was reasonable cause for his arrest and search.

(2) The evidence admitted was obtained on illegal search and seizure as there was no reasonable cause for the arrest.

(3) The trial court erred in instructing the jury that if the defendant was under the influence of narcotics at the time of his arrest, he was committing an offense in the presence of an officer as there was no evidence on this point, and the defendant was not arrested on this ground.

[1, 2] Subsection 3 of section 836 of the Penal Code provides that an officer may make an arrest without a warrant when a felony has, in fact, been committed and he has reasonable cause for believing the person arrested to have committed it. Reasonable cause has been defined as: "such a state of facts * * * as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." People v. Kilvington, 104 Cal. 86, at page 92, 37 P. 799, at page 801; People v. Novell, 54 Cal.App.2d 621, 129 P.2d 453; In re McCarty, 140 Cal.App. 473, 35 P.2d 568. It is clear that the court looks only at the facts and circumstances presented to the officer at the time he is required to act. People v. Paul, 147 Cal.App.2d 609, 305 P.2d 996; People v. Brown, 147 Cal.App.2d 352, 305 P.2d 126; People v. Hupp, 61 Cal.App.2d 447, 143 P.2d 84.

The first instruction to the jury complained of was as follows: "Now it's for you to determine whether or not the officer in taking the defendant into custody acted reasonably, did they have a reasonable ground for detaining him." The state argues that in this instruction the court was merely following the procedure in confession cases where the jury must be informed of the circumstances surrounding the confession in order to evaluate its probative value. However, in disposing of the same argument in People v. Gorg, 45 Cal.2d 776, at page 781, 291 P.2d 469, at page 472, the court said: "The probative value of evidence obtained by a search or seizure, however, does not depend on whether the search or seizure was legal or illegal, and no purpose would be served by having the jury make a second determination of that issue. Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial of the issue of guilt, People v. Boyles, [45 Cal.2d 652] 290 P.2d 535, and cases cited, evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure."

[3] In the instant case the only evidence against the defendant is that obtained by the search at the San Jose police station. Before the arrest and search the defendant's conduct was lawful, as in People v. Sanders, 46 Cal.2d 247, 294 P.2d 10. If the search was unreasonable it cannot be justified by what it turns up. People v. Brown, 45 Cal.2d 640, 290 P.2d 528. The reasonableness of the search and the arrest here depend on the existence of probable cause for arrest. Therefore, the above instruction which permitted the jury to determine the existence of probable cause was prejudicial to the defendant. This question should have been determined by the court as a question of law.

[4] The second instruction complained of was as follows: "If there was evidence that the defendant was under the influence of a narcotic in a public place in the presence of the officers, then that would be a public offense committed in his presence, wouldn't it?" This instruction was likewise improper under the rule of People v. Gorg, supra.

[5] In view of the erroneous instructions, it is not necessary to determine whether there was probable cause for the arrest in this case. We note however, that recently the matter of the legality of a search and seizure dependent on probable cause for arrest without a warrant under section 836, subd. 3, of the Penal Code has been before our courts and in each case the issue of probable cause has been decided on its own facts and circumstances in accordance with the rule set forth in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, and subsequent cases. It is also clear that the defendant makes a prima facie case when he establishes that an arrest without warrant or search without warrant has been made, and the burden then rests on the prosecution to show proper justification. Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23.

In view of the foregoing the judgment must be reversed.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

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150 Cal.App.2d 165

AMERICAN FEDERATION OF MUSICIANS, etc., Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 22215.

District Court of Appeal, Second District, Division 1, California.

April 16, 1957.

Proceeding upon petition of musicians' union for writ of mandate to require the Superior Court, County of Los Angeles, to show cause why its order for inspection of union's records should not be revoked in action against union and motion picture corporations for declaratory relief, injunction, accounting, damages, etc., on behalf of plaintiffs individually and other musicians, leaders, contractors, arrangers, and copyists similarly situated because of alleged breach of film-TV labor agreements following diversion of re-use payments from plaintiffs and those represented by plaintiffs to union. The District Court of Appeal, Doran, J., held that requiring the inspection did not constitute an abuse of trial court's discretion.

Alternative writ discharged, and peremptory writ denied.

1. Discovery ⚿89

In action against musicians' union and motion picture corporations for declaratory relief, injunction, accounting, damages, etc., on behalf of plaintiffs individually and all other musicians, leaders, contractors, arrangers, and copyists who had been employed by the motion picture corporations, on ground that film-TV labor agreements providing for re-use payments to plaintiffs and those represented by plaintiffs had been diverted to union in violation of the agreements, order requiring inspection of union records pertaining to the agreements did not constitute an abuse of trial court's discretion. West's Ann.Code Civ.Proc., § 1000.

2. Appeal and Error ⚷961
Discovery ⚷85

Trial court's action under statute authorizing inspection of writings is discretionary, and all intendments are in favor of validity of such order, and therefore trial court's action will not be annulled unless a clear abuse of discretion appears. West's Ann.Code Civ.Proc., § 1000.

3. Discovery ⚷80

Purpose of Code of Civil Procedure provision providing for inspection of writings is to enable a litigant to discover vital information which, by reason of an opponent's control, would otherwise be unavailable for judicial scrutiny. West's Ann. Code Civ.Proc., § 1000.

4. Discovery ⚷97(4)

In determining materiality of records sought to be inspected, trial court is not limited to consideration of the affidavit but is also entitled to consider contents of the pleadings filed. West's Ann.Code Civ.Proc., § 1000.

5. Discovery ⚷81

Code of Civil Procedure provision authorizing inspection of writings is remedial in nature and therefore should be liberally construed, and use of remedy provided therein should be encouraged rather than discouraged. West's Ann.Code Civ. Proc., § 1000.

6. Discovery ⚷93

Inconvenience resulting from compliance with order requiring inspection of writings under Code of Civil Procedure provision is no objection to issuance of such order. West's Ann.Code Civ.Proc., § 1000.

7. Discovery ⚷97(4)

In support of motion for inspection of one defendant's records, description in affidavits which identified the desired documents as list of signatories to designated agreements and all the agreements therein before specified, was sufficient to acquaint such defendant with nature of records sought to be inspected. West's Ann.Code Civ.Proc., § 1000.

◆

Bodkin, Breslin & Luddy, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent Superior Court.

Fendler & Lerner, Harold A. Fendler and Daniel A. Weber, Beverly Hills, for Wm. (Bill) Atkinson and all plaintiffs in the Superior Court.

DORAN, Justice.

An action for declaratory relief, injunction, accounting, damages, etc., was instituted in Superior Court on November 29, 1956, by William (Bill) Atkinson, and others, "Individually and on behalf of all other musicians, leaders, contractors, arrangers and copyists, * * * similarly situated and who are or have been employed by the defendants described in the complaint as the 'defendant motion picture companies' ", etc. Named as defendants therein are the petitioner, American Federation of Musicians, a labor union, and a number of motion picture corporations all of whom were parties to a series of contracts effective June 1, 1952, or February 1, 1954, entered into between the Federation and motion picture companies relative to the exhibition on television of motion pictures previously made for theatrical use.

As stated in the complaint, during the years 1946 and 1948, the Federation, acting as collective bargaining representative of musicians employed by motion picture companies, entered into certain agreements with said companies, governing wages, hours, etc., referred to as Hollywood film labor agreements. By the terms thereof, the motion picture companies were forbidden from using or exhibiting any such motion pictures on television without the consent or agreement of the Federation. The aim of such agreements was to "give recognition to and preserve the right of all musicians who performed services in connection with the production of any past or future motion picture", to receive additional wages or compensation for such services in the form of so-called re-use payments in the event of subsequent use or exhibition of such motion picture on television".

In September, 1952, the Federation entered into a collective bargaining agreement with the motion picture companies, terminating as of January 31, 1954, known as the "1952 Hollywood film-TV labor agreement", which specifies the amounts payable to musicians, etc. employed in the original film productions, and providing that in the case of inability to find the musicians entitled thereto, contributions in an equal sum should be made to Samuel R. Rosenbaum as Trustee.

It is further alleged that as a part of the same transaction, the motion picture companies were required to execute a so-called trust agreement under which such companies would pay to the trustee, 5% of gross revenues received from the re-use of motion pictures on television, such arrangement being known as the "Music Performance Trust fund", to be employed by the Trustee "for the purposes and objectives of arranging and organizing the presentation of personal performances (free of charge to the public) by instrumental musicians", to contribute "to the public knowledge and appreciation of music".

In February, 1954, the Federation again entered into a similar agreement known as the "1954 Hollywood film-TV labor agreement", which provides for "re-use payments". In connection therewith, the motion picture companies were again required to execute trust agreement calling for similar 5% payments to the trustee, referred to as "royalty payments".

The complaint further avers that the specified re-use payments were regularly made to musicians who had participated in the making of the original motion pictures later used on television from the effective date of the 1952 Hollywood film-TV labor agreement until about June 9, 1955. On this date, it is alleged, the international Executive Board of the Federation authorized its president, James C. Petrillo, "to take such measures as he might deem fit to cause to be diverted from the plaintiffs to said trust fund the re-use payments aforesaid, upon the ostensible or alleged ground that the musicians who rendered the services in such motion pictures could not be located, well known that * * * said excuse was untrue". Thereafter, the Federation "arbitrarily and without justification, diverted and deprived the plaintiffs of any and all further or additional re-use payments".

The complaint then alleges that the Federation in so doing, "acted without the plaintiffs' consent and in violation of its fiduciary duties and responsibilities to the plaintiffs as their exclusive collective bargaining representative", and that "said trust fund policies and the Federation's acts and omissions in furtherance thereof were discriminatory and oppressively unfair to the plaintiffs". Written appeals to the Federation and personal appearances in reference thereto, for the purpose of securing redress of the grievances in question, were unavailing, and it is alleged that plaintiffs have exhausted all avenues of relief within the Federation.

In addition to injunctive and declaratory relief, plaintiffs, in various causes of action, seek a judgment against the Federation in the sum of $1,495,000 under the fourth cause of action, for loss of re-use payments; under the fifth count, $2,937,850 for loss of royalty payments; and under the eighth cause of action, a judgment of $200,000 against the defendant trustee.

On December 27, 1956, Judge Leon T. David of the Superior Court granted the plaintiffs' motion for inspection of records of the American Federation of Musicians, including (1) "List of all signatories to all collective bargaining agreements" between the Federation and defendant motion picture companies, "dated either September 2, 1946 or September 1, 1948, or any extensions thereof; (2) All collective bargaining agreements hereinbefore specified * *"; (3) List of all signatories to the respective television film labor agreements * * * effective June 1, 1952, or February 1, 1954; (4) all such television film labor agreements referred to in Paragraph 3; (5) List of all signatories to each and all agreements executed by the * * * Federation * * * with persons, firms, or corporations engaged either in the production or exploitation of motion picture films and sound tracks * * * together with the dates of execution * * *; (6) Each and all such agreements * * *; (7) List of all producers or exploiters of motion picture films who have executed the amendment effective June 15, 1955 to the television film labor agreement effective February 1, 1954; (8) Each and all such amendments * * *; (9) Each and all existing agreements to which the * * * Federation * * * is signatory, which provides wholly or in part for any payment to Samuel R. Rosenbaum as trustee, of any sum or amount as consideration, compensation, royalty payment or any other kind of payment however classified, for the use and exploitation upon television of any motion picture originally produced for exhibition in motion picture theatres by the defendant motion picture companies, or any other motion picture producer".

The present petition for writ of mandate was then filed by the Federation seeking to require the respondent Superior Court to show cause why its order for inspection of the Federation's records should not be revoked. The petition alleges that the Federation possesses no such lists of signatories to motion picture contracts and did not have all of the contracts requested; that such contracts with other companies would not be relevant or admissible in evidence; that revelation of the contents of its contracts providing for varying terms of payment would be "harmful to the Petitioner and to its members" and that petitioner has no appeal from the order made and no other adequate remedy.

In opposing said petition, it is argued that an order granting inspection will not be vacated in the absence of a clear abuse of discretion; that the complaint may properly be considered in support of such a motion; that where the object of litigation is to redress a breach of fiduciary duty, a more liberal rule in respect to inspection is to be applied; that the documents requested are material and relevant and are adequately described; and that Judge David was justified in assuming that the Federation "preserved at least either the originals or copies of all important documents which were directly related to the administration of (its trust)".

[1, 2] The Federation's petition for writ of mandate to compel the revocation of the trial court's order for inspection of documents must be denied. As said in Construction Products Corp. v. Superior Court, 103 Cal.App.2d 403, 404, 229 P.2d 399, 400, "In determining the propriety of an order under Section 1000, Code of Civil Procedure, it must be borne in mind that the trial court's action thereunder is discretionary and that all intendments are in favor of the validity of such order. Accordingly, such action will not be annulled unless a clear abuse of that discretion appears. Milton Kauffman, Inc. v. Superior Court, 94 Cal.App.2d 8, 16, 210 P.2d 88." The Construction Products case involved an action for fraud and it was held that the trial court did not exceed its jurisdiction in ordering the defendants to make available to plaintiff "all * * * books, accounts, documents and papers now in the possession and/or under the control of defendants * * * in connection with * * * and relating to the business, operations and financial condition of defendant". More

recently, this rule finds approval in Dowell v. Superior Court, 47 Cal.2d 483, 304 P.2d 1009.

[3] No adequate reason has been advanced by petitioners why the above principle should not govern the instant case. Nor does the record disclose anything in the nature of an abuse of discretion in the granting of the order for inspection of the Federation's records. Without that right the plaintiff musicians would be helpless to discover or uncover those facts and practices which, as beneficiaries under the original re-use contracts plaintiffs are entitled to know. Indeed, Section 1000 of the Code of Civil Procedure, providing for such inspection, was obviously enacted to enable a party litigant to discover such vital information which, by reasons of an opponent's control, would otherwise be unavailable for judicial scrutiny. Petitioner's arguments to the contrary are untenable.

[4] While the merits of the controversy between the musicians and the union are of no present concern, it is entirely proper to consider the allegations of the complaint. As said in Union Trust Co. of San Diego v. Superior Court, 11 Cal.2d 449, 455, 81 P.2d 150, 154, 118 A.L.R. 259, "In determining the question of materiality of the records sought to be inspected, the trial court was not limited to a consideration of the affidavit, but also was entitled to consider the contents of the pleadings filed".

[5, 6] Section 1000 of the Code of Civil Procedure, providing for inspection, is remedial in nature and therefore should be liberally construed and, as has been said, use of the remedy should be encouraged rather than discouraged. Nor is inconvenience resulting from compliance with such an order any objection to its issuance. There is nothing in the present record to indicate that the order in question was not granted after due deliberation and the consideration of all relevant facts and circumstances. Certainly there has been no manifest abuse of the broad discretion which is and must be reposed in the trial judge.

Arguments advanced by the Federation that revelation of the desired information "would be harmful to the Petitioner and its members" and therefore should not be divulged, is not persuasive. The re-use agreements were negotiated by the Federation itself for a legitimate and beneficent object. If, as alleged in the complaint, the Federation later found it advantageous for its own purposes to divert money so received from the musicians entitled thereto, it cannot be said that the plaintiff musicians entitled to these re-use payments have no right to a full disclosure of all pertinent facts in connection with the transaction.

[7] The affidavits made in support of the motion for order of inspection, when considered in connection with the complaint, must be deemed adequate to support the order made. Likewise the description of the desired documents was amply sufficient to acquaint the Federation with the nature of records sought to be inspected.

The alternative writ heretofore issued is discharged and a peremptory writ is denied.

WHITE, P. J.. and FOURT, J., concur.

150 Cal.App.2d 241

Harllee TOWNSEND, Jr., Plaintiff and Appellant,

v.

Thomas GONZALEZ and Gonzalez & Blanco, a co-partnership, and East India Trading Company, Inc., a corporation, Defendants,

Thomas P. Gonzalez, sued as Thomas Gonzalez, and East India Trading Company, a corporation, Respondents.

Civ. 21861.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Rehearing Denied May 14, 1957.

Hearing Denied June 12, 1957.

Action to recover amount due for beans shipped to defendants under contract. The Superior Court, Los Angeles County, Donald R. Wright, J., after entry of judgment for plaintiff, granted defendants' motion for new trial and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that there was no prejudicial error trial and judgment was not against the law.

Reversed.

1. Appeal and Error ⚿933(4)

Where alleged insufficiency of evidence to support judgment was not specified in order granting new trial, District Court of Appeal would assume that it was not granted on that ground. West's Ann. Code Civ.Proc., § 657.

2. Appeal and Error ⚿901

Where insufficiency of evidence was not specified for grounds for granting new trial, in order for appellant to sustain burden of reversing order and of reinstating original judgment, he must convince appellate court that there was no prejudicial error at the trial or that none was specified at hearing of motion for a new trial, and judgment was not against law.

3. Appeal and Error ⚿977(3)

It is only in rare instances and on very strong grounds that a reviewing court will set aside an order granting a new trial since the granting of a new trial does not finally dispose of a controversy.

4. Appeal and Error ⚿977(3)
New Trial ⚿6

The granting of a new trial rests largely in the discretion of the trial court whose order will not be disturbed except upon a showing of a manifest and unmistakable abuse of such discretion.

5. Appeal and Error ⚿854(6), 867(2)

Where order granting new trial is not grounded on insufficiency of evidence, it is duty of reviewing court to consider the entire record on which the order was based in order to discover whether there was any error which would have justified trial court in making its order, and if the order fails to specify the ground upon which it was granted it will not be disturbed on appeal if any one of the grounds specified in notice of intention, with exception of insufficiency of the evidence, is sufficient to sustain order.

6. Appeal and Error ⚿977(3)

If upon full consideration of the record it is shown that trial court in granting order for new trial erred in application of law to facts in issue, its action will be corrected.

7. Trial ⚿84(4)

In action to recover part of purchase price of beans sold to buyers under contract that required production of warehouse receipts showing weights and grades, admission of documents showing railroad weights over general objection which did not specify that such exhibits were not the best evidence, was not erroneous.

8. New Trial ⚿24

Where findings of court followed every allegation of the complaint and traversed every denial of the answer and substantial evidence established each of such findings and judgment necessarily followed the findings and conclusions derived from them, new trial could not be granted on theory that judgment was against the law.

9. New Trial ⚿26

Where losing party pointed out no error to trial court on motion for new trial, if there was any error at trial, it was waived.

10. Evidence ⚿116

Proof is admissible if it affords a reasonable inference as to the principal facts in dispute.

11. Trial ⚿86

Under a general objection, if evidence offered is admissible for any purpose, it is proper for the court to overrule the objection and hear the evidence.

12. New Trial ⚿41(2)

Admission of irrelevant evidence is not ground for a new trial in absence of a showing that movant for new trial was prejudiced by the evidence.

13. Evidence ⚷318(1)

In action by seller to recover purchase price as to part of shipment that was allegedly unpaid, admission of certain bills of lading, warehouse notices, and receipts and other papers relating to various railroad cars loaded by seller's agent who shipped them on seller's behalf was not erroneous as hearsay testimony where agent identified his signature on bills of lading attached to each set of documents relating to cars.

14. New Trial ⚷65

Where facts from which a conclusion is drawn are given and the conclusion is proper there is no error warranting the granting of a new trial.

15. Joint Adventures ⚷1.15

In action by seller to recover part of purchase price due for portion of goods shipped under contract, involving question as to whether several of the defendants were engaged in a joint venture, questions designed to ascertain the facts as to the sharing of profits and losses by the parties were proper.

16. Joint Adventures ⚷1.1

In order to determine the ultimate fact as to whether there was a joint adventure it is necessary to consider all of the attending circumstances. West's Ann. Corp.Code, §§ 15006, 15007.

17. Evidence ⚷314(1)
Sales ⚷355(1)

In action by seller for part of purchase price as to portion of goods shipped under contract, where buyers claimed to have paid for entire shipment, there was no error in admitting testimony of seller's employee as to billings that she made personally on ground that such testimony was irrelevant to the issues raised by the pleadings or that it was hearsay.

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Moore, Trinkaus & Currer, Henry T. Moore, Los Angeles, for appellant.

Lee A. Solomon, Los Angeles, for respondents Gonzalez and Gonzalez & Blanco.

Bonhomme M. Cahn, and Warner, Peracca & Cowan, Los Angeles, for East India Trading Co., respondents.

MOORE, Presiding Justice.

Defendant Gonzalez had been operating under the fictitious name of Gonzalez and Blanco when he entered upon a joint venture with defendant East India Trading Company, Inc., for the purchase of beans from appellant. The complaint alleged that on November 3, 1952, respondents contracted to purchase from appellant a cargo of pinto beans as follows: 31,000 one-hundred-pound bags at $9.10 per bag for No. 1 grade beans; $8.85 per bag for No. 2 grade beans; $8.60 per bag for No. 3 grade beans. Respondents accepted from appellant beans as follows: 1,971,916 pounds of No. 1 grade beans; 639,175 pounds of No. 2 grade beans, and 170,923 pounds of No. 3 grade. Also, it alleged that respondents paid for all the No. 1 grade beans, but did not pay for 2,303 pounds of No. 2 grade beans or for 78,360 pounds of No. 3 grade beans, leaving a balance due appellant of $6,942.78.

Both respondents denied that any sum was unpaid to appellant and the East India Trading Company denied the joint venture. Upon such pleadings the action was tried. The court found the contract as alleged; that respondents were joint adventurers; that they had not paid for 2,303 pounds of No. 2 grade beans, or for 78,360 pounds of No. 3 grade beans which they had received from appellant, and that respondents were indebted to appellant in the sum of $6,942.78 for beans not paid for and judgment was entered for that sum.

Respondents filed their notice of intention to move for a new trial and specified three grounds, to wit: (1) insufficiency of the evidence to justify the judgment; (2) errors at law occurring at the trial and excepted to by the moving parties, and (3) that the judgment is against the law.

The minute order granting the motion for a new trial was made January 31, 1956, as follows:

> "Defendants' Gonzalez and East India Trading Company, motion for a

new trial submitted this date; the Court now makes its order. Each Defendant's motion is granted."

This is the order appealed from.

[1–6] Since insufficiency of the evidence to support the judgment was not specified in the order granting the new trial, we must assume it was not granted upon that ground. Malloy v. Fong, 37 Cal.2d 356, 376, 232 P.2d 241; Code Civ.Proc. § 657. Therefore, in order for appellant to sustain the burden of reversing the order granting a new trial and of reinstating the original judgment, he must convince this court that there was no prejudicial error at the trial or that none was specified at the hearing of the motion for a new trial, and that the judgment was not against the law. It is only in rare instances and on very strong grounds that a reviewing court will set aside an order granting a new trial. Morgan v. Los Angeles Pacific Company, 13 Cal.App. 12, 108 P. 735; Abrams v. American Fidelity and Casualty Company, 69 Cal.App.2d 426, 431, 159 P.2d 62. The orthodox statement of the rule is: Whether a new trial will be granted rests largely in the discretion of a trial court; its order will not be disturbed except upon a manifest and unmistakable abuse of such discretion. (4 Cal.Jur.2d 476, § 598.) Because the granting of a new trial does not finally dispose of a controversy, seldom will an appellate court reverse an order granting a new trial where there is a fairly debatable justification in law. Cf. Sloboden v. Time Oil Company, 131 Cal.App.2d 557, 281 P.2d 85. Where the order granting a new trial is not grounded on the insufficiency of the evidence, it is the duty of the reviewing court to consider the entire record on which the order was based to discover whether there was any error which would have justified the trial court in making the order. Greenman v. Rogers, 122 Cal.App.2d 55, 56, 264 P.2d 92; Renfer v. Skaggs, 96 Cal.App.2d 380, 385, 215 P.2d 487. Where, as here, the order fails to specify the ground upon which it was granted, it will not be disturbed on appeal if any one of the grounds specified in the notice of intention, with the exception of insufficiency of the evidence, is sufficient to sustain the order. Tasker v. Cochrane, 94 Cal.App. 361, 363, 271 P. 503; Lucerne Country Club v. Beal, 21 Cal.App.2d 121, 124, 68 P.2d 408. But since the power of a court is not unlimited, if upon full consideration of the record it is shown that the trial court erred in the application of the law to the facts in issue, its action will be corrected. Vertson v. City of Los Angeles, 116 Cal.App. 114, 126, 2 P.2d 411.

The agreement of purchase originated in a telephone conversation between the parties, but its terms were confirmed in a telegram dated November 3, 1952 (Exhibit 17)[1] from Gonzalez to Townsend. It will be noted the telegram provided *"most recent warehouse receipts weights and grades to govern."* (Emphasis added.) It was from this clause and its proper interpretation that arose most of the controversy over the admissibility of plaintiff's exhibits 3[2] and 4[3], by reason of the fact that these exhibits contained evidence of only “railroad weights” and not warehouse receipts.

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[1] "Townsend Supply Company
"c/o H. E. Wilson & Co
"1815 Magoffin Street
"El Paso, Texas.

"We are airmailing special delivery today to Mr. Moreno El Paso National Bank twentyfive thousand dollars to be held as advance against our purchase of 28,000 bags pinto beans as per your telegram October 31st also additional 3,000 bags purchased by phone same price stop bankers irrevocable letter credit will be established for total less advance for approximately 31,000 bags at $9.10 per one hundred net pounds basis fob El Paso for USones quality less discount twentyfive cents UStwos and fifty cents USthrees all other terms identical to your purchase from Production Marketing Administration Dallas Texas also most recent warehouse receipts weights and grades to govern.

"Gonzalez and Blanco"

[2] Plaintiff's Exhibit 3 consisted of 29 sets of documents covering twenty-nine cars containing 27,420 bags of beans. Each set contained a freight bill with the car number, a railroad scale ticket with the net weight, a shipping order signed by Jack C. Schoen, agent for respondents and appellant's invoice. None of the sets contained either PMA or Townsend warehouse receipts covering grades and weights.

An application for commercial letter of credit from the International Branch of the Bank of America in Los Angeles was made by respondent East India Trading Co., Inc., through its president, Moosa H. Rawjee. Pursuant to this application, on November 12, 1952, the Bank of America issued its Irrevocable Letter of Credit to Townsend Supply Company, payable through the El Paso National Bank in the total amount of $252,889 with expiration date of November 29, 1952. Under the title “Documents Required” the letter called for, in part: “2. Copies of most recent Authentic PMA Warehouse Receipts for each lot. 3. Railroad Weight Certificates in quadruplicate.” Under “Special Instructions” it stated: “PMA Warehouse Authentic Copies of Most Recent Grades and Weights to Govern and Must Be Substantiated By Warehouse Receipt Copies * * * If copies of Authentic PMA W. R. are not available immediately, payment may be paid [sic] against Railroad weight certificate and on basis of grade subject to adjustment as follows: 19,000 bags of US No. 1 quality, 7,000 bags of US No. 2 quality and 2,000 bags of US No. 3 quality until such time as copies of authentic warehouse receipts are presented. Townsend Warehouse Receipts are acceptable (copies), in lieu of PMA Authentic Warehouse Receipts.” On its reverse side the exhibit shows a withdrawal on November 17, 1952, of $96,460 and on November 24 of $147,307.95, leaving a balance of $9,121.05. At the bottom of the sheet, in ink, are the following notations:

“No. 1 Pinto Beans

10600 bags	1,061,680 # [4] no 1
9294 bags	910,256 # no 1
6574 bags	636,872 # no 2
1752 bags	92,563 # no 3

28,220 ”

It is significant that the 28,220 bags listed on the Letter of Credit is the same as the aggregate number of bags listed in plaintiff's exhibits 3 and 4 combined. Also, the weights listed total 2,701,371 pounds, which is the quantity of beans both parties agree was paid for.

Plaintiff's exhibits 12 and 13 are copies of “Advice of Negotiation” sent by the Bank of America to East India Trading Co., Inc., with copies to Gonzalez & Blanco, and dated November 17, 1952 and November 24, respectively. Exhibit 12 covers eleven cars and shows the car numbers, the quantity of beans and the amount of the draft, in payment of the beans, to wit, $96,460. On both 12 and 13 there is a notation that PMA warehouse receipts are included in the accompanying documents. Exhibit 13 is similar, covers the last nineteen cars and is in the amount of $147,307.95. In listing the car numbers, exhibit 13 includes disputed car AT–32317.

But the significance of exhibit 13 with respect to appellant's claim against respondents appears in the following listing of No. 3 beans: “92,563 # 3 Pinto Beans[5]
80,600”

In short, in listing the quantity of beans used in computing the money due appellant on the reverse side of the Letter of Credit, as quoted, supra, the item of 80,600 pounds of No. 3 beans *was not included.* This was the quantity of beans contained in car AT–32317. It therefore appears from the undisputed documentary evidence that car AT–32317 had been delivered prior to November 24, 1952, and that in computing the amount of the draft in payment of the beans covered by exhibit 13, the bank omitted the contents of car AT–32317. It follows that the uncontradicted documentary evidence shows on its face that respondents failed to pay appellant for the beans in car AT–32317 and that the trial court's original findings were correct.

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[3] Plaintiff's Exhibit 4 was a set of similar documents covering the disputed 30th car (AT–32317) containing 800 bags of beans. No warehouse receipts showing weights and grades are included. It was for the beans in this car that appellant claims he was not paid.

[4] The symbol “#” is used in this column to mean pounds.

[5] The quotation is an exact copy of exhibit number 13 and the symbol “#” means “pounds of No.” 3 Pinto Beans.

In view of the involved facts, it will be of advantage to repeat some of the factual statements above. Extensive briefs have been filed whereby the asserted errors of the court in overruling a certain objection have been discussed generously. There is no merit in such objection for the reason that it did not direct the court's attention to the point aimed at by the objector.

[7] It will be recalled that respondents insisted that the railroad weights were not admissible because the contract and letter of credit required the production of warehouse receipts showing the weights and grades. They objected to the introduction of exhibits 2 and 3 on the grounds that they were incompetent, irrelevant and immaterial. Exhibit 2 consists of 29 sets of documents covering 29 cars and exhibit 3 is a set of similar documents containing a description of the contents of car AT–32317. But exhibits 12 and 13 contained all the car numbers, weights of beans and a list of all other documents required to make payment under the letter of credit. But such documents, at the time of the trial, had been returned to "the beneficiary" as it appeared on exhibit 13. The objection was general. It did not specify that it was not the best evidence. The court overruled it and properly acted upon the evidence received and rendered judgment accordingly. The objection was without merit, but if it had been meritorious without considering exhibits 2 and 3, it appears from exhibits 7, 12 and 13 that respondents actually received the full 30 cars of beans and that the El Paso Bank had in its possession all the required warehouse receipts and other documents before it made payment. In computing a final payment for the last 19 cars, it failed to include the beans in disputed car AT–32317.

It remains to determine whether there was any error sufficient to justify the granting of a new trial or whether the judgment was against the law.

[8] Taking the points in their inverse order, it is observed that the judgment is not against any law. The findings followed every allegation of the complaint and traversed every denial of the answer. Substantial evidence established each of such findings. The judgment necessarily followed the findings and the conclusions derived from them. No evidence was presented by respondents other than exhibits A, B, and C. The proof is clear that respondents received 80,600[6] pounds of beans for which no payment was made. There is no escape from the conclusion that the judgment necessarily followed the facts legally proved. Not a word appears in the argument of respondents to indicate that a different judgment might, would, or could follow another trial.

[9] Now, if there was an error at the trial, it was waived by respondents for the reason that it was not pointed out to the trial court when the motion for a new trial was argued. It is the duty of the party seeking a new trial to make clear to the trial court the errors claimed. In such event the record on appeal would contain the particular errors assigned as justifying the granting of the motion and the affirmance of the order. Phillips v. Wheeler, 55 Cal.App. 236, 238, 156 P.2d 468. Herein, no particular error was specified to the trial court.

[10–12] Unfortunate for respondents, the only objections they made at the trial related to the admissibility of evidence offered by appellant. In the main, such objections were general, based upon the grounds that the evidence was "incompetent, irrelevant and immaterial." Such grounds do not always point out the vice of proposed evidence. Proof is admissible if it affords a reasonable inference as to the

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6. The briefs and the findings refer to 80,663 pounds but exhibit 13 specifies 80,600 pounds of Pinto beans.

principal fact in dispute. Dike v. Golden State Company, 125 Cal.App.2d 6, 11, 269 P.2d 619; Craven v. Central Pacific Railroad Company, 72 Cal. 345, 350, 13 P. 878. Under a "general objection," if the evidence offered is admissible for any purpose, it is proper for the court to overrule the objection and hear the evidence. Hawkinson v. Oesdean, 61 Cal.App.2d 712, 719, 143 P.2d 967. Moreover, irrelevant evidence is not a ground for a new trial in the absence of a showing that the movant for a new trial was prejudiced by the evidence. Hansen v. Martin, 54 Cal. 394, 395.

[13, 14] Respondents objected to certain bills of lading, warehouse notices and receipts and other papers relating to the various cars of beans loaded by respondents' agent Schoen who shipped them on behalf of respondents. Gonzalez made the general objection while the Trading Company interposed the objection of hearsay on the theory that there was no joint venture. Those papers were received subject to a motion to strike if not properly connected. After the witness had identified the documents as to various cars of beans, respondents objected to the witness' testimony as to whether they related to a certain designated car on the ground it called for a conclusion. His testimony was properly received because he knew the fact from his own knowledge; he could tell this from the bill of lading for each car shipped. The same objections were made to the offer of documents relating to the disputed car, AT-32317. They were received in evidence after witness Schoen had identified his signature on the bills of lading attached to each set of documents relating to such car. There was no hearsay on the part of the witness Schoen because he had personal knowledge of the amount of beans shipped under the contract of the parties. The questions did not call for conclusions, but for facts he knew. Where the facts from which a conclusion is drawn are given and the conclusion is proper, there is no error warranting the granting of a new trial. Davenport v. Stratton, 24 Cal.2d 232, 240, 149 P.2d 4. It was proved beyond question that 80,600 pounds of beans were not paid for. The judgment correctly authorized recovery for their value. It was established that 30 carloads were delivered to respondents. The warehouse receipts and bills of lading relating to twenty-nine carloads were admitted as exhibit 3 subject to a motion to strike; but such motion was never made. The letter from appellant's El Paso bank attached to such receipts and bills of lading were received as exhibits 8, 9 and 10. By those documents it was established that 29 carloads of beans were covered and that those cars contained 2,701,371 pounds of beans, the exact amount for which respondents paid appellant. That amount is all for which they claim to have paid. In view of the fact that 29 cars contained 2,701,371 pounds and that such poundage is all that respondents paid for, what more should be required to show that the beans in the 30th car were not paid for?

Moreover, the shipping book of respondents' agent (Schoen) proves that only two cars had No. 3 beans, to wit: AT-212729 which contained 952 bags of No. 3 weighing 92,563 pounds and AT-32317 which contained 800 bags of No. 3 beans weighing 80,600 pounds. Inasmuch as exhibits 7, 11 and B show that only 92,563 pounds of No. 3 beans were paid for by respondents and that such was the exact quantity of grade No. 3 in car AT-212729, it follows that no money was ever paid for No. 3 beans in car AT-32317, which were 800 bags weighing 80,600 pounds.

Furthermore, the record demonstrates that respondents should have known that they had not paid for the beans they had contracted to buy. Their letter of credit was for $252,889 but of that sum, $9,121.05 was not used before it expired on November 29, 1952. They paid $96,460 at one time and $147,307.95 at another. These aggregated $243,767.95. These payments were based upon billings from appellant (exhibits 8, 9, 10 and 11 and B) covering 2,701,371 pounds of beans. If respondents had followed the usual good business practice of checking the quantity and grades of beans listed on exhibit 13 against the amount of the draft listed on the same exhibit, they would have known they had received 80,600 pounds of No. 3 beans not included in the amount of the payment.

Objections were made to questions propounded to the witness Schoen (1) as to the number of sacks in the various cars and (2) as to the identity of the shipping record he had made as respondents' agent. The witness was testifying from his own knowledge. He had made the record when he shipped the beans and in it set out the number of sacks of beans in each car. This evidence was material in establishing the quantity of beans received and in identifying the cars in which the beans were shipped.

[15, 16] Questions were propounded to respondent Gonzalez with respect to his joint venture with East India Trading Company. The court overruled objections to those questions made on the ground that the questions were immaterial. The ruling was correct. The joint venture was a vital factor. It was proper to ascertain the fact of sharing profits and losses by the parties. In order to determine the ultimate fact as to whether there was a joint venture it was necessary to consider all the attending circumstances. Corp.Code, § 15006, 15007; Constans v. Ross, 106 Cal.App.2d 381, 386, 235 P.2d 113.

Many general objections were made to the questions addressed to Mrs. Caballero; also, "hearsay" objections were made to inquiries with reference to East India Trading Company. Her answer was that she knew the matters of her own knowledge. She had made the billings concerning which inquiry was made for appellant about the time the billings were forwarded to respondents. There were three billings, the third accompanied the draft for payment of beans in the 30th car.

[17] Inasmuch as she had made the billings, why should not Mrs. Caballero have explained her own work and how the billings were computed from the records and from the particular cars and beans to which the billings related? Who could deny that it was proper for her to testify that appellant had paid the Commodity Credit Corporation for the beans in the 30th car subsequent to the prior billings. Such evidence all related to the question whether respondents had paid for all the beans delivered to them and as to why the billing on the 30th car was submitted after the expiration date of the letter of credit and not included in the two prior billings made under the letter of credit. The testimony of Mrs. Caballero was concerning facts within her own knowledge and it was relevant to the issues raised by the pleadings. It is established that the facts upon which she based her statements were fully related to and in most cases were supported by documentary evidence. Its admission was not error.

From the facts established by the evidence and upon a consideration of the testimony to which objection was made, it is inconceivable that its exclusion would have resulted in a different judgment.

Order reversed.

FOX and ASHBURN, JJ., concur.

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150 Cal.App.2d 271

Philip Leverett SALTONSTALL, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Maxine Saltonstall, Real Party in Interest.

Civ. 22301.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Original proceedings on petition for writ of prohibition to restrain Superior Court from further proceedings on contempt citation. The District Court of Appeal, Richards, J. pro tem., held that where District Court of Appeal granted temporary stay restraining all proceedings in connection with Superior Court's order directing father to return child to mother until determination of father's petition for writ of supersedeas and January 29, 1957, decision denying petition did not become final for 30 days, order of Superior Court dated February 7, 1957 directing father to show cause why he should not be adjudged guilty of contempt for failure to comply with the previous Superior Court order was void.

Peremptory writ of prohibition issued commanding Superior Court to desist from any further proceedings in connection with the order to show cause.

1. Appeal and Error ⚷485(2)

Supersedeas is an auxiliary process in aid of appellate jurisdiction to stay proceedings for the enforcement of an order or judgment from which an appeal is taken. West's Ann.Rules on Appeal, rule 49.

2. Appeal and Error ⚷485(2)

It is the process of the court to enforce the order of judgment from which the appeal is taken that is involved in the supersedeas proceeding irrespective of the time of the conduct upon which the issuance of such process is predicated.

3. Appeal and Error ⚷485(2)

Temporary stay restraining all proceedings in a lower court pending an appeal operates as a supersedeas and deprives the lower court of power, during the pendency of such stay, to issue any process to enforce the appealed order. West's Ann.Rules on Appeal, rule 49.

4. Appeal and Error ⚷485(4)
Courts ⚷209(2)

Where District Court of Appeal had granted temporary stay order restraining all proceedings in connection with Superior Court's order directing father to return child to mother until determination of father's petition for writ of supersedeas, and January 29, 1957 decision denying petition did not become final for 30 days, order of Superior Court dated February 7, 1957 directing father to show cause why he should not be adjudged guilty of contempt for failure to comply with previous Superior Court order was void and the fact that Supreme Court had denied father's petition for writ of supersedeas did not render question moot in original proceedings by father to restrain Superior Court from any further proceedings on contempt. West's Ann.Rules on Appeal, rule 49.

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Henry B. Ely, Los Angeles, and Dean M. McCann, Upland, for petitioner.

Hahn, Ross & Saunders and E. Loyd Saunders, Los Angeles, for real party in interest.

RICHARDS, Justice pro tem.

Petitioner seeks a writ of prohibition to restrain the respondent court from any further proceedings on a contempt citation.

On October 26, 1956, the petitioner perfected an appeal from an order of the respondent court dated October 17, 1956, directing him to return his child to the mother on or before October 27, 1956. On November 16, 1956, he filed a petition for a writ of supersedeas to stay the enforcement of the order of respondent court pending the appeal and requested a temporary stay. Rule 49, Rules on Appeal. On November 19, 1956 this court issued its order as follows: "It is further ordered that enforcement of the order of the Superior Court of Los Angeles County made in the above entitled cause on the 17th day of Oct., 1956 and entered on the 31st day of Oct., 1956, is hereby stayed until determination of this proceeding or until further order of this court." On January 29, 1957, this court rendered its decision denying the writ of supersedeas, Saltonstall v. Saltonstall, 148 Cal.App.2d 109, 306 P.2d 492. On February 7, 1957, an order was issued by respondent court directing the petitioner to show cause on February 13, 1957, if any, why he should not be adjudged guilty of contempt for failure to comply with its order of October 17, 1956. Petitioner's motion to dismiss the contempt proceeding, on the ground that the order of this court denying the writ of supersedeas was not final at the time of the issuance of the order to show cause, was denied and the court continued the hearing thereon to a subsequent date. The petition herein was filed February 21, 1957 and an alternative writ of prohibition issued. A petition for rehearing for the writ of supersedeas was denied and a hearing by the Supreme Court was denied March 27, 1957.

[1-4] It is the contention of the real party in interest that this proceeding is now moot following a denial of a hearing by the Supreme Court. This contention is not tenable. The temporary stay order of this court dated November 19, 1956, restrained all proceedings in connection with the respondent court's order dated October 17, 1956 until the determination of the supersedeas proceedings or until the further order of this court, and the decision of this court on January 29, 1957, denying the petition for writ of supersedeas, did not become final until 30 days thereafter. Supersedeas is an auxiliary process in aid of appellate jurisdiction to stay proceedings for the enforcement of an order or judgment from which an appeal is taken. Smith v. Smith, 18 Cal.2d 462, 464, 116 P.2d 3. It is the process of the court to enforce the order or judgment from which the appeal is taken that is involved in the supersedeas proceeding irrespective of the time of the conduct upon which the issuance of such process is predicated. Smith v. Smith, supra, 18 Cal.2d at page 466, 116 P.2d 3. A temporary stay granted under Rule 49, Rules on Appeal, operates as a supersedeas and deprives the court of power, during the pendency of such stay, to issue any process to enforce the appealed order, Owen v. Pomona Land & Water Co., 124 Cal. 331, 57 P. 71; McAneny v. Superior Court, 150 Cal. 6, 8, 87 P. 1020; Holcomb v. Juster, 39 Cal.App. 462, 179 P. 445, from which it follows, that the expiration of the stay cannot infuse power in the court to act upon a process issued in violation of the order of this court. The order to show cause issued by respondent court on February 7, 1957 and prior to the finality of the proceeding for writ of supersedeas was in violation of the order of this court and is void.

It is therefore ordered that a peremptory writ of prohibition issue commanding the respondent court to desist from any further proceedings in connection with the order to show cause dated February 7, 1957.

FOX, Acting P. J., and ASHBURN, J., concur.

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150 Cal.App.2d 420

John G. OPPENHEIMER, Plaintiff and Appellant,

v.

P. D. ROBINSON, Southern Pacific Company, a corporation, Defendants and Respondents.

Civ. 21960.

District Court of Appeal, Second District, Division 3, California.
April 23, 1957.

Rehearing Denied May 7, 1957.
Hearing Denied June 19, 1957.

Statutory action by employee against railroad and railroad superintendent to recover unpaid wages and for penalty for failure to pay wages. The Superior Court of Los Angeles County, Leon T. David, J., sustained demurrers of railroad and superintendent with leave to amend against railroad but upon employee's refusal to amend, dismissed action and employee appealed. The District Court of Appeal, Shinn, P. J., held that complaint which showed no more than employer's liability for earned and unpaid wages was insufficient in absence of allegation of amount of wages accrued and unpaid, of the rate of compensation, or number of working days for which no payment was made.

Affirmed.

1. Labor Relations ⚷1471, 1473

Rights of employee in action for unpaid wages and statutory penalty are governed by labor code sections which relate to payment of employee's wages and to civil and criminal penalties resulting from willful failure to pay such wages when due. West's Ann.Labor Code, §§ 200–272, 201, 203.

2. Pleading ⚷61

Sufficiency of complaint is to be judged from alleged facts which purport to establish liability of defendant.

3. Labor Relations ⚷1496

Where complaint for non-payment of wages showed no more than employer's liability for earned and unpaid wages and did not allege amount of wages accrued and unpaid, rate of compensation, or number of working days for which no payment had been made, complaint was insufficient. West's Ann.Labor Code, §§ 200–272, 201, 203.

4. Courts ⚷122

Where employee in statutory action for non-payment of wages merely alleged damages in amount that would give jurisdiction to Superior Court, that court was not required to give effect to the allegation of damage in absence of allegation of facts showing liability in damages, nor to proceed further in the action in face of refusal of employee to plead essential jurisdictional facts. West's Ann.Labor Code, §§ 200–272, 201, 203.

5. Labor Relations ⚷1496

Complaint for penalty for failure to pay wages, in absence of allegation of facts from which amount of claimed penalty could be ascertained, and of facts showing liability in sufficient amount to give court jurisdiction of action, was insufficient. West's Ann.Labor Code, §§ 200–272, 201, 203.

6. Pleading ⚷193(3)

Where suit is brought for amount of a statutory penalty complaint is vulnerable to demurrer if it fails to allege facts showing liability in sufficient amount to give court jurisdiction of action.

7. Pleading ⚷225(1)

Special demurrer should not be sustained without leave to amend when complaint states substance of cause of action.

8. Labor Relations ⚷1496

Discharged railroad employee's complaint against railroad superintendent to recover unpaid wages and statutory penalty was insufficient, in absence of allegation that plaintiff contracted with superintendent, or allegation that superintendent had duty to pay plaintiff's wages or was guilty of any wrong. West's Ann.Labor Code, §§ 200–272, 201, 203; West's Ann. Civ.Code, § 2343.

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John G. Oppenheimer, in pro. per.

W. A. Gregory, San Francisco, E. D. Yeomans, Walt A. Steiger, Los Angeles, for respondents.

SHINN, Presiding Justice.

The present action is against Southern Pacific Company and P. D. Robinson to recover unpaid wages and a statutory penalty for the wilful failure to pay said wages on plaintiff's discharge from employment. Defendants demurred jointly to the amended complaint. The court sustained Robinson's special demurrer without leave to amend and entered judgment in his favor. It also sustained Southern Pacific's demurrer with leave to amend, but the record does not disclose the ground or grounds on which the company's demurrer was sustained. Plaintiff declined to amend further against Southern Pacific and judgment of dismissal followed. Plaintiff appeals from the judgments dismissing the action.

The amended complaint contains two causes of action. The material allegations of the first cause of action are the following: Plaintiff was employed by Southern Pacific Company. P. D. Robinson is a superintendent of Southern Pacific Company, acting within the scope of his authority and with the full knowledge, consent and ratification of the company. On August 2, 1955, defendants discharged plaintiff from his employment and wilfully failed to pay him any wages which were then due, owing and accrued; by reason thereof, plaintiff has been damaged in the sum of $6,000. The second cause of action incorporates the preceding allegations by reference. It also alleges that defendants wilfully failed to pay plaintiff any penalty wages and that by reason thereof he is entitled to a statutory penalty in the sum of $6,000. The prayer is for $6,000 on each count and there is no prayer for judgment in the amount of wages earned.

Defendants interposed a general and special demurrer to each cause of action; the special demurrer specified a number of respects in which the amended complaint was uncertain and ambiguous, viz., it did not allege the amount of wages plaintiff earned while in the company's employment nor the amount of wages due at the time of his discharge; it did not allege whether he made a demand for penalty wages, and, if so, the amount demanded and the amount defendants refused to pay; it did not allege how or in what manner plaintiff was entitled to $6,000 damages or a $6,000 penalty.

[1] Plaintiff states in his brief that the present action is one for unpaid wages and a statutory penalty, and not for wrongful discharge in violation of an employment contract. His rights are therefore governed by sections 200 through 272 of the Labor Code, which relate to the payment of employees' wages and to civil and criminal penalties resulting from a wilful failure to pay such wages when due.

Section 201 provides in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Section 203 contains the following language: "If an employer wilfully fails to pay, without abatement or reduction, in accordance with sections 201 and 202, any wages of an employee who is discharged or who quits, the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than thirty days * * *."

The issues involved in a statutory action for the nonpayment of wages are whether the employer failed to pay wages which had accrued at the time the employer-employee relationship terminated and the amount of the accrued wages. Although plaintiff does not allege either the amount of wages accrued and unpaid at the time of his discharge, the rate of his compensation, or the number of working days for which he has not been paid, he argues that the amended complaint states all the ultimate facts essential to a cause of action against Southern Pacific and that all other matters are evidentiary and need not be alleged. His position is clearly untenable.

[2-4] It is elementary that the sufficiency of a complaint is to be judged from the facts alleged which purport to establish liability of the defendant. The facts alleged in the first cause of action show no more than a liability of Southern Pacific Company for payment of plaintiff's earned and unpaid wages. There is no allegation that the discharge was wrongful, or a breach of contract or breach of duty on the part of defendants or either of them, other than a failure to pay the wages plaintiff had earned. Upon the facts alleged any recovery on the first cause of action would be limited to that amount. The mere allegation that plaintiff was damaged in the sum of $6,000 by reason of the failure to pay the wages earned is meaningless in the absence of any allegation as to the amount of wages due plaintiff. That allegation is an obvious attempt

to claim a sum as damages that would give the superior court jurisdiction of the action, while suppressing facts that would determine whether the action was within the jurisdiction of the superior court. The court was not required to give any effect to the allegation of damage in the absence of the allegation of facts showing liability in damages, nor to proceed further in the action in the face of the refusal of plaintiff to plead essential jurisdictional facts.

[5,6] The second cause of action is for a penalty for failure to pay wages, and it is insufficient for the reasons stated with respect to the first cause of action. No facts are alleged from which the amount of the claimed penalty can be ascertained. The allegation of damage in the sum of $6,000 is not supported by allegation of facts that would entitle plaintiff to a recovery in excess of the amount of the statutory penalty. The most that plaintiff could recover as a penalty would be 30 days' wages at the rate of his earnings under his employment. To pretend or argue that the allegation of damage is sufficient to show a liability of either defendant for more than that amount would be trifling with the court. Where suit is brought for the amount of a statutory penalty the complaint is vulnerable to demurrer if it fails to allege facts showing a liability in a sufficient amount to give the court jurisdiction of the action.

In view of plaintiff's refusal or inability to allege facts that would entitle him to go to trial the court did not err in dismissing the action against Southern Pacific. Hendricks v. Osman, 72 Cal.App.2d 465, 164 P.2d 545.

[7,8] The judgment in favor of Robinson was likewise proper. While a special demurrer should not be sustained without leave to amend when the complaint states the substance of a cause of action, Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Wilk v. Vencill, 30 Cal.2d 104, 180 P.2d 351, no basis of recovery against Robinson has been alleged. There is no allegation that plaintiff contracted with Robinson, that Robinson had any duty to pay plaintiff's wages or was guilty of any wrong. He was merely an employee of Southern Pacific and is not personally liable for non-payment of wages to a fellow employee. Civ.Code, § 2343; Oppenheimer v. General Cable Corp., 143 Cal.App.2d 293, 300 P.2d 151.

The judgments are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

150 Cal.App.2d 184

James P. CANTILLON, Petitioner,

v.

SUPERIOR COURT of the State of California IN AND FOR COUNTY OF LOS ANGELES, Respondent.

Civ. 22278.

District Court of Appeal, Second District, Division 2, California.

April 16, 1957.

Hearing Denied June 12, 1957.

Proceeding to review an adjudication of contempt in connection with a pretrial conference. The District Court of Appeal, Richards, J. pro tem., held that criminal contempts consisting of acts done in disrespect of authority of court are necessarily acts or omissions committed by an individual or individuals as distinguished from acts or omissions committed by a firm or association of which the individuals are members, and, therefore, firm's failure to have pretrial conferences, prepare for pretrial and have a lawyer represent firm at pretrial hearing prepared to proceed, did not authorize adjudication of contempt against firm.

Order of contempt annulled and vacated.

1. Courts ⚷85(1)

Rules of practice and procedure adopted by judicial council, including such rules as have been adopted under specific statutory mandate, and which do not transcend legislative enactments, have force of positive law. West's Ann.Const. art. 6, § 1a.

2. Courts ⚷78

Courts have inherent power to enforce the effective conduct of judicial proceedings in order to insure orderly administration of justice and Legislature has codified this principle by granting power to every court to provide for the orderly conduct of proceedings before it. West's Ann.Code Civ.Proc., §§ 128, subd. 3, 1209, subd. 8.

3. Contempt ⚷20

An inexcusable failure to comply with rules or orders made by court pertaining to orderly conduct of judicial proceedings before it constitutes an unlawful interference with proceedings of court and by appropriate proceedings is punishable as contempt of court. West's Ann.Code Civ. Proc., § 1209, subd. 8.

4. Contempt ⚷10
Courts ⚷81

A rule of procedure promulgated by Judicial Council within its constitutional or statutory power for conduct of judicial proceeding before court is rule of court, and an inexcusable failure of an attorney to prepare for, appear at, and participate in a pretrial conference is, by appropriate proceedings, subject to punitive power of court. West's Ann.Superior Court Rules, rules 8 to 8.12, 8.2; West's Ann.Const. art. 6, § 1a; West's Ann.Code Civ.Proc., §§ 128, subd. 3, 1209, subd. 8.

5. Constitutional Law ⚷70(1)
Contempt ⚷5

Rule of procedure promulgated by Judicial Council to effect that each party in any case shall attend pretrial conference by counsel and be prepared to discuss and make stipulations or admissions where appropriate and providing for penalties in event of failure of an attorney to prepare for or appear at or participate in pretrial conference did not attempt to define any new or distinct act of contempt, was not encroachment upon the legislative authority to enact substantive law and did not attempt to trench upon field of law already pre-empted by Legislature. West's Ann. Code Civ.Proc., § 575; West's Ann.Superior Court Rules, rules 8 to 8.12, 8.2.

6. Contempt ⚷29

Criminal contempts consisting of acts done in disrespect of authority of court are necessarily acts or omissions committed by an individual or individuals as distinguished from acts or omissions committed by a firm or association of which the individuals are members and, therefore, firm's failure to have pretrial conferences, prepare for pretrial and have lawyer represent firm at pretrial prepared to proceed did not authorize adjudication of contempt against firm. West's Ann.Superior Court Rules, rules 8 to 8.12, 8.2.

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Cantillon & Cantillon and James P. Cantillon, Beverly Hills, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

RICHARDS, Justice pro tem.

This petition to review an adjudication of contempt made in connection with a pretrial proceeding before the respondent court challenges the power of that court to make a finding of contempt based on a violation of Rule 8.2, Rules for the Superior Courts.

It is a matter of common knowledge that court congestion in many areas throughout the United States has resulted frequently in a virtual denial of justice and is a matter of grave concern to the bench, the bar, and to the public. It is equally well known that a system of pre-trial conferences as a means of expediting litigation has been effectuated in the federal courts and in many of the state courts and, for several years, has been the subject of study and experimentation in this state.

In 1949, by Assembly Concurrent Resolution 92, Stats.1949 p. 3406, the Legislature requested the Judicial Council to study pre-trial practice and procedure. There followed an extensive study, Judicial Council 15th Biennial Report, pp. 13 et seq., resulting in a recommendation by the Judicial Council to the Legislature that there be adopted an effective pre-trial system in California, through rules to be promulgated by the Judicial Council. Thereafter section 575 of the Code of Civil Procedure was enacted, Stats.1955 p. 1130, providing that "The Judicial Council may promulgate rules governing pretrial conferences, and the time, manner and nature thereof, in civil cases at issue, or in one or more classes thereof, in the superior courts and in the municipal courts." Pursuant to this legislative mandate, the Judicial Council made further study of appropriate rules for pre-trial procedure and submitted tentative rules for consideration and discussion to members of the bar and to the governing officials of the State Bar of California. The necessity for sanctions to insure the effectiveness of pre-trial proceedings was a matter of prime consideration and it was determined by the Judicial Council that unless compliance with such rules by attorneys was made compulsory, the pre-trial system could not attain its desired objectives. On September 19, 1956, "[w]ith full cooperation of the State Bar of California and in direct concert with its Board of Governors", California Manual of Pre-trial Procedure, p. 9, rules relating to pre-trial conferences were adopted by the Judicial Council, effective January 1, 1957. Rules 8 to 8.12, Rules for the Superior Courts.

[1] Article VI, sec. 1a, of the California Constitution, creates a Judicial Council and vests in it the power to "Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force". Under this constitutional grant of power, it is well settled that the rules of practice and procedure adopted by the Judicial Council, including such rules as have been adopted under specific statutory mandate, and which do not transcend legislative enactments, have the force of positive law. Helbush v. Helbush, 209 Cal. 758, 290 P. 18; Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860; Isenberg v. Superior Court, 39 Cal.App.2d 106, 102 P.2d 552; Kuhn v. Ferry and Hensler, 87 Cal.App. 2d 812, 197 P.2d 792.

[2–4] The duties of attorneys in respect to pre-trial conferences are set forth in Rule 8.2[1] which requires the attendance at the conference by counsel, if any, who shall have a thorough knowledge of the case and be prepared to discuss it. Manifestly, there can be no pre-trial conference without conferees, and no effective pre-trial conference without participation predicated on preparation. This rule of practice and procedure duly adopted by the Judicial Council is not inconsistent with any statutory law and therefore has the force of law as it applies to the duties of attorneys to prepare for, attend, and participate in a pre-trial conference. It is a well-recognized principle that courts have inherent power to enforce the effective conduct of judicial proceedings in order to insure orderly administration of justice, People v. Kerrigan, 73 Cal. 222, 14

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[1] "Each party appearing in any case shall attend the pre-trial conference by counsel, or if none, in person, and shall have a thorough knowledge of the case, be prepared to discuss it and to make stipulations or admissions where appropriate. They shall confer before the date assigned for this conference to reach agreement upon as many matters as possible. They shall prepare jointly, or each shall prepare, and submit to the pre-trial conference judge at or before the conference, a written statement of the matters agreed upon. Each shall be prepared to state orally the factual and legal contentions to be made as to the issues remaining in dispute. Each shall complete his depositions, inspection of writings and other discovery proceedings, and physical examinations, before the pre-trial conference." Rules for the Superior Courts, Rule 8.2.

P. 849; Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975, and the Legislature has codified this principle by granting power to every court to provide for the orderly conduct of proceedings before it, Code Civ.Proc., sec. 128, subd. 3. An inexcusable failure to comply with the rules or orders made by a court pertaining to the orderly conduct of judicial proceedings before it constitutes an unlawful interference with the proceedings of the court, Code Civ.Proc., sec. 1209, subd. 8, and by appropriate proceedings is punishable as a contempt of the authority of the court, Lyons v. Superior Court, 43 Cal.2d 755, 278 P.2d 681. A rule of procedure adopted by the Judicial Council within its constitutional or statutory grant of power for the conduct of a judicial proceeding before a court is a rule of the court within the purview of Code Civ.Proc., sec. 128, subd. 3, and we conclude that an inexcusable failure of an attorney to prepare for, appear at, and participate in a pre-trial conference is, by appropriate proceedings, subject to the punitive power of the court.

[5] The contention is here made that Rule 8.9,[2] Rules for the Superior Courts, constitutes an attempt by the Judicial Council to legislate in the field of substantive law, in that said rule designates certain acts or omissions as contempts of court, and is therefore an unconstitutional encroachment upon the power of the Legislature. With this contention we cannot agree. Section 1209 of the Code of Civil Procedure, except subdivision 8 thereof, defines with some particularity various types of acts or omissions which constitute contempts of the authority of the court. However, subdivision 8, by its terms, embraces any other acts not otherwise described which result in the unlawful interference with the process or proceedings of a court. Manifestly, a specific enumeration of every act or omission which may unlawfully interfere with the proceedings of the court is impractical, if not impossible, and the clear purpose of the foregoing subdivision is to include within the definition of contempt, acts or omissions not previously specified but which in fact result in an unlawful interference with the proceedings of the court. Rule 8.9 delineates certain omissions by an attorney as constituting an unlawful interference with the proceedings of the court in a pre-trial conference and does not attempt to define any new or distinct act of contempt and, in our opinion, is not an encroachment upon the legislative authority to enact substantive law, which conclusion answers petitioner's further contention that Rule 8.9 attempts to trench upon a field of law already pre-empted by the Legislature.

In the instant matter, a pre-trial conference was held in connection with a civil case pending in the respondent court and the pre-trial conference judge made an order which, after reciting the names of the counsel appearing (not including the petitioner herein) and the holding of the pre-trial conference, set forth that the following action was taken:

> "It appears to the Court in this Matter that the office of Cantillon & Cantillon have neither prepared for pre-trial nor have they conferred with either counsel for plaintiff or counsel for the defendant Foster prior to pre-trial as required; that Mr. McDonough, who is appearing here this morning, is not the lawyer in the Cantillon office who is familiar with this matter, he having advised the Court that he just read the pleadings and that Mr. James Cantillon is the lawyer who is familiar with this matter, and that he, Mr. McDonough, is not familiar with the facts or the law of the case and is without adequate knowledge or authority to proceed. Counsel for plain-

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[2] "Any failure of an attorney to prepare for, appear at, or participate in, a pre-trial conference, unless good cause is shown for any such failure, is an unlawful interference with the proceedings of the court; and in addition the court may impose costs, actual expenses, counsel fees, or any or all thereof, arising therefrom." Rules for the Superior Courts, Rule 8.9.

> tiff and counsel for the defendant Foster advise the Court that they have not been able to make arrangements with the Cantillon office for pre-pretrial conferences, and that their telephone calls have not been answered. The matter obviously is not ready for pre-trial hearing.
>
> "By reason of the foregoing, i. e., the failure of the Cantillon office to have any pre-pretrial conferences, prepare for pre-trial, have a lawyer represent their office at this pre-trial hearing prepared to proceed, the Court therefore finds that the office of Cantillon & Cantillon has violated Rule 8.2 of the Pre-Trial Rules, and by reason thereof violated Rule 8.9, and has thereby committed an unlawful interference with the proceedings of this Court, and that Cantillon & Cantillon therefore are in contempt of Court.
>
> "No good cause having been shown by the office of Cantillon & Cantillon for the above violations of the rules of pre-trial procedure, they are directed to pay a fine in the sum of $100 within twenty-four hours from this date in the hands of the Clerk of this Court for such violation."

Rule 8.9 specifically provides that it is the failure of "an attorney" to appear at the pre-trial conference which constitutes the unlawful interference and not the failure of a firm or association of attorneys; and although the order made herein recites that Mr. James Cantillon is the attorney who is familiar with the case, the order does not find that Mr. James Cantillon committed an unlawful interference with the proceedings of the court but that such interference was committed by "the office of Cantillon & Cantillon".

[6] Criminal contempts consisting of acts done in disrespect of the authority of a court are necessarily acts or omissions committed by an individual or individuals as distinguished from acts or omissions committed by the firm or association of which the individuals are members, and we know of no authority by which the court may impose a fine upon a firm or association for a personal contempt committed by a member of such firm or association.

Inasmuch as we are compelled to annul the particular order here under review for the reasons stated, we find it unnecessary to pass upon the question of whether the inexcusable failure of an attorney to appear and participate in a pre-trial conference is a direct or indirect contempt.

The order of contempt is annulled and vacated.

MOORE, P. J., and FOX, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

150 Cal.App.2d 435

Frank H. DEA, d/b/a Dea Realty Company, Plaintiff and Appellant,

v.

Dolores M. DAVY, Defendant and Respondent.

Civ. 22162.

District Court of Appeal, Second District, Division 2, California.

April 24, 1957.

Action to recover real estate broker's commission from owner who had prescribed terms, including cash payment of $6,000, and had rejected purchase proposal embodied in deposit receipt acknowledging payment of $600 and providing for deposit of $5,400 in escrow. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that deposit receipt had amounted to rejection of owner's terms and making of new proposal; and held that since such counter-proposal had not been accepted by owner, broker was not entitled to commission.

Affirmed.

1. Brokers ⚷49(1)

Where terms of sale included in "Owner's Statement" were substantially different from those of previously-executed authorization to sell, court would look to the latest writing as basis for determining whether broker had performed such acts as would entitle him to collect commission.

2. Brokers ⚷49(3)

Where authorization to sell required payment of $6,000 in cash, deposit receipt, acknowledging payment of $600 by prospective purchaser and providing for deposit of $5,400 in escrow, amounted to rejection of owner's terms and making of new proposal; and such counter-proposal not having been accepted by owner, broker was not entitled to commission.

3. Customs and Usages ⚷19(3)

In action to recover real estate broker's commission from owner who had prescribed cash payment of $6,000 and had rejected purchase proposal embodied in deposit receipt acknowledging payment of $600 and providing for deposit of $5,400 in escrow, evidence would not sustain broker's claim with regard to alleged custom to handle agreed down payment in manner reflected by deposit receipt.

4. Customs and Usages ⚷14

Where known usage and contract are in conflict, contract prevails. West's Ann. Civ.Code, § 1655.

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Anderson, Adams & Bacon, Los Angeles, for appellant.

Earl D. Reese, Sherman Oaks, for respondent.

ASHBURN, Justice.

[1] Appeal from judgment of nonsuit in action to recover a real estate broker's commission. On September 23, 1955, defendant owner signed an authorization for plaintiff broker to sell her "Trailer Park" for a price of $76,500, with a down payment of $15,000. On October 4, 1955, defendant signed a new "Owner's Statement" setting forth the terms upon which she would dispose of her property. The terms of sale included in this writing are substantially different from those of September 23rd and we look to the later one as a basis for determining whether the agent performed such acts as would entitle him to collect a commission.

The instrument of October 4 essentially provides for a lease for three years with an option to purchase at the expiration of that period. The price is fixed at $76,500, and the body of the seller's authorization says: "I agree to the following $6000.00 Cash—$650.00 per month rental for three years or a total of $29,400.00 has been paid: At that time buyer may exercise his option to purchase, the $29,400.00 to be then considered as a down payment. Price to be the same as previous listing. Renter to pay taxes, insurance and upkeep. Owner to pay loans until such time as renter exercises option. Owner to pay Dea Realty Company ($1000.00) one thousand dollars at time above arrangement is made and the balance of commission ($2825.00) twenty eight hundred and twenty five dollars. When buyer exercises option to purchase. At that time buyer to pay ($3000.00) in cash, three thousand dollars, making a total of $32,400.00 to be applied against total purchase price. At time option is executed buyer to purchase subject to existing trust deeds, as paid down at that time, and seller to execute a purchase price trust deed to buyer for any difference there may be at that time, said trust deed to be payable at the rate of 1% per month including 6% interest."

There is no mention of a policy of title insurance[1] and no reference to an escrow; no indication that payment of the $6,000 is to be deferred at all. That sum, plus the cash rentals and $3,000 payable upon exercise of the option, aggregate $32,400, the full amount of cash to be paid. There appears to be no occasion to bring down title until that time arrives, and certainly no indication in the writing that it would be done sooner, or that the "$6,000 cash" payment should be held in escrow awaiting that event or any other one.

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[1] The first authorization did not contain an agreement to furnish satisfactory policy of title insurance, but this provision was not incorporated in the document of October 4, either expressly or by reference.

[2] Plaintiff procured from one Cuthill and wife a written offer dated October 21, 1955, a "Deposit Receipt," signed by the broker and the buyers, which acknowledges payment of $600 as a deposit on account of the purchase price, and says: "Balance of ($5400.00) fifty four hundred dollars to be deposited in escrow within thirty days from date. Rents to be pro rated outside of escrow. Possession when deal comes out of escrow." The other terms square with the owner's authorization except that the printed portions call for a policy of title insurance, a return of the deposit in event of failure of seller to perfect title within a reasonable time, and further says: "Seventh—Place of escrow ———." It also provides "that the property is sold subject to approval of the owner." This approval was never forthcoming. The owner did not execute the Deposit agreement and refused to sign escrow instructions when presented to her. This Deposit Receipt, with its provision for cash payment of $600 and deposit of $5,400 in escrow (instead of $6,000 in cash), amounted to a rejection of defendant's terms and the making of a new proposal which defendant declined to accept. Hence the broker failed to perform. The case of Andrews v. Waldo, 205 Cal. 764, 770, 272 P. 1052, is in point.

[3] Appellant relies on an asserted custom to handle the agreed down payment in the manner of the Deposit Receipt. His proof on that subject fell short of the goal. After testifying to same he said, on cross-examination:

> "Q. Mr. Dea, is it not a fact that this custom you spoke of, that the listing agreements which real estate brokers use, provide that an escrow will be opened in a reliable escrow company? A. Yes.
>
> "Q. And isn't it a fact that these escrow agreements also provide that a policy of title insurance would be deposited in escrow by a reliable title insurance company? A. Yes.
>
> "Q. Then isn't it a fact that the reason these escrows are opened is because the contract so provides? A. Yes."

[4] The Andrews case, supra, says, 205 Cal. at page 770, 272 P. at page 1055: "But by express Code provision stipulations which are necessary to make a contract conformable to usage are implied only in respect to matters concerning which the contract manifests no contrary intention. Section 1655, Civ.Code. In other words, where the known usage and the contract are in conflict the contract prevails." That is the situation at bar. The court properly granted a nonsuit.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

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150 Cal.App.2d 232

Keith GARRICK, Plaintiff and Respondent,

v.

J. M. P., Inc., a California corporation, and Cecil D. Pruitt, Defendants and Appellants.

Civ. 21855.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Rehearing Denied May 13, 1957.

Hearing Denied June 12, 1957.

Action, against corporation engaged in development of subdivisions and its secretary, on note which corporation had issued to its secretary and which plaintiff had purchased for $15,000 from the secretary under agreement by which he was to be able to make $4,500. The Superior Court of Los Angeles County, Clarence M. Hanson, J., rendered judgment holding both defendants liable, and they appealed. The District Court of Appeal, Ashburn, J., held, inter alia, that evidence sustained trial court's findings that the agreement was not for a loan and not usurious, but was one for investment in the business of the corporation.

Judgment affirmed.

1. Appeal and Error ⚷931(1)

All testimony and inference favorable to respondent, wherever evidence presented a substantial conflict, would be accepted by reviewing court.

2. Usury ⚷72

Presumptions favor legality, and if transaction is open to two constructions, one legal and other illegal, in absence of evidence clearly pointing to usury, court will construe it in favor of lawfulness.

3. Appeal and Error ⚷994(3)

Trial court's finding that a defendant had no credibility was required to be accepted by reviewing court where it had substantial support in record.

4. Appeal and Error ⚷1010(1)

Claim of insufficiency of evidence requires demonstration that there is no substantial evidence to support challenged findings.

5. Appeal and Error ⚷989, 996

Power of appellate court begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support trial court's findings, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

6. Appeal and Error ⚷1010(1)

To warrant rejection of statements given by a witness who has been believed by trial court, there must exist either physical impossibility that they are true or their falsity must be apparent without resorting to inferences and deductions.

7. Usury ⚷117

In action against corporation engaged in development of subdivisions and its secretary, on note which corporation had issued to its secretary and which plaintiff had purchased for $15,000 from the secretary under agreement by which he was to be able to make $4,500, evidence sustained trial court's findings that the agreement was not for a loan and not usurious, but was one for investment in business of corporation.

8. Appeal and Error ⚷1057(1)

In action against corporation engaged in development of subdivisions and its secretary, on note which corporation had issued to its secretary and which plaintiff had purchased for $15,000 from the secretary under agreement by which he was to be able to make $4,500, trial court committed no prejudicial error in excluding defendants' proffered evidence of usurious nature of loan in connection with another building corporation and substantially concurrent with transaction at bar, where such loan was, subsequently in trial, fully proved to be usurious and defendants had full benefit of everything they sought to prove by their rejected testimony.

9. Appeal and Error ⚷1048(1)

In action against corporation engaged in development of subdivisions and its secretary, on note which corporation had issued to its secretary and which plaintiff had purchased from the secretary, wherein crucial issue was whether transaction was usurious loan or investment in business and wherein there was evidence that plaintiff was part owner of escrow company to which he took note to have it indorsed with full recourse, record failed to reveal any prejudice from trial court's sustaining objection on ground of immateriality to question of whether he was owner of escrow company and consequently familiar with promissory notes.

10. Appeal and Error ⚷1048(7)

In action against corporation engaged in development of subdivisions and its secretary, on note which corporation had issued to its secretary and which plaintiff had purchased from the secretary, though there was no issue as to secretary's true name and though questions propounded to him on cross-examination eliciting that he had used other names and that his true name was not that which he was then using had purpose only of discrediting him, record failed to reveal that questioning had prejudicial effect on trial judge.

11. Election of Remedies ⚷1

Doctrine of election of remedies rests upon estoppel.

12. Election of Remedies ⚷14

In absence of prejudice to opposing party, no shifting of theories by plaintiff can be precluded by application of doctrine of election of remedies.

13. Estoppel ⚷68(2)

Where plaintiff, throughout action, asserted as only theory of recovery a promissory note made by first defendant to second defendant and sold to plaintiff, and not a joint venture, plaintiff's contention at trial that defendants had made admission that there was no loan as claimed by them at trial could not require plaintiff to elect to proceed on basis of joint venture rather than note.

14. Trial ⚷159

Nonsuit cannot be granted because of existence of conflict in plaintiff's evidence.

15. Trial ⚷165

On motion for nonsuit, evidence of plaintiff which is most favorable to his cause must be accepted and the balance rejected.

16. Trial ⚷89

No motion will lie to strike part of opponent's evidence on grounds of inconsistency.

17. Pleading ⚷237(8)

In action against corporation engaged in development of subdivisions and its secretary on note which corporation had issued to its secretary and which plaintiff had purchased from the secretary, wherein issue was whether loan constituted investment in business or usurious loan and individual defendant had testified that there was no joint venture and plaintiff had not sued on such theory, trial court properly denied defendants' motion to amend to conform to proof by alleging joint venture.

18. Appeal and Error ⚷1149

Where trial court's findings holding indorser liable on note erroneously stated that note was indorsed without recourse where record clearly showed that it had been indorsed with recourse and apparently neither side observed the error, reviewing court would amend the findings in aid of affirmance.

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Wolver & Wolver, Los Angeles, for appellants.

Robinson & Powers, Franklin K. Lane, III, Los Angeles, for respondent.

ASHBURN, Justice.

[1] Defendants J. M. P., Inc. and Cecil D. Pruitt appeal from a judgment rendered against them upon a promissory note for $19,500 which the court found to have been issued by the corporation to Pruitt without consideration, later purchased by plaintiff for $15,000 in good faith, before maturity and without notice of any infirmity therein. Their major defense of usury was rejected. The primary question upon appeal is the sufficiency of the evidence to sustain the findings. In stating the facts we shall accept, in accordance with the familiar rule of appellate review, all testimony and inferences favorable to respondent wherever the evidence presents a substantial conflict.

Plaintiff was in the plastering and general contracting business and defendant Pruitt in the development of subdivisions through the erection of houses and customary incidental activities. He was operating through defendant corporation, J. M. P., Inc., which was owned by himself and other members of his family. His official status was that of secretary. In the latter part of September, 1950, plaintiff and Pruitt had a conversation in which the latter rejected plaintiff's plastering bid and then suggested that a better way for him to make money would be investing in the building business with Pruitt. He told of other investors and that they had been making from 25 to 50 per cent profit on their investments. Asked if he had any money to invest Garrick said he probably could get $10,000 to $15,000 for that purpose. Pruitt assured him he could make a profit of 25 to 50 per cent as other investors had done. Plaintiff wanted more information and was given a list of properties which defendant had under construction; plaintiff agreed to look at them and did so within the next two or three days. Pruitt said the construction was being done by a corporation of his, J. M. P., Inc., and that he was its secretary.

About October 3rd he telephoned to Garrick saying he had worked out a deal whereby Garrick could make $4500 by buying a note that had been made by J. M. P., Inc., to him, Pruitt. "He stated that this would simplify everything because I would not have to sign any loan papers for the construction of these houses or be involved that way, so I asked Mr. Pruitt, 'Well, how do I get my money?' And Mr. Pruitt told me that he would give me an order on the escrows, that I would be paid through the sales escrows, and I said, 'Fine.' And I thought that we could work out something on it." Pruitt also said in that conversation that he would give plaintiff a letter to show that he was willing to sell him for $15,000 a note which he had received and which had a face value of $19,500. "Q. Did he tell you why he would give it to you? A. Well, strictly for my protection is the only thing I know of."

[2] The parties met on the following day and Pruitt produced a note saying it was the one he had mentioned. It bears date of that same day, October 4th, is payable to the order of Pruitt and is signed by him as secretary of the corporation, having no other signature. The principal sum is $19,500, payable eight months after date with interest at six per cent, and the note specifies that interest will be waived if the note is paid within eight months from date. Pruitt had given the corporation nothing for the note but he did not tell Garrick of that fact. When plaintiff looked over the note he asked Pruitt "if he would mind if I took the note to the West Florence Escrow Company and have them put a stamp on it which calls for full recourse. Mr. Pruitt said that this would be absolutely all right and that he would also give me a letter where I would be paid from the escrows." Apparently the instrument already bore a typewritten assignment from Pruitt to Garrick which in terms was expressly made "with recourse." With the note Pruitt also presented to plaintiff two letters dated October 4th; one of them, exhibit 4, was signed by himself as an individual and reads as follows: "As per our conversation, I have a note executed by J. M. P., Inc., to C. D. Pruitt for $19,500, bearing 6% interest due in eight months. If paid within eight months the 6% interest is to be waived. This is secured by sales escrow orders at the escrow company on the enclosed list of twenty-eight buildings. At this time, I would be willing to sell this note for $15,000." The other, signed by Pruitt as corporate secretary, contained an agreement to "issue instructions to the escrow companies handling sales to pay to Keith Garrick out of each sale the sum of $500.00." Plaintiff took the note to the escrow company and there had placed under the existing assignment a stamp which also assigned to plaintiff the said note "with recourse on us." This was also signed by Pruitt. In exchange for the note and letters plaintiff delivered his check of October 4th for $15,000 payable to Pruitt. It was endorsed by him and apparently deposited in the corporate bank account on October 5th. Plaintiff did not request these letters or otherwise enter into the formulation of the transaction, which had been presented to him as an investment. He testified that there was at no time a request for a loan and no mention of a loan between him and Pruitt. It is an established rule, as stated in Lindsey v. Campbell, 132 Cal.App.2d 746, 750, 282 P.2d 948, 951, that: "The presumptions of law are in favor of legality;

and therefore if the transaction in question is open to two constructions, one making for legality, the other for illegality, then in the absence of evidence pointing clearly to usury, it is the duty of the court to adopt the construction in favor of lawfulness."

Rose v. Wheeler, 140 Cal.App. 217, 220, 35 P.2d 220, 221: " 'The contention of the defendant is that the transaction was not a loan of money, but a sale of certain corporate stock to plaintiff upon credit, and further that defendant has not even yet been able to realize the return of any of his money.

" 'If there was a *bona fide* transaction of purchase and sale, and not a loan or forbearance of money, the usury law has no application.' " "Of course, the burden, and a heavy one, rests upon [plaintiff] to establish the evasion." Miley Petroleum Corp., Ltd. v. Amerada Petroleum Corp., 18 Cal.App.2d 182, 190, 63 P.2d 1210, 1214.

[3-6] Defendant's version of the instant transaction was that of an outright usurious loan to the corporation with the above mentioned letter (exhibit 4) intended as a cover up. Some of the circumstances related in plaintiff's testimony are strongly suggestive of the accuracy of defendant's version, but the trial judge stated in his summary of the case that "the defendant has not any credibility whatsoever." This appraisal we must accept as it has substantial basis in the record. And we bear in mind, lest we yield to the temptation to substitute our own factual inferences for those of the trial judge, that a claim of insufficiency of the evidence "requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will support the findings, and when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' " Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552. Moreover, "[t]o warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759. Mr. Justice Stone remarked in one of his dissenting opinions that the test of fitness to wield power is self restraint in its exercise. In the light of the precepts just mentioned it is incumbent upon this court to hold that the evidence is legally sufficient to support the finding of innocence and bona fides in plaintiff's purchase of the note in question. The case closely resembles Lindsey v. Campbell, supra, 132 Cal.App.2d 746, 282 P.2d 948, wherein an investment in a subdivision project was revamped into promissory notes but not thereby changed in its essence or converted into a usurious transaction.

[7] The case of Smith v. G. Cavaglieri Mortgage Co., 111 Cal.App. 136, at page 144, 295 P. 366, at page 369, which appellants stress, is not controlling authority in their favor, for it turned upon the conclusion "that the finding of the court that the transaction was a purchase and not a loan, has no substantial support in the testimony". In the case before us the record contains such substantial support for the crucial finding.

[8] Appellant complains of various rulings upon evidence. One of them is the exclusion of certain testimony and rejection of an offer of proof of the usurious nature of a loan made in connection with Reliance Building Corporation, which was substantially concurrent with the transaction at bar.

The merits of the contention do not require examination for the Reliance loan was fully proved at a later stage of the trial, it plainly was usurious, and appellants had the full benefit of everything they sought to prove by their rejected testimony and offer of proof.

[9] It appears from the evidence that plaintiff is part owner of West Florence Escrow Company, which has an office in the same building with him; that he took the note to that escrow company to have "a stamp on it which calls for full recourse." When asked if he was the owner of the escrow company objection was sustained upon the ground of immateriality, and counsel for defendants made an offer to prove by the witness that he was an officer and one of the owners of the escrow company, acquainted with promissory notes and with the drawing and the terms and conditions of promissory notes. Objection thereto was sustained. The substance of the matter is elsewhere in the record and there could be no prejudice from rejection of this proof.

[10] On cross-examination of appellant Pruitt, plaintiff's attorney asked if C. D. Pruitt was his true name. Objection being overruled he answered in the negative, gave his true name as R. F. Cross, and then the following occurred: "Q. How long have you been in the construction business? A. I have a couple of other names when I was railroading, you know, that I worked under, if you want to know all of them. Q. No, your true name I said. How long have you been in the construction business?" This put defendant to the burden of explaining later the reasons why he had used the name Pruitt for some 25 to 30 years. This he did, and then upon re-cross-examination the following took place: "Q. Mr. Pruitt, isn't it a fact you changed your name because you went through bankruptcy in the 1920's sometime? A. It is not, I never went through bankruptcy, I have never been convicted of anything, I have never been arrested for any crime." Plainly this questioning about change of name and bankruptcy had only one purpose, the discrediting of defendant as a man rather than as witness. There was no issue whatever as to defendant's true name, nor any which involved it indirectly. Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 165, 195 P.2d 416, and cases therein cited, hold this type of examination to be improper. However, the evidence does not appear to have been prejudicial for the credibility of the witness had been so thoroughly destroyed in the view of the trial judge by other features of the case that this matter can be accorded little weight in any direction.

Other complaints concerning evidentiary rulings do not require discussion.

Plaintiff, in an effort to discredit the claim of a loan, offered certain evidence to the effect that defendants carried the Garrick matter upon the corporate books as a joint venture between plaintiff and defendant. This proof was offered by way of an admission of defendant showing that Pruitt did not prior to suit consider the transaction as a loan. Of course such admissions of defendant are not binding upon the plaintiff. Appellants seized upon this proof as a basis for (1) a motion to compel an election by plaintiff between allegedly inconsistent remedies,—an action on a note and one for an accounting of the affairs of a joint venture, (2) a motion for a nonsuit on the theory that plaintiff had proved only a joint venture and hence had pursued the wrong remedy in suing on a note, (3) a motion to strike the evidence of joint venture,—this on the theory of inconsistency of remedies, and (4) at the close of the trial a motion to amend their answer to conform to the proof by alleging a joint venture and a resulting loss which plaintiff must share. Having met adverse rulings upon these several matters, appellants claim error in each.

[11-13] There was no occasion for an election. Plaintiff did not sue upon a joint venture. He stood on the promissory note, there being but one cause of action in his complaint. Neither he nor his attorney ever claimed that a joint venture existed in fact, merely that defendants

had made an admission that there was no loan as claimed by them at the trial. The doctrine of election of remedies rests upon Superior Ct., 7 Cal.2d 121, 129, 59 P.2d estoppel. Commercial Centre Realty Co. v. 978, 107 A.L.R. 714; Perkins v. Benguet Cons. Min. Co., 55 Cal.App.2d 720, 758, 132 P.2d 70; 1 Witkin on California Procedure, p. 548, § 51. And in the absence of prejudice to the opposing party no shifting of theories by one party can be precluded by application of the rule of election of remedies. However, as above indicated, there was no shifting of positions by plaintiff. He consistently stood upon the promissory note.

[14, 15] A nonsuit cannot be granted because of the existence of a conflict in plaintiff's own evidence. That which is most favorable to his cause must be accepted and the balance rejected. This is hornbook law. On defendants' motion at bar the evidence concerning joint venture was properly disregarded and the motion properly denied.

[16] A motion to strike part of plaintiff's evidence upon the theory of inconsistency therein does not lie. An election sometimes becomes proper, but counsel cite no authority for the proposition that the court may strike the portion of plaintiff's case which is favorable to him and thereby compel plaintiff to stand upon a ground selected for him by his adversary. That would be absurd.

[17] Defendants' motion for leave to amend to conform to the proof by alleging a joint venture and a resulting loss was properly denied. Defendant Pruitt had previously testified factually and by way of conclusion that there was no joint venture, and hence defendants cannot complain of a denial of their motion to amend. They cannot blow hot and cold in this manner. "These two positions are entirely inconsistent. The courts will not recognize or tolerate such tactics. A party cannot thus 'blow hot and cold.' McDanels v. General Ins. Co. [35 P.2d 394 reh. gr.] 1 Cal.App.2d 454, 459, 36 P.2d 829, 832; Chaquette v. Ortet, 60 Cal. 594, 600. The courts would be impotent indeed if they were compelled to approve such duplicity." Alexander v. Hammarberg, 103 Cal.App.2d 872, 879, 230 P.2d 399, 404. These considerations also dispose of appellants' complaint that they were precluded from proving that the alleged joint venture had operated at a loss.

[18] Defendant Pruitt argues that there is error in holding him personally liable on the note because he endorsed it without recourse. The findings state that it was so endorsed but the original note bears two assignments or endorsements and both expressly say "with recourse." This error in the findings seems to stem from the fact that defendants' counsel misread the note in cross-examining plaintiff, substituting the words "without recourse" for "with recourse." The error crept into the findings, which appear to have been drafted by plaintiff's attorney. The judge failed to observe the mistake when signing the findings and at the same time rendered judgment against both defendants. Counsel for respondent join appellants' attorneys in discussing the case upon the basis of an endorsement without recourse. This persistence in mutual error is difficult to understand.

Plaintiff testified that when the note was presented to him he asked Pruitt if it would be agreeable for him to take the note to West Florence Escrow Company and have them put a stamp on it calling for "full recourse." There appears on the note a typed assignment reading "with recourse," and below that a stamped endorsement, also signed by defendant Pruitt, which says "with recourse." The stamp itself reads: "and ——— recourse on us," the blank obviously being left for insertion of "with" or "without." The word "with" was inserted in this instance. It seems quite unlikely that, upon the facts of this case, the eminent trial judge would have rendered judgment against Pruitt in the face of an endorsement without recourse, and the inference is well-nigh inevitable that those words in the findings are the result of misprision. This is an appropriate occasion for amendment of the finding in aid of affirmance. Kastel v. Stieber, 215 Cal. 37, 44, 8 P.2d 474.

Finding III of the findings of fact and conclusions of law is amended by changing the second sentence thereof to read as follows: "Defendant Pruitt endorsed said note on the back thereof, expressly stating same to be with recourse, and delivered said note to the plaintiff Garrick."

The judgment is affirmed as to both defendants.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 190

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ruben Ocuna MACHADO et al., Defendants, Ruben Ocuna Machado, Charles Cowan, Jr., Raymond Aguilarro Ulibarri, and Gilbert Israul Muro, Appellants.

Cr. 5715.

District Court of Appeal, Second District, Division 2, California.

April 16, 1957.

Prosecutions for murder. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgments of conviction and an order denying a new trial to one codefendant and appeals were taken. The District Court of Appeal, Richards, J. pro tem., held, inter alia, that evidence sustained convictions as to appealing defendants who assigned insufficiency of evidence as error.

Affirmed.

1. Homicide 🔑18(5)

Homicide committed in the perpetration of robbery is murder in the first degree regardless of whether the killing be wilful, deliberate and premeditated or even accidental. West's Ann.Pen.Code, § 189.

2. Homicide 🔑30(1)

A principal in a robbery resulting in homicide may be found guilty of murder in the first degree notwithstanding fact that his codefendant fired the fatal shot. West's Ann.Pen.Code, §§ 31, 189.

3. Homicide 🔑30(1)

Where one of the codefendants advised and encouraged commission of a robbery, and as a "lookout" aided and abetted commission of such crime, he became a principal in the commission of the robbery, and as a result of the killing of robbery victim by a codefendant during course of the robbery, defendant became a principal in the homicide and was properly found guilty of murder in the first degree. West's Ann.Pen.Code, §§ 31, 189.

4. Homicide 🔑30(1)

Where a defendant stated he was one of the persons involved in a holdup and shooting at a liquor store, and was at door of the store when codefendant shot robbery victim, and he helped a codefendant pick up the cash register and put it in an automobile and later broke it open and divided the contents, and directed police to a place where the cash register was found, he thus aided and abetted in the commission of the robbery and became a principal in such crime, and as a result of the killing of robbery victim by codefendant during the course of such robbery he was a principal in the homicide and properly found guilty of murder in the first degree. West's Ann. Pen.Code, §§ 31, 189.

5. Infants 🔑68

Under statute providing for reference of certain persons convicted of public offenses to the Youth Authority before sentence, with certain exceptions, Superior Court was not required to refer 16 to 18 year old defendants charged and convicted of murder in the first degree to the Youth Authority before sentencing them to prison for life. West's Ann.Pen.Code, § 190; West's Ann.Welfare & Inst.Code, § 1731.5.

6. Infants ⚿68

All that need be established to confer jurisdiction upon superior court to try a minor over the age of 16 years under general law rather than under juvenile law is proof of the juvenile court's finding of unfitness.

7. Witnesses ⚿255(1)

In prosecutions for murder arising out of a killing during the course of an armed robbery, trial court did not err in allowing an investigating officer, while on witness stand, to refresh his memory on cross-examination by referring to a stenographic transcript of a conversation he had with one of the defendants. West's Ann.Pen.Code, §§ 31, 189.

◆

David C. Marcus, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

RICHARDS, Justice pro tem.

Ruben Ocuna Machado, Charles Cowan, Jr., Raymond Aguilarro Ulibarri, Gilbert Israul Muro, together with Tomas Guzman Guajardo were accused by indictment of the murder of Sergei Markarian on or about February 16, 1956. Defendants Cowan and Guajardo pleaded guilty; a jury trial was waived as to defendants Machado, Ulibarri, and Muro; and each of the five defendants was found guilty of murder in the first degree. Motions by defendants Machado, Ulibarri and Muro for new trials were denied and the court sentenced appellants to the state prison for life.

Defendant Muro has appealed from the order denying his motion for new trial and from the judgment, and defendants Machado, Ulibarri and Cowan have each appealed from the judgment. The assignments of error are: (1) Insufficiency of the evidence to sustain the conviction of defendant Muro of murder in the first degree; (2) Insufficiency of the evidence to sustain the conviction of the defendant Ulibarri of murder in the first degree; (3) Error in sentencing appellants to the state prison without first having committed each to the Youth Authority; (4) Lack of jurisdiction to try appellants under general law without establishing compliance with juvenile court statutes.

Sergei Markarian operated a liquor store on Whittier Boulevard in East Los Angeles. Sarkis Sanoin, who had known Markarian for a number of years, was in the liquor store with Markarian shortly before midnight on February 16, 1956, and while he was talking to Markarian, Cowan and Machado entered the liquor store, Cowan carrying a rifle and Machado a short knife. Almost immediately upon their entry Cowan shot and killed Markarian, whereupon Machado tried unsuccessfully to open the cash register. Cowan then turned the rifle on Sanoin, telling him to open the cash register, which he was unable to do, and then Machado carried the cash register out of the store. After the shot, but before the cash register was carried away, Sanoin heard some voices outside although he was not able to state how many nor did he see any one on the outside or any one else on the inside except Cowan and Machado. Not more than two minutes elapsed between the entry into the store by Cowan and Machado and their departure with the cash register.

There is no contention upon this appeal that the evidence was insufficient to sustain the conviction of Cowan and Machado of first degree murder.

Sufficiency of the Evidence as to Defendant Muro.

The evidence connecting Muro with the offense consists mostly of his free and voluntary statements made to investigating officers after the arrest; and according to testimony thereof at the trial, Muro stated that on the evening preceding the shooting he was in an automobile with the other defendants and another boy and that during the evening they had discussed the possibility of "pulling a stick-up some place"; that later the same evening Cowan obtained a .22 caliber rifle and put it in the car and that the four of them drove to the East Los Angeles area looking for a place to hold up; that they checked on two liquor stores but did not like the condition and that upon passing Markarian's liquor store they made a U-turn and parked across the street; that he (Muro), Ulibarri, Machado and Cowan then walked over to the store and saw two men inside; that Cowan told him (Muro) that he and Machado should go in and make a small purchase, which they did; that thereafter he went out of the store as Cowan walked in and held Markarian up; that he stayed outside by the door of the store, heard a shot, saw a man fall, and then ran to the car; that the other boys followed him with the cash register and together they drove to the San Fernando area where the cash register was opened and they divided the money five ways.

[1–3] Homicide committed in the perpetration of robbery is murder in the first degree regardless of whether the killing be wilful, deliberate and premeditated or even accidental. Pen.Code, sec. 189; People v. Sutton, 17 Cal.App.2d 561, 567, 62 P.2d 397. A principal in a robbery resulting in a homicide may be found guilty of murder in the first degree notwithstanding that his co-defendant fired the fatal shot, People v. Leon, 129 Cal.App.2d 676, 679, 277 P.2d 481, and principals include those persons who advise or encourage the commission of a crime or who aid and abet in its commission. Pen.Code, sec. 31; People v. Perkins, 37 Cal.2d 62, 64, 230 P.2d 353. From the undenied admissions of Muro, the evidence was clearly sufficient to justify the trial court's conclusion that Muro advised and encouraged the commission of the robbery and as a "look-out" aided and abetted the commission of that crime. People v. Moore, 120 Cal.App.2d 303, 306, 260 P.2d 1011. He thus became a principal in the commission of the robbery and as a result of the killing of Markarian by Cowan during the course of the robbery Muro was a principal in the homicide and was properly found guilty of murder in the first degree. People v. King, 30 Cal.App.2d 185, 201, 85 P.2d 928.

Sufficiency of Evidence as to Defendant Ulibarri.

[4] The evidence connecting Ulibarri to the offense likewise consists mainly of his free and voluntary statements made to investigating officers after his arrest and according to testimony thereof at the trial, Ulibarri stated that he was one of the persons involved in the holdup and shooting at the liquor store; that he was at the door of the store when Cowan shot Markarian; that prior to that event they had discussed pulling a robbery; that thereafter Cowan got a rifle which they put into the car; that they went to the Markarian store; that Muro and Machado went in first to make a small purchase and when Muro came out he gave them the high-sign; that when Cowan entered the store he could see the gun in Cowan's hands; that he heard the shot, then heard Cowan say "Get the cash register", and as Machado came out of the store with the cash register it started to drop and he (Ulibarri) helped pick it up and together they put it in the car and later broke it open and divided the contents; that the next day they returned and buried the cash register in the ground. There was also testimony that Ulibarri directed the police to a place where the cash register was found in a mound of dirt.

In addition to his statements made to investigating officers, Ulibarri took the stand on his own behalf and testified that he was in the car driven by Guajardo on the evening of the robbery; that when they reached the Markarian store he walked as far as the corner of the store and saw Cowan and Machado running out with the cash register; that later he helped throw the cash register into the wash and later went back to bury it and the gun. From Ulibarri's own statements before and at the trial, his participation in the robbery is clear; and for the reasons and upon the authorities cited above in connection with the defendant Muro, we are convinced that the defendant Ulibarri was likewise properly found guilty of murder in the first degree.

Sentencing Defendants to State Prison.

[5] The four appealing defendants, each between the ages of 16 and 18 years at the time of trial, contend that the trial court erred in not referring them to the Youth Authority before sentencing them to prison for life. The minimum, as well as the maximum, statutory penalty for murder in the first degree, as to minors committing the offense under the age of 18, is confinement in the state prison for life. Pen.Code, sec. 190. The provision of the Welfare and Institutions Code germane to the contention made is section 1731.5, which provides as follows:

> "After certification to the Governor as provided in this article a court may refer to the authority any person convicted of a public offense who comes within all of the following description: (a) Is found to be less than 21 years of age at the time of apprehension; (b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment; (c) Is not granted probation."

Under the foregoing provision, since the appellants were each subject to being sentenced to life imprisonment, none of them was eligible for reference to the Youth Authority. Appellants contend there is no express requirement that sentence be pronounced before a reference be made to the Youth Authority. This argument is answered by In re Ralph, 27 Cal.2d 866, 168 P.2d 1, 4, in which case the Supreme Court declined to accept an interpretation of the above-quoted section which would require a commitment to the Youth Authority of those obviously intended by the Legislature to be excepted; i. e., those who, following conviction, are subject to being "sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine" and said, 27 Cal. 2d at page 871, 168 P.2d at page 4: "We are satisfied that a proper interpretation of the pertinent statutory provisions contemplates that sentence be pronounced prior to tentative commitment of a defendant to the Youth Authority;".

Compliance with Juvenile Court Law.

[6] As we have previously stated, each of the four appellants at the time of the commission of the offense was between the ages of 16 and 18 years, and they contend that the superior court lacked jurisdiction to try them under general law in that prerequisite compliance with the juvenile court law was not established, although they make no contention of any failure in fact to comply therewith. The record discloses that there were offered and received in evidence certified copies of the orders of the juvenile court finding that appellants were minors and were unfit for further consideration by the juvenile court, and remanding each to the custody of the sheriff for prosecution under the general law. The appellants' contention, unsupported by the citation of any authority, appears to be that notwithstanding the aforesaid certification of defendants as unfit for consideration by the juvenile court, there must additionally be established each and all of the several proceedings of the juvenile court leading up to and culminating in its order. In our opinion all that need be established to confer jurisdiction upon the superior court to try a minor over the age of 16 years under general law is proof of the juvenile court's finding of unfitness, as was here established.

[7] An additional contention is made by the defendant Muro only, that the court erred in allowing the investigating officer, while on the witness stand, to refresh his memory on cross-examination by referring to the stenographic transcript of a conversation he had with the defendant Muro. That transcript of the conversation indicated that Muro had made no audible response to the witness' question "You all agreed to pull a robbery?" Error is claimed that inasmuch as the transcript did not purport to disclose an audible response by

Muro, the court should not have permitted the witness to refresh his recollection of the conversation. This alleged error occurred during the cross-examination of the witness who had previously testified that Muro said that "the possibility of a stick-up" had been discussed. Even if we accept appellant's version that the transcript showed that Muro made no audible response, it appears to us that it only affects the weight to be given to the witness' testimony that Muro did in fact make an audible affirmative response to the question and we are of the opinion that no error was committed, in any event, by permitting the witness to refresh his memory from the written transcript, People v. Sica, 112 Cal. App.2d 574, 587, 247 P.2d 72.

We find no other points in appellants' brief which merit discussion, and no prejudicial errors in the record.

The judgment and order denying a motion for new trial as to defendant Muro are affirmed, and the judgments as to each of the defendants Machado, Ulibarri and Cowan are affirmed.

MOORE, P. J., and FOX, J., concur.

WEST COVINA ENTERPRISES, Inc., a corporation, Plaintiff and Respondent,

v.

John H. CHALMERS, Defendant and Appellant. *

Civ. 22108.

District Court of Appeal, Second District, Division 2, California.

April 17, 1957.

On motion for rehearing of opinion of District Court of Appeal reported in 308 P.2d 508. The District Court of Appeal by the court held that where contracts for architectural services required defendant to comply with certain regulations providing that plans be prepared by duly licensed architect, defendant could not repudiate the agreement because of his lack of a certificate due to his own inaction with respect to obtaining one.

Petition denied.

1. Licenses 🔑39.40

Where contract for architectural services provided that defendant would prepare plans complying with regulations requiring that plans for hospitals should be prepared by duly licensed architect, contract was not unenforceable on the ground that it could not be performed lawfully because it was impossible for defendant to secure an architect's certificate in time to do so, where there were two ways of complying with the regulations by obtaining of a temporary or permanent certificate. West's Ann.Bus. & Prof.Code, §§ 5540, 5550, 5551.

2. Contracts 🔑175(1)

Where contract for performance of architectural services was dated January 2, 1954, and performance had begun at least two months before the actual signing, the presumption that January 2 was the true date should prevail. West's Ann.Code Civ.Proc., § 1963, subd. 23.

3. Licenses 🔑20

The statute respecting the issuance of temporary certificates for architects and referring to one "who is engaged in practice of architecture outside this state" did not demand residence in a sister state as a condition of issuance of a temporary certificate in California, and the statute is complied with during the transition period, by the existence of a certificate to practice elsewhere, regardless of whether the architect is then actually residing in one state or the other. West's Ann.Bus. & Prof.Code, § 5540.

4. Licenses 🔑39.40

The object of statute respecting licensing of architects is to prevent persons practicing architecture who have not proved to the Board of Architectural Examiners their fitness and character and skill to serve others as experts in that field, and if this showing is made through procuring a certificate before the work is performed, object of the statute is fulfilled, and initial absence of a license does not preclude a recovery for services. West's Ann.Bus. & Prof.Code, §§ 5537, 5540, 5550, 5551.

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* Opinion vacated 372 P.2d 13.

5. Licenses ⚷39.40

The main object of the act so far as furnishing plans and specifications for hospitals is concerned was to secure the erection of buildings from plans prepared by those who were sufficiently schooled in the profession to secure a license from the state board and who had complied with the state law by securing such license. West's Ann.Bus. & Prof.Code, §§ 5537, 5540, 5550, 5551.

6. Licenses ⚷39.40

Where contract for architectural services required defendant to prepare plans complying with regulations providing that plans for hospital should be prepared by duly licensed architect and defendant could have procured a certificate as an architect before completion of the final plans, defendant could not repudiate the agreement because of his lack of certificate due to his own inaction with respect to obtaining one. West's Ann.Bus. & Prof.Code, §§ 5537, 5540, 5550, 5551.

* * *

Morrow & Morrow, Los Angeles, for plaintiff and respondent.

Louis M. Welsh, Los Angeles, David H. Thompson, San Diego, for defendant and appellant.

PER CURIAM.

[1] Appellant argues in support of his petition for rehearing that his contract could not be performed lawfully because it was impossible to secure an architect's certificate in time to do so; that this impossibility grew out of absence of opportunity to take an examination and thus prove his qualifications.

That the contract did not call for a violation of the law plainly appears from the agreement to comply with the requirements and regulations of the California State Department of Public Health, and the further fact that § 406(b) of those regulations provides: "Plans and specifications shall be prepared by a duly licensed architect or a registered civil engineer." As pointed out in our previous opinion there were two ways to comply with this regulation, the obtaining of a temporary certificate under § 5540, Business & Professions Code, or a permanent certificate under §§ 5550–5551.

[2, 3] Counsel claim that § 5540 is inapplicable because it refers to one "who is engaged in the practice of architecture outside this State" and plaintiff had moved to California before the contract was signed. True, that signing was on April 12, 1954, and plaintiff had become a resident of California in March of that year. He began his work in February and his pay started in that month. But the contract is dated January 2, 1954, and, as performance had begun at least two months before the actual signing, the presumption that January 2 is the true date, Code Civ.Proc. § 1963, subd. 23, should prevail. To say the least, its provisions are retroactive to January 2nd. Appellant was a nonresident at the time the actual arrangement was made and then was certificated within the State of Nebraska. We find it too narrow a construction of § 5540 to hold that it demands residence in a sister state as a condition of issuance of a temporary certificate here. We think its object is fulfilled, during the transition period that it covers, by the existence of a certificate to practice elsewhere, regardless of whether the architect is then actually residing in the one state or the other. In fact, one who holds a Nebraska certificate but resides in Kansas comes within the terms of § 5540.

So far as procuring a permanent California certificate is concerned the following considerations are pertinent. The quoted regulation 406(b) plainly applies to final plans and specifications, which in this instance were to be submitted to the owner on or before September 1, 1954. The preliminary plans were to be completed by May 1st, but it is the final set which must be approved by the Department of Public Health "prior to commencement of construction", § 406(a) of Regulations, and that was to occur not later than October 1st.

Counsel quote § 117 of Title 16, Administrative Code, a regulation of the Board of Architectural Examiners, to the effect that examinations "may be held in June and/or December of each year." They assume that such examinations are given in June and, nothing appearing to the contrary, we shall do likewise. There appears to be no element of impossibility of obtaining a certificate, or otherwise complying with the regulations, which grows out of this combination of facts: Applicant starts work in California in February, 1954; becomes a resident of this state in March; furnishes preliminary plans by May 1st; takes examination in June; completes final plans by September 1st and seeks approval of those final plans by the Board prior to commencement of construction on October 1st. This spacing of events affords ample time for appellant to take and pass the requisite examination.

[4, 5] Counsel's argument is based upon the assumption that the certificate must be obtained before the contract is made. In this they err. The object of the statute (forgetting § 5537 for the moment) is to prevent persons practicing architecture who have not proved to the Board of Architectural Examiners their fitness in character and skill to serve others as experts in that field. If this showing is made through procuring a certificate before the work is performed, the object of the statute has been fulfilled and the initial absence of a license does not preclude recovery for the services. The same approach should be made to Rule 406(b) of the Department of Public Health. "The main object of the act, so far as furnishing plans and specifications alone is involved, was to secure the erection of buildings from plans prepared by those who were sufficiently schooled in the profession to secure a license from the state board and who had complied with the state law by securing such license." Walter M. Ballard Corp. v. Dougherty, 106 Cal.App.2d 35, 40, 234 P.2d 745, 748. In Fitzhugh v. Mason, 2 Cal.App. 220, 223, 83 P. 282, 284, this court, considering an action for recovery of an architect's fees, said: "[I]n order to carry out the contract, it would have been necessary for the plaintiff to take out his certificate. But we can see no reason why it should be held that a contract made in advance of the issue of a certificate should be void."

See, also, Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 689, 166 P.2d 265; Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 308 P.2d 713.

[6] It fairly appears that defendant could have procured a certificate (assuming his professed qualifications) before completion of the final plans and specifications, and that such a certificate would have been sufficient to sustain a recovery on his contract. Certainly he cannot repudiate that agreement because of his lack of a certificate due to his own inaction with respect to obtaining one.

A somewhat persuasive analogy exists in the law governing real estate brokers. The statute forbids practice without a license (now § 10130, Bus. & Prof.Code), but sanctions recovery for services where a license is procured before the work is completely done. Under § 10136 the plaintiff must allege and prove possession of a license "at the time the alleged cause of action arose." See Houston v. Williams, 53 Cal.App. 267, 271, 200 P. 55; Radich v. Cernokus, 65 Cal. App. 452, 454, 224 P. 124; Wise v. Radis, 74 Cal. App. 765, 772, 242 P. 90; Brenneman v. Lane, 87 Cal.App. 414, 416, 262 P. 400; Davis v. Chipman, 210 Cal. 609, 622-623, 293 P. 40.

Petition for rehearing is denied.

150 Cal.App.2d 157

Mrs. Anna Marie SILER, Joseph Vance Siler, John William Siler, Kenneth F. Siler, Mary Ann Siler, Carolyn Joyce Siler, and Teresa M. Siler, by their Guardian ad litem and Trustee, Anna Marie Siler, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, County of Los Angeles, a body politic and corporate; State Compensation Insurance Fund, Respondents.

Civ. 22119.

District Court of Appeal, Second District, Division 1, California.
April 16, 1957.

Proceeding for review and annulment of the order of the Industrial Accident Commission, denying dependency benefits for the death of a deputy sheriff caused by heart attack. The District Court of Appeal, White, P. J., held that the statute creating presumption that death by heart trouble of member of a police department of a city or municipality arose out of and in course of employment was applicable to the deceased deputy sheriff, and that the failure of the Commission to consider such presumption as against imposing evidence, was reversible error.

Order annulled and proceedings remanded for further proceedings.

1. Workmen's Compensation 🔑1519

Evidence established that death of a deputy sheriff from a second heart attack was due to nonoccupational causes and was not hastened nor caused by an injury arising out of and in course of his employment. West's Ann.Labor Code, § 3212.5.

2. Statutes 🔑212.6

Any construction of a statute should be avoided which implies that the legislature was ignorant of the meaning of the language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and sensible purpose.

3. Municipal Corporations 🔑1

The term "municipal" as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal".

4. Municipal Corporations 🔑2

Whenever it appears that the Legislature so intended, the terms "municipality" and "municipal corporation" will be construed to include a county or other quasi-municipal corporation.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Corporation" and "Municipality".

5. Workmen's Compensation 🔑1365

The statute providing that in case of a member of a police department of a city or "municipality" term "injury" includes heart trouble and shall be presumed to arise out of and in course of employment, manifests legislative intention to give benefit of presumption therein to peace officers as a class, including deputy sheriffs of a county, and to afford relief whenever occasion arises for application of the statute to the class of public employees sought to be benefited thereby. West's Ann.Labor Code, § 3212.5.

6. Statutes 🔑220

Amendment of the statute creating presumption that heart trouble of members of police department of a city or municipality presumably arises out of and in course of employment, by adding a clause expressly including a sheriff or deputy sheriff, was construable as merely for the purpose of clarification, rather than as indicating that sheriffs and deputy sheriffs were not covered by the statute, as it read prior to the amendment. West's Ann.Labor Code, § 3212.5.

7. Workmen's Compensation 🔑1365

In compensation proceeding for death of a deputy sheriff caused by heart attack, petitioners were entitled to have statutory presumption applicable to members of police departments when death results from a heart attack considered and weighed by the triers of fact against other evidence that death of the deputy sheriff was caused by nonoccupational causes. West's Ann. Labor Code, § 3212.5.

William T. Hays, Hollywood, for petitioners.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

Loton Wells, San Francisco, for respondent State Compensation Insurance Fund.

WHITE, Presiding Justice.

Petitioners, the widow and minor children of Joseph Horace Siler, seek review and the annulment of an order of respondent Commission denying dependency benefits. Respondent Commission's finding number two, on which the order rested, is that the death of said Siler "was not caused nor hastened by any injury or injuries arising out of and occurring in the course of" said decedent's employment. Basically, the question presented is whether the finding is supported by substantial evidence.

The relevant facts can be epitomized as follows:

The decedent, hereinafter referred to as the employee, worked as a detective-sergeant in the Office of the Sheriff of Los Angeles County. Petitioners were wholly dependent upon said employee for support. That his work was in active law enforcement, with more than 5 years of such service prior to August 18, 1954, under civil service employment and a regular full time salary as a deputy sheriff of Los Angeles County is not questioned.

In July, 1954, the employee commenced to have chest pains which lasted three or four minutes and were relieved by rest. During August, 1954, the chest pains occurred more frequently, about once or twice each day. On July 31, 1954, he had to work extra long hours without rest; and a similar incident of overwork occurred on or about August 11, or 12, 1954. On August 18, 1954, said employee suffered a coronary occlusion. Thereafter and up to the time of his death on October 2, 1955, said employee was under treatment for his heart condition. During this period he did not return to his duties in the sheriff's department, and he did only light work around his chicken ranch.

On October 2, 1955, he suffered a second heart attack at his home during the night, and he died therefrom on the same date.

On February 2, 1956, petitioners filed their application for adjustment of compensation for dependency benefits, claiming the death was industrially caused. On March 20, 1956, hearing was duly held on said application, following which respondent Commission's referee made findings and order reading, in part, as follows: "Joseph H. Siler, born March 6, 1911, while employed as a detective sergeant on August 18, 1954, at San Dimas, California, by the County of Los Angeles * * * sustained injury consisting of a coronary occlusion which went on to healing, arising out of and occurring in the course of his employment * * *"; that "The employee died on October 2, 1955, and his death was not caused nor hastened by any injury arising out of and occurring in the course of his employment on August 18, 1954 * * *" and that "* * * It is ordered that applicants (petitioners) take nothing by reason of (their) claim."

Thereafter, petitioners duly filed their petition for reconsideration. Respondent Commission's referee recommended that rehearing be granted so that the "matter can be thoroughly explored"; but the Commission refused to follow the recommendation of the referee, and made and entered its order that the petition for reconsideration be denied.

[1] To us it appears unnecessary to review in any detail the medical testimony which was before the referee. We are

satisfied that if petitioners' claim of error committed by the referee and Commission, to be hereinafter discussed, is not well-founded, there was medical testimony sufficient to establish that the second heart attack and Mr. Siler's death on October 2, 1955, were due to non-occupational causes and to sustain the finding that the employee's death on October 2, 1955, was not caused nor hastened by any injury arising out of and occurring in the course of his employment on August 18, 1954. It should be mentioned however that the finding was predicated entirely on the reports of one physician (Dr. Dimitroff); and that petitioners at the hearing before the referee offered no medical testimony other than a report by another physician (Dr. Schield), who had examined and treated the decedent, which said latter report amounted only to a report of the physician's examination and treatment of the employee and did not contain his opinion as to the cause of the heart trouble or as to whether or not it was occupationally caused.

Upon their petition for reconsideration, petitioners however annexed to their said petition a report of Dr. Martin S. Goldfarb dated August 16, 1956. In his report, Dr. Goldfarb stated in part that, "the first coronary occlusion hastened and was contributory to the second occlusion"; that the "decrease in the myocardial reserve, due to the first infarction, placed an increased load on the remainder of the myocardium"; and said doctor gave it as his opinion that, "It is reasonable to assume that the duties of a Deputy Sheriff, which are of an exciting and stimulating nature, did aggravate and contribute to the underlying condition of essential hypertension which in turn did accelerate the arteriosclerotic disease process."

Notice should also preliminarily be taken of petitioners' positive assertion that both the referee and Commission ruled that the rebuttable presumption contained in Section 3212.5 of the Labor Code, to-wit, that heart trouble which develops or manifests itself during the period while an employee is a member of a police department of a city or municipality shall be presumed to have arisen out of and in the course of employment, had no application to deputy sheriffs, and that the referee and Commission refused to consider or weigh said presumption. Respondent Commission does not challenge the correctness of petitioners' assertions, and therefore, we shall assume as a fact that the referee and Commission ruled that said rebuttable presumption was not applicable herein and did not therefore weigh the presumption as a specie of evidence.

In this proceeding, two questions are primarily involved:

(1) Did the rebuttable presumption contained in Section 3212.5 of the Labor Code (as it read on August 18, 1954) apply to deputy sheriffs of a county?

(2) Whether substantial error was committed by the Commission in refusing to weigh said presumption (if it was applicable herein) against the other evidence?

Insofar as pertinent herein, Section 3212.5, as it read on August 18, 1954, provided as follows:

> "In the case of a member of a police department of a city *or municipality,* or a member of the State Highway Patrol, when any such member is employed under civil service upon a regular, full time salary, the term 'injury' as used in this division includes heart trouble and pneumonia which develops or manifests itself during a period while such member is in the service of the department, or the State Highway Patrol, as the case may be. * * *
>
> "Such heart trouble or pneumonia so developing or manifesting itself shall be presumed to arise out of and in the course of the employment; provided, however, that the member of the police department or State Highway Patrol shall have served five years or more in such capacity before the presumption shall arise as to the compensability of heart trouble so developing or manifesting itself. This presumption is disput-

> able and may be controverted by other evidence, but unless so controverted, the commission is bound to find in accordance with it." (Emphasis added.)

Had the legislature in the aforesaid statute merely used the phrase, "a member of a police department of a city", it seems obvious enough that the foregoing presumption would not be applicable to deputy sheriffs of a county. However, the lawmaking body after the word "city" also used the words "or municipality", thereby raising a perplexing problem as to the meaning of the statute and the legislative intent in the use of the words, "or municipality", and the phrase, "a member of a police department of * * * a municipality".

[2] The fundamental rule of statutory construction which must be borne in mind is well expressed in Prager v. Isreal, 15 Cal. 2d 89, 93, 98 P.2d 729, 731, as follows: "Any construction should be avoided which implies that the legislature was ignorant of the meaning of the language employed [in the Statute] or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and sensible purpose." It must, therefore, be presumed that in using the words "or municipality" after the word "city", the legislature intended the words to have some meaning and to perform some useful office.

Respondent Commission in its answer fails to ascribe any meaning to the words "or municipality", and, in effect suggests that they be ignored by the court in construction of the statute because, as appears in the answer of respondent Commission, "Scattered through our laws are many provisions showing clearly that 'municipality', far from being synonymous with 'county' or inclusive of it, denotes, so far as our governmental structures are concerned, a type of organization distinctly different. * * Would petitioners have it that any member of any 'municipality'—within that frame of reference—which had any kind of policing duty, would be included in the coverage of Section 3212.5? Is it not more reasonable to assume that the Legislature, which is an articulate body, was capable of including earlier than it did, a specific reference to *county* peace officers, if, indeed, it desired to include them in the group favored by the presumption, prior to the time of such actual inclusion? * * * Effective September 7, 1955, Section 3212.5 was amended by adding a clause expressly including 'a sheriff or deputy sheriff employed upon a regular, full-time salary'." It is also stated by respondent Commission in its answer that, "Research, for the purpose of making this answer, has failed to disclose any authoritative controlling definition of the term 'municipality'."

Petitioners earnestly urge that in the context the terms "municipality" and "a member of a police department of a * * * municipality" includes and means county, and a member of a police department of a county, i. e., sheriffs and deputy sheriffs; that the legislature must be presumed to have been aware that there are no police departments other than the police departments of incorporated cities and the sheriff's departments in unincorporated areas; and that, unless the terms "municipality" and "a member of the police department of a * * * municipality" are construed in the context to mean and include counties and members of the sheriff's departments of counties, the said terms have no meaningful purpose.

[3] From the independent research by us, as well as study of the cases cited by petitioners, we are impressed that the authorities lend considerable support to the latter's basic contention that in the context the terms "municipality" and "a member of the police department of a * * * municipality" may very well mean and include sheriffs and deputy sheriffs of a county. That the term "municipal" as commonly used, is appropriately applied to all corporations exercising governmental functions, either general or special was the holding in Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist., 144 Cal. 329, 333, 77 P. 937.

Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754, involved the construction and interpretation of the "City Boundary Line Act" and of the "Street Improvement Bond Act of 1893," which latter act in its title limited its operation to the issuance of bonds to represent the cost of street work "within municipalities."

While this case is a complicated one and deals with the provisions of statutes far afield from Labor Code section 3212.5, the basic principles of statutory construction enunciated therein would seem to be applicable to the instant situation. At page 368 of 69 Cal.App., at page 763 of 231 P., the court declares:

[4] "We are by no means convinced that the title of the Street Improvement Bond Act of 1893 limits its operation to cities and towns. The word 'municipality' is often used as synonym of the term 'municipal corporation.' 28 Cyc., p. 118. *Whenever it appears that the Legislature so intended, the terms 'municipality' and 'municipal corporation' will be construed to* include a county or other quasi-municipal corporation. [Citing cases]." (Emphasis added.)

More closely analogous to the situation with which we are here confronted is the case of Murphy v. Freeholders of Hudson, 91 N.J.L. 40, 102 A. 896, wherein a county prosecutor who had been elected to office failed or neglected to take and file an official oath. By reason thereof, the office was declared vacant and a successor appointed in his place. A New Jersey statute in the words of the New Jersey Supreme Court required "persons elected or appointed to any office in any town, township, borough, *or other municipality* to take an oath before entering on the duties of his office and to file it with the clerk of the *municipality* in which he shall have been elected or appointed."

The county prosecutor contended that the said statute had no applicability to county offices. The court stated that the specific question before it was whether the words "other municipality" were meant to include counties. In holding that the statute applied to said county prosecutor and county officers, the Supreme Court of New Jersey pointed out first "that the word 'municipality' sometimes includes counties," and secondly that, since the difficulty which the Legislature was trying to cure was the failure and neglect of public officials to take and file oaths of office, it was reasonable to conclude that the Legislature meant to pass an act that would afford relief wherever the difficulty arose.

In State ex rel. Schneider v. Midland Investment & Finance Corporation, 219 Wis. 161, 262 N.W. 711, constitutional and statutory provisions with respect to municipal courts provided in substance that the processes of such a municipal court should not extend beyond the municipality in which it was located. The court in this case had to consider and construe the meaning of the terms "municipal" and "municipality"; and it was held in substance that, while it is not to be denied that the authorities are confusing and conflicting as to the meaning to be given to the terms "municipal" and "municipality", such terms are sufficiently broad under various circumstances to include counties.

[5] To us it seems manifest that by enacting Labor Code Section 3212.5 as it read ou August 18, 1954, the legislature intended to give the benefit of the presumption therein contained to peace officers as a class and that the legislative intent was to pass an act that would afford the relief provided by the presumption whenever occasion arose for its application in the class of public employees sought to be benefitted thereby and of which class the employee herein was a member. It was therefore, substantial error for the Commission to refuse to weigh the foregoing presumption against the other evidence.

[6] As heretofore noted, effective September 7, 1955, Labor Code Section 3212.5 was amended by adding a clause expressly including "a sheriff or deputy sheriff em-

ployed upon a regular, full-time salary" among the persons in whose favor the rebuttable presumption contained in said section applies. It is argued by both petitioners and respondent Commission that this amendment strengthens their respective contentions as to the meaning of the pertinent section prior to the amendment thereof. If we are to enter the field of speculation, it seems to us just as reasonable to suppose that the legislature made the amendment merely for purposes of clarification, as to suppose that the lawmaking body adopted the amendment because it believed that sheriffs and deputy sheriffs were not covered by the section as it read prior to the 1955 amendment.

[7] Finally, respondent Commission argues that, even if the presumption was applicable, there was ample and substantial medical evidence to support the Commission's findings. Had the referee and Commission recognized the presumption instead of refusing to consider or weigh it the argument of counsel for respondent Commission might appear substantial, but it is not for us to speculate what conclusion might have been reached by the duly constituted arbiter of the facts had they given consideration to the presumption to which we have held petitioners were entitled. Indeed, it is significant, as heretofore pointed out, that the Commission's referee herein recommended that the petition for reconsideration be granted so that the "matter can be thoroughly explored". If the presumption was, as we have held, applicable, petitioners were clearly entitled to have it considered and weighed by the triers of fact against other evidence.

The order is annulled and the proceeding remanded to respondent Commission for further proceedings in accordance with the views herein expressed.

DORAN and FOURT, JJ., concur.

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150 Cal.App.2d 379

Vera Allen DAWSON, a/k/a Vera Allen, a/k/a Vera Whitney Allen, Plaintiff and Appellant,

v.

Robert G. MARTIN, Individually, and Robert G. Martin, as Building Inspector, County of Stanislaus; County of Stanislaus; Ken Ables, Clinton C. Wilson, M. F. Bradshaw, John Delphia, and John B. Melugin, Individually, and as constituting the Board of Supervisors of the County of Stanislaus, Defendants and Respondents.

Civ. 8927.

District Court of Appeal, Third District, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Action against county supervisors and building inspector for false arrest, false imprisonment and malicious prosecution. The Superior Court, Stanislaus County, Thomas P. O'Donnell, J., rendered judgment of dismissal, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that in Government Code Section, making supervisor "fraudulently" or "corruptly" performing duty imposed upon him liable on his official bond, quoted words were used in narrow sense, with "fraudulently" referring to actionable fraud whereby damage is inflicted, and "corruptly" connoting conduct whereby one induces another, by means of improper considerations, to commit violation of duty; and held that supervisors had incurred no liability thereunder even if, as alleged, they had maliciously requested building inspector to swear to building code violation charges known by supervisors to be false.

Affirmed.

Peek, J., dissented.

1. False Imprisonment ⚷20(1)

Complaint, against building inspector and members of county board of supervisors, for false arrest and imprisonment, on ground of county building code violations was insufficient, by reason of affirmatively showing that sheriff rather than defendant had arrested and imprisoned plaintiff.

2. False Imprisonment ⚿7(4)

County supervisors and building inspector would not be liable for arrest made by sheriff or unlawful detention by that official after arrest, even if they had instituted proceedings by swearing to complaint falsely charging violations of county building code.

3. Counties ⚿146

County enjoys absolute immunity from suits for malicious prosecution.

4. Counties ⚿222

County's immunity defense to malicious prosecution suit need not be pleaded in answer, but may be taken advantage of by demurrer.

5. Malicious Prosecution ⚿42

Building inspector who acted as agent of county and its governing board of supervisors in filing complaint charging violations of county building code could not be held liable for malicious prosecution.

6. Counties ⚿47
Malicious Prosecution ⚿42

In their official capacity, members of county board of supervisors were charged with general duty of upholding and requiring obedience to county ordinances, and in absence of statute, they enjoyed official immunity from suits for malicious prosecution.

7. Pleading ⚿246(3)

Where it had been alleged, in prior counts charging false arrest and imprisonment, that county supervisors knew that building code violation charges against plaintiff were false, court would have to consider that plaintiff could permissively amend third count to state same allegations; and if, by such amendment, third count would state cause of action under statute, plaintiff should have been permitted to make amendment. West's Ann. Gov.Code, § 25042.

8. Counties ⚿96
Malicious Prosecution ⚿42

In Government Code section, making supervisor "fraudulently" or "corruptly" performing duty imposed upon him liable on his official bond, quoted words were used in narrow sense, with "fraudulently" referring to actionable fraud whereby damage is inflicted, and "corruptly" connoting conduct whereby one induces another, by means of improper considerations, to commit violation of duty; and supervisors incurred no liability thereunder even if, as alleged they maliciously requested building inspector to swear to building code violation charges known by supervisors to be false. West's Ann.Gov.Code, § 25042.

See publication Words and Phrases, for other judicial constructions and definitions of "Corruptly" and "Fraudulently".

Molly H. Minudri, San Francisco, for appellant.

Robert R. Elledge, Modesto, for respondent Melugin.

Frederick W. Reyland, Jr., William R. Mitchell, David G. Dunford, Modesto, for other respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of dismissal entered in an action for false arrest, false imprisonment, and malicious prosecution, after the sustaining of general demurrers without leave to amend.

[1, 2] The complaint is in three counts. All counts allege that respondent Martin is the Building Inspector of the County of Stanislaus and that the other individual respondents are members of the County Board of Supervisors. The first count alleges that on April 16, 1954, respondent Martin, acting as the agent and at the special instance and request of the other respondents, swore to a complaint which falsely charged appellant with two violations of the county building code and that as a result thereof the judge of the justice court issued a warrant under which the appellant was arrested and imprisoned by the sheriff. The second count contains

like charges as to events occurring on April 21, 1954. Both counts allege that the respondents acted wantonly and with knowledge of the falsity of the charges made. It is clear that the first two counts attempt to set forth causes of action against the respondents for false arrest and imprisonment. They failed to do this because it affirmatively appears on the face of the complaint that the sheriff and not the respondents arrested and imprisoned the appellant. Although it is alleged the respondents instituted the proceedings, they are not liable for arrests made by the sheriff nor for any unlawful detention by that official after the arrest. Respondents' general demurrers to the first two counts of the complaint were properly sustained (Restatement, Torts, Sec. 37), and they could not be permissibly amended by leaving out the factual allegations concerning arrest and detention by the sheriff which allegations destroy the efficacy of the pleading to state a cause of action. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358.

[3–5] The demurrers of the respondent county and respondent Martin to the third count of the complaint were likewise properly sustained without leave to amend. That count alleges malice, lack of probable cause and appellant's acquittal on the false charges made by the complaint of April 16th. So far as the county is concerned it enjoys absolute immunity from suits for malicious prosecution and the defense need not be pleaded by answer, but may be taken advantage of by demurrer. Norton v. Hoffmann, 34 Cal.App.2d 189, 194, 93 P.2d 250; White v. Towers, 37 Cal.2d 727, 235 P.2d 209, 28 A.L.R.2d 636; 2 Witkin, California Procedure, p. 1479. Immunity from suit also extends to and protects the respondent Martin in the instant case in view of the affirmative allegations that in all that he did he acted as agent of the county and of its governing board of supervisors. 2 Witkin, California Procedure, supra; White v. Brinkman, 23 Cal.App.2d 307, 315, 73 P.2d 254. As building inspector of the county it was part of his duty to bring charges for alleged violations of the county building code and he cannot be held liable in this action on a charge of malicious prosecution. White v. Brinkman, supra, 23 Cal.App.2d at pages 315–316, 73 P.2d at page 258.

[6] The members of the board of supervisors were also entitled to the protection of official immunity unless liable under the specific provisions of Section 25042 of the Government Code. Official immunity is shown by the allegations that in causing plaintiff's prosecution the board members acted officially as a board of supervisors. Since in that capacity they were charged with the general duty of upholding and requiring obedience to the county ordinances they were entitled to official immunity from acts based on charges of malicious prosecution.

> "* * * 'Duties of a public office include those lying squarely within its scope, those essential to accomplishment of the main purposes for which the office was created, and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes.'" White v. Towers, supra, 37 Cal.2d at page 733, 235 P.2d at page 213.

[7, 8] Appellant contends that she has stated or by permissible amendment could state a cause of action against the board members under the provisions of Government Code Section 25042, which in material part provides as follows:

> "Any supervisor who * * * fraudulently or corruptly performs any duty imposed on him * * * is * * * liable on his official bond to any person injured thereby, for all damages sustained."

Appellant argues that the actions charged to the board members by her pleading were fraudulent and corrupt. We do not agree. Returning to the pleading we find that in count 3 it is alleged that Martin, acting as the agent of the board members and at their special instance and request, wrongfully, falsely and maliciously and without probable cause charged appellant with violating the county building code. In the prior counts which charged false arrest and imprisonment it is averred that the board members knew these same charges were false. We must, therefore, consider that appellant could permissibly amend the third count to state the same allegations. If by such amendment the third count would state a cause of action under the Government Code section appellant should have been permitted to make the amendment and her complaint ought not to have been dismissed by an order sustaining the demurrers of the board members without leave to amend. Appellant argues that if the board members, although acting in the performance of their general duty, yet maliciously instigated her prosecution by causing Martin to make charges against her which they knew to be false they are guilty of violating the code section and are liable to her in damages. "Fraud" is defined in Webster's International Dictionary, second edition, as the quality of being deceitful, as deceit and trickery, as the means by which deceit is practiced, as in law an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact intended to deceive another so that he act upon it to his legal injury. The same authority defines fraud in equity as including all acts, omissions or concealments by which one person obtains advantage in conscience over another or which equity or public policy forbids as being to another's prejudice; as acts in violation of trust and confidence, often called constructive fraud. In a broad sense the dictionary's definitions would fitly describe maliciously and with known falsity charging criminal action and thereby causing unjustified prosecution. Turning to the liability for corrupt conduct, we find the same authority defining "corruption" as impairment of integrity, virtue or moral principle and specifically as "inducement of a person by means of improper considerations to commit a violation of duty." Here again the broad language of the dictionary's definitions could be used to fitly describe the conduct complained of here. But we cannot believe that the legislature intended to make members of boards of supervisors liable in damages on such broad and general grounds, there being no perceivable reason why they of all public officials entitled to official immunity should be singled out for such special statutory liability while other officials equally guilty enjoyed immunity from liability for malicious prosecution. On the contrary, we think the words "fraudulently" and "corruptly" were used in the narrow sense; that "fraudulently" refers to actionable fraud, whereby damage has been inflicted; and that "corruptly" connotes the specific meaning ascribed to the words by the dictionary, that is, conduct whereby one induces another by means of improper considerations to commit a violation of duty. We therefore hold that the trial court acted properly in sustaining the demurrers of the board members to the third count and in refusing leave to amend.

The judgment appealed from is affirmed.

SCHOTTKY, J., concurs.

PEEK, Justice (dissenting).

I cannot agree with the interpretation which the majority places upon the words "fraudulently" and "corruptly" as used in section 25042 of the Government Code. It would appear to me that such construction, rather than following the well-established rule that "words in a statute should be given their ordinary meaning unless otherwise clearly intended or indicated", In re Estate of Richartz, 45 Cal.2d 292, 294, 288 P.2d 857, 858, adopts a narrow construction which is neither "intended" nor "indicated." Furthermore our courts have held that "the word 'fraudulently' is very broad in its meaning." People v. Simmons, 12 Cal.App.2d 329, 332, 55 P.2d 297, 299. Again in People v. Wisecarver, 67 Cal.App.2d 203, 207, 153 P.2d 778, 780, it was held that "fraud may be committed by declaring to be true that which the declarant does not believe to be true; by suppressing a fact which he is bound to disclose; * * *. Civil Code, § 1710; Wells v. Zenz, 83 Cal.App. 137, 140, 256 P. 484. Moreover, any act fitted to deceive is actual fraud. Civil Code, § 1572." Thus it would appear to follow that since under the statute a supervisor is liable for "fraudulently, or corruptly" performing any duty imposed upon him, and since absent any intention or indication to the contrary, "words in a statute should be given their ordinary meaning"; and since the word "'fraudulently' is very broad in its meaning," and since, as is conceded by the majority, under such construction plaintiff's complaint could be amended to state a cause of action, then defendants' demurrer should not have been sustained without leave to amend.

It is true as the majority notes, public officials generally are entitled to official immunity from malicious prosecution. But when the legislature chooses to make an exception thereto by the enactment of a statute such as the one here in question, it is not the province of this court to attempt to rationalize a "perceivable reason" for the adoption of such a policy, but rather it is our duty to interpret the same as we would any other statute in accordance with the well-established rules of construction. The legislature having so expressed itself, it appears to me that to apply such a narrow interpretation to the critical words "fraudulently" and "corruptly" as does the majority, is to write into section 25042 something which was never intended. I would reverse the judgment.

Hearing denied; CARTER, J., dissenting.

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150 Cal.App.2d 71

Kent F. ORDWAY and Edith Ordway, Plaintiffs and Appellants,

v.

Mike ARATA, Jr., Defendant and Respondent.

Civ. 8973.

District Court of Appeal, Third District, California.

April 11, 1957.

Action to recover money. The Superior Court, Merced County, Gregory P. Maushart, J., dismissed action for want of prosecution and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that under circumstances, dismissal of action was an abuse of discretion.

Reversed.

1. Dismissal and Nonsuit ⚷60(1)

In addition to the statutory grounds for dismissal of actions for lack of prosecution court has inherent power limited by sound discretion to dismiss an action for want of reasonable diligence in the prosecution thereof. West's Ann.Code Civ.Proc., §§ 581a, 583.

2. Appeal and Error ⚷962

Dismissal and Nonsuit ⚷60(1)

Power of court to dismiss for unreasonable delay in service of summons is without regard to the merits of action, and order of dismissal will not be disturbed unless the court's discretion has been abused.

3. Dismissal and Nonsuit ⚷60(7)

A plaintiff's lack of diligence in service of summons on defendant is not excused by fact that other proceedings are pending.

4. Dismissal and Nonsuit ⚷60(1)

The discretion of the court to dismiss suits for want of prosecution is not to be exercised arbitrarily, but is a discretion, governed by legal rules, to do justice according to law or to analogies of the law, as near as may be in order to promote substantial justice in the case.

5. Dismissal and Nonsuit ⚷60(3)

Where delay of more than two and one-half years between time of filing of action and service of summons upon defendant was caused by the serious illness and subsequent death of one of the plaintiffs plus the illness of plaintiffs' attorney and there was no showing of prejudice resulting from delay, dismissal for want of prosecution was an abuse of discretion. West's Ann.Code Civ.Proc., § 583.

6. Dismissal and Nonsuit ⚷60(1)

In a legal sense discretion to dismiss a suit for want of prosecution is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. West's Ann.Code Civ.Proc., § 583.

7. Dismissal and Nonsuit ⚷60(1)

Purpose of statute giving court discretion to dismiss action for want of prosecution for failure to bring action to trial for more than two years is to prevent unreasonable delay. West's Ann.Code Civ.Proc., § 583.

8. Action ⚷66

As a matter of sound public policy, litigation should be disposed of upon substantial rather than technical grounds.

◆

C. Ray Robinson, Merced, for appellants.

O. F. Fenstermacher, Pittsburg, for respondent.

SCHOTTKY, Justice.

This is an appeal from an order dismissing an action for want of prosecution.

On November 21, 1952, Kent F. Ordway and Edith Ordway filed an action against defendant Mike Arata, Jr., to recover the sum of $7,000 loaned to said defendant and evidenced by an instrument in writing. Summons was issued on the same day but the complaint and summons were not served upon defendant until June 27, 1955, two years, seven months and six days after the commencement of the action. On July 27, 1955, defendant filed a motion to dismiss the action for want of prosecution, and the court made an order dismissing the action on August 15, 1955. A motion to set aside the order of dismissal was denied on October 14, 1955.

Appellants make a vigorous attack upon the order of dismissal, contending that it was an abuse of discretion. They argue that the delay does not show lack of diligence but that the peculiar extenuating circumstances of the instant case clearly show excusable delay. These circumstances, as detailed in the counter-affidavits of respondent Edith Ordway and attorney Wallace W. Everett, Jr., may be summarized as follows:

Between November 21, 1952, and July, 1953, the plaintiffs attempted to ascertain the financial status of the defendant. On June 25, 1953, the plaintiffs' attorney, Wallace W. Everett, Jr., by a letter requested payment from defendant, but such letter was not answered. This fact was communicated to the plaintiffs, who informed their attorney of the illness of Kent Ordway and advised that upon his recovery he would communicate with Mr. Everett concerning further efforts at collection. Less than seven months after the action was filed Kent Ordway entered the St. Francis Hospital in San Francisco where it was discovered that he was suffering from malignant cancer. He remained in that hospital for over a month until August 14, 1953. On September 13, 1953, he re-entered that hospital and remained until October 1, 1953. From October 6 to October 16, 1953, he was hospitalized in the Pittsburg Community Hospital. On October 28, 1953, he entered the Franklin Hospital where he remained until December 18, 1953, when he was transferred back to the Pittsburg Community Hospital. He remained there until his death on January 16, 1954. Thereafter, all of the business affairs were cast upon plaintiff, Edith Ordway.

On the advice of physicians, the attorney for plaintiff, Mr. Everett, was absent from active practice from July, 1954 to November 1, 1954.

The defendant was a friend of the plaintiffs. Edith was disturbed about disrupting that friendship and at the same time believed, following the death of her husband, that she was fully protected by the timely filing of this action. Between July 16, 1954, and April of 1955, Edith believed that the defendant was having considerable financial trouble. Out of consideration for such worries of the defendant and in view of her own worries and responsibilities, Edith refrained from enforcing any harassing or disrupting collection procedures. In the early part of May, 1955, Edith asked defendant when she could expect him to commence payment. Upon receiving the evasive answer that "He would see what he could do," Edith promptly instructed her attorney to serve the defendant, with process, which was done.

Because the counter-affidavits of appellants were not served upon respondent's attorney until the time of the hearing of the motion, respondent was sworn and testified. His testimony was unreported but according to the respondent's brief respondent testified that the appellant Edith Ordway had, on or about April, 1949, told the respondent that he could have the money and that he could forget about it. He denied that the appellants attempted to ascertain his financial status. He testified that long before the service of summons upon him the respondent and Edith Ordway had terminated the intimate relationship and bad blood existed between the parties. The respondent did not have any knowledge of the pendency of the lawsuit, either before or after receiving the letter from Mr. Everett, of the law offices of C. Ray Robinson, dated June 25, 1953. His first knowledge of the action was when he was served.

Appellants do not directly deny that there was such unreported testimony but assert: "Even considering the recollections of the respondent as to his unreported oral testimony, the circumstances disclosed by the entire record demonstrate that the dismissal of the action was an abuse of discretion."

[1] The statutes relating to dismissal of action for lack of prosecution are sections 581a and 583 of the Code of Civil Procedure. Under section 581a dismissal is mandatory on request of the party against whom the delay operates if there is (1) a failure to issue summons within one year or (2) a failure to serve and make return thereon within three years. Under section 583 dismissal is mandatory upon failure to bring the action to trial within five years, and the court may (with certain exceptions not applicable here) in its discretion dismiss the action for want of prosecution whenever plaintiff has failed for two years to bring the action to trial. In addition to the statutory grounds for dismissal of actions for lack of prosecution the court has inherent power limited by sound discretion to dismiss an action for want of reasonable diligence in the prosecution thereof. Feather River Land & Mining Co. v. Paradise Irrigation Dist., 3 Cal.2d 733, 46 P.2d 147.

In the instant case, as hereinbefore set forth, the summons was not served until two years, seven months and six days after the action was filed, and the question that we must determine is whether or not we should hold that the court abused its discretion in granting the motion to dismiss.

[2, 3] The general rule is well expressed in Thompson v. Lester, 20 Cal.App.2d 745, at page 747, 67 P.2d 1093, at page 1094, as follows:

> "The power of the court to dismiss for unreasonable delay in the service of summons is well settled. Feather River Land & Mining Co. v. Paradise Irr. Dist., 3 Cal.2d 733, 46 P.2d 147. This is without regard to the merits or demerits of the cause of action (Bell v. Solomons, 162 Cal. 105, 121 P. 377); and the order will not be disturbed unless the court's discretion has been abused. (Lieb v. Lager, 9 Cal.App.2d 324, 49 P.2d 886). A plaintiff's lack of diligence is not excused by the fact that other proceedings are pending (Kreiss v. Hotaling, 99 Cal. 383, 33 P. 1125; Watterson v. Hillside Water Co., 42 Cal.App. 364, 183 P. 592); and delays for periods approximating that in

> the case at bar [14 months] have been held sufficient to justify a dismissal. [Citing cases.]"

In support of their contention that the court abused its discretion in granting the motion to dismiss the action, appellants have cited several cases in which such an order was reversed. The case most strongly relied on by appellant is Jepsen v. Sherry, 99 Cal.App.2d 119, 220 P.2d 819. In that case the defendant had filed four demurrers and an answer, and after the case had been set for trial made a motion to dismiss the action for failure to prosecute on the ground that it had not been brought to trial within two years. In reversing the order of dismissal the court said at page 121 of 99 Cal. App.2d, at page 822 of 220 P.2d:

> "This discretion is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice. Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. Each case must be decided on its own peculiar features and facts. First National Bank v. Nason, 115 Cal. 626, 47 P. 595. It is a well established policy of law to favor the avoidance of litigation by compromise. Hamilton v. Oakland School Dist., 219 Cal. 322, 26 P.2d 296. While not always controlling, this sometimes has an important bearing. In Ferris v. Wood, 144 Cal. 426, 77 P. 1037, an order of dismissal was reversed, it appearing that the debt was owed, and that the delay occurred through the plaintiff's desire to effect a compromise. The court held that an excuse for the delay reasonably appeared and that in such a matter, unlike some others, a trial judge is in no better position than an appellate court in determining whether substantial justice has been done. The court then expressed the opinion that the dismissal there involved had tended to defeat, rather than to subserve, the ends of substantial justice.
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> "In most of the cases where such a dismissal has been sustained either nothing was done by the plaintiff or no valid excuse for the delay was shown, and no unusual circumstances appeared. Unreasonable delay in litigation should be avoided; but all the circumstances should be carefully considered before a plaintiff is denied relief without a hearing. While it appears here, technically, that more than two years had elapsed before the trial date and that some of the delay was probably unnecessary, the excuse for the delay is not entirely unreasonable and there are other considerations which should not be overlooked.
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> "The circumstances here were unusual, all of them should be considered, and an unjust effect should not be given to this procedural rule, which is merely optional. The defendants may owe the plaintiff nothing, but under the circumstances substantial justice requires that this issue should be determined by a trial on the merits. The drastic order made is not sustained by the record before us, and an abuse of discretion clearly appears."

Respondent in reply cites a number of cases which enunciate the rules stated in 16 Cal.Jur.2d, sec. 28, page 176, as follows:

> "The courts have inherent discretionary power independent of statute to dismiss an action on motion of the defendant where it is not diligently prosecuted, without regard to the merits or demerits of the cause of action. Certain sections of the Code of Civil Procedure have imposed on the courts a mandatory duty to dismiss actions in certain specified instances; but the courts' inherent power to dismiss for want of prosecution in other cases is unaffected, and remains, as before, limited only by a sound discretion. The only restrictions on the exercise of such discretionary power are that it must not be abused."

The principal case cited by respondent, and the one apparently relied upon by the trial court, is Lieb v. Lager, 9 Cal.App.2d 324, 49 P.2d 886, in which the court affirmed an order dismissing an action in which the summons had not been served until two years and three months after the action was filed. Said the court at page 326 of 9 Cal. App.2d, at page 887 of 49 P.2d:

> "Section 581a of the Code of Civil Procedure makes provision for mandatory dismissal of an action where summons is not served within three years. It is conceded, however, as indeed it must be, that courts may, in the exercise of a wise discretion, dismiss a case when the delay in service is for a period shorter than that named in the statute. 9 Cal.Jur., p. 536. It is appellant's contention, however, that where nothing more than the mere lapse of time is brought to the attention of the court—where no facts are established to show any prejudice resulting from the delay in serving summons—and the delay is less than three years, it is an abuse of power to dismiss an action; that in order to exercise discretion some facts other than the mere lapse of time must be addressed and presented to the court in order to enable it to exercise discretion, otherwise the arbitrary policy of the law as expressed by section 581a must govern, and only in cases where the delay is for three years or more can an order of dismissal be made. As above indicated, it is an inherent right, and therefore one existing independent of any statute, to dismiss a suit for a failure to prosecute it with due diligence. Grigsby v. Napa County, 36 Cal. 585, 95 Am.Dec. 213; Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. As has frequently been said, the duty rests upon a plaintiff at every stage of the proceedings to use diligence to expedite his case to a final determination that there may be an end to litigation. The question of diligent prosecution is one largely committed to the discretion of the lower court. Ferris v. Wood, 144 Cal. 426, 77 P. 1037. The only limitation upon the exercise of the discretionary power of the court to dismiss a cause for delay in the service of summons is that it must not be abused."

Also cited by respondent and relied upon by the trial court is Thompson v. Lester, supra, in which the court affirmed an order dismissing an action because of a delay of fourteen months in the service of summons. However, in that case there was evidence that defendants, owing to the delay, had lost certain rights to relief under the moratorium acts and that the property sold for less than its reasonable value.

No hard and fast rule can be laid down as to what constitutes an abuse of discretion. Each case must be judged upon its own factual situation, and upon an appeal in a case in which a trial court has exercised its discretion in ruling upon a motion to dismiss an action an appellate court will not disturb that ruling unless a clear case of abuse if discretion is shown.

[4] As was said in the early case of Lybecker v. Murray, 58 Cal. 186, at page 189, the court said:

> "* * * Under no circumstances is the discretion of the Court to be exercised arbitrarily, but it is a discretion, governed by legal rules, to do justice according to law or to the analogies of the law, as near as may be. * * * It must be exercised within the limitations above stated to promote substantial justice in the case."

In Berry v. Chaplin, 74 Cal.App.2d 669, at page 672, 169 P.2d 453, at page 456, the court said:

> "* * * In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered. Makzoume v. Makzoume, 50 Cal.App.2d 229, 231, 123 P.2d 72. An abuse of discretion is never presumed but must be affirmatively established by the party complaining of the provisions of the or-

> der. [Cases cited.] The burden is on the party complaining of the order to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power. [Cases cited.]"

And in Fine v. Fine, 76 Cal.App.2d 490, at page 495, 173 P.2d 355, at page 358, the court said:

> "In determining the question as to whether an abuse of discretion occurred in this case, we have in mind the language employed in Clavey v. Lord, 1891, 87 Cal. 413, 25 P. 493, where the court said (87 Cal. at page 419, 25 P. at page 495): 'The only limitation that the law has placed upon the exercise of discretionary judicial power is, that it must not be abused. While it may be difficult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is, that it must plainly appear to effect injustice.' See, also, Hale v. Hale, 1935, 6 Cal.App.2d 661, 663, 45 P.2d 246."

See also In re Estate of Selb, 93 Cal. App.2d 788, 210 P.2d 45.

[5-8] We have concluded that taking into consideration the facts and circumstances shown by the record in the instant case there was an abuse of discretion in granting the motion to dismiss the action. As was said in Berry v. Chaplin, supra, "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." While the purpose of the two year provision in section 583 of the Code of Civil Procedure undoubtedly was to prevent unreasonable delay, we do not believe that it was ever the intention of the legislature to provide that it would be a proper exercise of judicial discretion to grant a motion for dismissal of an action under the circumstances shown by the record here. As a matter of sound public policy litigation should be disposed of upon substantial rather than on technical grounds.

The record here shows an action to recover money loaned, evidenced by an instrument in writing. There is nowhere in the record any denial that the money was borrowed, nor is there any statement that it was not due. While this alone would not justify a conclusion that the court abused its discretion, yet it is a circumstance which should be weighed with the other facts shown by the record, the relations between the parties, the serious illness and subsequent death of the husband, Kent Ordway, with the undoubted disrupting effect it would have upon the wife and the business affairs of the family, the illness of the attorney handling the case for the plaintiffs, and the absence of any showing that the defendant was injured by the delay. In view of these and other facts shown by the record we do not believe that under the authorities hereinbefore cited, the term "judicial discretion" is broad enough to sustain the court's order dismissing the action, for as stated in Jepsen v. Sherry, supra [99 Cal. App.2d 119, 220 P.2d 822], the discretion to be exercised in such a case is "one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating the ends of substantial justice."

The order is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 391

Thomas EISTRAT et ux., Plaintiffs, Cross-Defendants and Appellants,

v.

William I. HUMISTON et ux., Defendants, Cross-Complainants and Respondents.

Civ. 5392.

District Court of Appeal, Fourth District, California.

April 22, 1957.

Rehearing Denied May 20, 1957.

Hearing Denied June 19, 1957.

Action by landowner against logger consolidated for trial with action against logger and his wife for declaratory relief in connection with agreement for cutting of timber. The Superior Court, Tulare County, Robert K. Meyers, J., rendered judgment, and landowner appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that agreement terminated when logger was notified by landowner that agreement had been terminated because of logger's default, and that under agreement, which provided that title to timber cut, at time of its felling, passed to logger, logger had right to cut timber on property after default until landowner elected to terminate contract, and title to such timber passed to logger.

Affirmed.

1. Appeal and Error ⚷419(1)

Although plaintiffs in notice of appeal from particular parts of judgment set forth sixteen claimed errors on part of court, none of which were particular parts of judgment, notice of appeal was sufficient to constitute appeal from judgment and reviewing court would consider points raised in plaintiffs' opening brief, denominated statement of errors.

2. Bills and Notes ⚷534

Where obligees instituted suit on promissory note, which provided that if suit were instituted thereon obligor agreed to pay reasonable attorney's fee actually incurred, but obligees appeared in propria persona in the action, prepared and signed pleadings and conducted trial in propria persona, and there was no evidence that obligees employed attorneys, obligees were not entitled to recover attorney's fees.

3. Logs and Logging ⚷3(15)

In proceeding by landowners against logger for breach of contract which provided that contract would terminate on default of logger, evidence sustained finding that contract terminated at date on which logger was notified of termination by landowners and not earlier where landowners knew of breaches of contract and entered into new arrangements with logger before sending notice of termination.

4. Logs and Logging ⚷3(5), 5

Under contract for sale of timber which provided that title to timber to be cut, at time of its felling, passed to logger and that contract terminated if logger defaulted in payment on note, logger had right to cut timber on property after default until landowner elected to terminate contract, and title to lumber cut passed to logger.

◆

Thomas Eistrat, Alhambra, in pro. per. for appellants.

Francis B. Cobb and W. Floyd Cobb, Los Angeles, for respondents.

MUSSELL, Justice.

Plaintiffs filed two actions for declaratory relief in the Superior Court of Tulare county, which actions are numbered 42418 and 46892. The pleadings in action No. 46892 are not included in the record herein. However, the trial court found that the first cause of action set forth in plaintiffs' amendment to the eighth amended complaint in action No. 42418 is predicated upon the same facts as set forth in plaintiffs' amended complaint in action No. 46892 and that the cross-complaint of William I. Humiston, filed in action 46892, is predicated upon the same facts as set forth in his cross-complaint filed in case No. 42418. The two actions were consolidated for trial and one judgment was rendered. William I. Humiston and his wife were named as defendants in the amendment to the eighth amended complaint in action No. 42418 and William Humiston was the only defendant named in action No. 46-892. Seven causes of action are pleaded in the amendment to the eighth amended complaint in action No. 42418, all alleged as arising out of an agreement in writing, which is marked "Exhibit A" and attached to the fifth amended complaint. This agreement between plaintiffs, as parties of the first part, and defendant William I. Humiston, as party of the second part, was executed by the parties on April 28, 1951. It provides generally for the sale and removal of timber located on property owned by the plaintiffs in Sequoia National Forest in Tulare county.

The agreement and amendments thereto provided, among other things, that in consideration of any rights to accrue to second party, he should first pay parties of the first part the sum of $35,000, cash or securities which they "accept in lieu thereof" and that "default in payment of notes, if given for security, shall, at the option of the parties of the first part, terminate all rights in the party of the second part under this agreement." It is further stated therein that no assignment of the agreement could be made by second party; that "in consideration of the payment of the sums provided herein and of the agreements set forth, parties of the first part hereby sell, transfer and convey to party of second part all right, title and interest of parties of the first part in and to all timber standing on said real property, subject to all other provisions of this agreement, said all timber being all timber except that reserved to the party of the first part by Paragraphs IX and X (The timber reserved under paragraphs IX and X was that having a circumference measured inside the bark of less than 70 inches at a point of measurement 42 inches from the ground and trees designated by the District Forest Ranger as seed trees.); that all rights of the second party under the agreement terminate on or before December 31, 1952, except for removal of lumber by May 30, 1953; that second party shall comply with the rules and regulations of the Supervisor of the Sequoia National Forest relative to the cutting, lumbering or logging on government lands and that all rights of second party shall be terminated as of two weeks after notification by the district ranger of the breach in such rules, provided corrections to the satisfaction of the district ranger have not been complied with. Party of the second part agreed to pay party of the first part the sum of $50.00 as liquidated damages for the cutting of each tree of any species of any size less than 70 inches in circumference. It is further provided that said trees designated by the district ranger shall not be cut, and if such trees are cut or injured, second party agrees to pay first party $500.00 as liquidated damages for each such tree cut or injured. Time is made the essence of the agreement and it is further agreed that in the event of the breach of the agreement by second party that the $35,000 paid shall be only partial liquidated damages due first party; that title shall pass to party of the second part to that timber to be cut, at the time of its felling, with reversion to the party of the first part of all timber, or its products therefrom, not removed from the boundaries of said land by the time indicated in paragraph five (December 31, 1952, except for removal by May 30, 1953). It was further agreed that supervision of the operations of second party by the United States Forest Service may be required by first party by cooperative agreement between first party and the Forest Service; that second party shall be bound by such supervision and by the requirements of said Forest Service and that all rights under the agreement are terminated in the event of noncompliance with said requirements.

On April 28, 1951, the United States Forest Service and the Eistrats, as owners of the property involved, entered into an agreement in writing wherein the owners agreed to conditions imposed by the Forest Service relative to the cutting and felling of timber, slash disposal, fire precautions, skidding requirements, occupancy of the property and milling requirements. This agreement is denominated "Cooperative Timber Sale Administrative Agreement".

Pursuant to the terms of the agreement of April 28, 1951, between the Eistrats and Humiston relative to the payment of $35,000 cash by Humiston, the sum of $5,000 in cash was paid by him and he executed and delivered to the Eistrats a promissory note, dated April 28, 1951. The note provided for the payment to the Eistrats of the sum of $30,000 as follows: $5,000 June 1, 1951, and the further sums of $5,000 on the first of each month thereafter for five months. The note contained a recital that if suit is instituted thereon, Humiston agreed to pay "all costs of such action, together with a reasonable attorney's fee actually incurred" and a further recital that "this note is secured by 366 shares of common stock of Associated Piping and Engineering Company, Inc." On August 15, 1951, by written agreement, the said stock was returned to Humiston by the Eistrats and the time for payment of the promissory note was extended to January 2, 1952, in consideration of Humiston's transfer to the Eistrats of all his rights to all fir and cedar timber on the property. Humiston made the payments that became due under the promissory note for the months of June and July, 1951, and made no further payments thereon.

On May 5, 1951, Humiston entered into a logging contract in writing with one Joseph A. Rego in which Rego agreed to cut, log and deliver, to any and all saw mills designated by Humiston, all timber belonging to Humiston on the property involved and purchased from the Eistrats on April 28, 1951. Rego commenced operations on the property under his logging contract and thereafter, on July 11, 1951, the forest ranger inspected the property and notified Eistrat by letter, stating therein that the operator was cutting pine on the premises; that the trees had been felled carefully; that the operator had done considerable work in cleaning up the area but that there was considerably more work yet to be done to conform with the requirements of the contract. On August 28, 1951, a report of the operations on the property was made by the district forest ranger to the Eistrats. This report showed that the previous operations on the property had not been done in a manner satisfactory to the ranger and that Humiston had employed a new operator, one Harry Upton; that some clean-up work had been done but not satisfactorily; that in his opinion Rego was attempting to comply with the stipulations of the contract but had not done a thorough job. During the early part of September, 1951, Humiston went to see the district forest ranger, Alden L. Wuoltee, and was informed by him that in his opinion there was no urgency about doing the things that had to be done under Humiston's contract, provided they were done before winter set in.

On October 5, 1951, at a time when Humiston had down, cut and bucked on the property 185,000 board feet of pine timber and prior to the time Humiston had cut all of the merchantable timber to be cut under the contract, the Eistrats served a written notice upon Humiston of their intention to terminate the agreement, as modified, and at the same time and on the same day, instituted the instant action, No. 42418.

The trial court found, inter alia, that the contract of April 28, 1951, notwithstanding its title "Option Agreement Concerning Timber", was a contract for the sale of timber; that it was to be performed by Humiston's representatives under the direction of the United States forest ranger; that Humiston promised to pay plaintiffs $5,000 on the 1st day of June, 1951, and the sum of $5,000 on the first day of each successive month for five months; that no part of the principal has been paid except $5,000 paid during June and July, 1951, and that the sum of $20,000 was due, owing and unpaid on account of the principal of said note, plus interest; that the note provided for the payment of attorney's fees but that plaintiffs appeared in persona and are not entitled to attorney's fees; that the plaintiffs terminated the rights of the defendants under the written contract of April 28, 1951, by notice given to the defendants on October 5, 1951; that plaintiffs "are not entitled to any damages under their second cause of action as stated in their 'Amendment to Eighth Amended Complaint' for the reason that the agreement of April 28, 1951, required defendants to clean up the premises, and the court further finds that any cut logs on the premises at the inception of the agreement were given to the defendants by the plaintiffs"; that "It is further found that as to whether or not the agreement was assigned by the defendant William I. Humiston is immaterial inasmuch as plaintiffs admit they first learned of the alleged assignment in 1954, long after they had terminated the 'Option Agreement' "; that "It is true that plaintiffs were not damaged by reason of defendants failing to fall snags concurrently with the falling of green timber"; that "It is not true that the defendant felled any trees less than 70 inches, measured inside the bark, in circumference, that were determined to be unnecessarily felled by the United States Forest Service"; that the costs of the United States Forest Service and expenses paid by plaintiffs was the sum of $164.93 and that defendant was obligated to pay one-half thereof; that during the last weeks of September, 1951, Humiston felled 185,000 board feet of pine timber of size greater than 70 inches in circumference, measured inside the bark at above 42 inches above ground, and converted said timber into logs; that in September, 1953, plaintiffs sold said logs for $5.00 per thousand board feet and that said logs had deteriorated by lying on the ground for two years; that the title to these cut logs passed from plaintiffs to defendants when they were cut and that the plaintiffs were therefore not damaged by a deterioration of said logs; that defendants were obligated to do all they could to mitigate damages when plaintiffs rightfully terminated the agreement because of the breach thereof by defendants and that defendants did nothing in regard to to the mitigation of damages resulting from deterioration of said logs; that at no time did plaintiffs have any right, title or interest in said logs or the lumber made therefrom that were taken and carried away from said lands by defendants; that defendant Humiston was not entitled to recover on his cross-complaint except the sum of $925.00.

The court then concluded that plaintiffs were entitled to judgment against William I. Humiston for the sum of $20,000 principal, together with $2,950 interest accrued thereon, together with the sum of $82.46 incurred as United States Forest Service expenses and costs, less the sum of $925.00, the amount received by plaintiffs from the sale of the logs remaining on the property on October 5, 1951.

Judgment was entered that plaintiffs recover from defendant William I. Humiston the principal sum of $19,157.46, together with interest in the sum of $2,950 and costs in the sum of $1,197.52. It was further decreed that the defendant William I. Humiston was the owner of all logs severed and all logs removed from plaintiffs' land during the year 1951, and that plaintiffs had no interest therein; that Humiston was not entitled to recover on his cross-complaint except the sum of $925.00 as an offset which was deducted from the amount due plaintiffs; that plaintiffs were not entitled to recover any sum or amount from defendant Marjorie Humiston and that she was entitled to her costs in the sum of $233.44.

[1] Plaintiffs state in their notice of appeal that they appeal from particular parts of the judgment and then set forth sixteen claimed errors on the part of the court in failing to make certain findings and conclusions and in making certain others. These claimed errors are not particular parts of the judgment. However, we conclude that the notice is sufficient to constitute a notice of appeal from the judgment and will consider the points raised and relied upon in appellants' opening brief and denominated "Statement of Errors".

[2] Appellants' first argument is that the court erred in not awarding them attorney's fees as provided for in the promis-

sory note sued upon. The note provides that if suit is instituted thereon, Humiston agrees to pay a reasonable attorney's fee actually incurred. The record shows that the Eistrats appeared in propria persona in this action and the court so found. Plaintiffs prepared and signed the pleadings in propria persona and conducted the trial. There is no evidence in the record that they employed attorneys, that attorney's fees were "actually incurred", or that attorneys appeared for them in the action. Under these circumstances, the court properly refused to allow the recovery of attorney's fees. Appellants cite Richee v. Gillette Realty Co., 97 Cal.App. 365, 275 P. 477 and Oakes v. Fernandez, 108 Cal.App.2d 168, 238 P.2d 641, as authority for their contention that the attorney's fees should have been allowed. These cases have no application to the question here involved for in each of them the question of whether attorney's fees were actually incurred was not raised.

[3, 4] As their second assignment of error appellants argue that "Where a court finds that defendants' rights under a written contract were subject to defendants' compliance with conditions precedent, concurrent and subsequent, and further finds that defendants failed to perform the required conditions precedent, concurrent or subsequent, and finds plaintiffs never waived any defaults, it is error for the court to find the contract terminated at a later date than that expressly provided for in the written contract." This argument is without merit. The record shows that on October 5, 1951, Thomas Eistrat notified Humiston by letter dated October 4, 1951, which stated in part as follows: "We also inform you that said option agreement of April 28, 1951, which we had made with you has been terminated in accordance with its terms because of your defaults and that the liquidated damages specified therein are now due us and are hereby demanded." At that time Humiston had cut and felled 185,000 board feet of pine timber and it was then on the property. The evidence would not support a finding that the contract was terminated at a date earlier than October 5, 1951. Plaintiffs allege in their sixth cause of action that "pursuant to the terms of said option agreement, plaintiffs on or about October 6, 1951, gave defendant written notice that plaintiffs then elected to exercise their option and then to terminate all defendants' rights, if any there were, for aforesaid defaults of defendants in making payments on said promissory note accepted in lieu of cash as part of the cash payment for the sale of the option." The record shows that after the Eistrats knew of breaches of the contract by Humiston they, on August 15 and September 7, 1951, entered into new arrangements with Humiston. It is apparent that Humiston had a right to cut timber on the property until the Eistrats elected to terminate the contract and that this election was effected on October 5, 1951. Title to the lumber cut previous to that date passed to Humiston when it was in fact cut. The agreement expressly provided that title to the timber to be cut, at the time of its felling passed to Humiston.

The third and final contention of appellants is that the contract was terminated at the time it was breached for failure to comply with the requirements of the cooperative agreement with the Forest Service and that the court should have quieted appellants' title to all logs cut and removed from the property thereafter and should have awarded damages for such timber as was removed by Humiston. However, as previously noted, the contract was found by the court to have been terminated by the notice of October 5, 1951, and that until that time the title to the logs cut and removed by Humiston vested in him. The record further shows that the court awarded plaintiffs judgment for the balance due them under the contract for timber purchased by Humiston.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

150 Cal.App.2d 366

George A. MITCHELL, Petitioner,

v.

COUNTY SANITATION DISTRICT NO. ONE OF LOS ANGELES COUNTY, State of California and J. M. Lowery, County Auditor of Los Angeles County, State of California, Auditor of Said Board, Defendants.

George A. MITCHELL, Petitioner,

and

County Sanitation District Number One of Los Angeles County, State of California, Defendant, Respondents,

v.

J. M. LOWERY, as an officer and employee of County Sanitation District Number One of Los Angeles County, the Auditor thereof, and on behalf of said County Sanitation District Number One, Defendant, Appellant.

Civ. 22100.

District Court of Appeal, Second District, Division 1, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Mandamus proceeding by holder of county sanitation district bonds to compel county auditor to draw warrants in favor of holder in accordance with judgment entered against district. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment granting writ of mandate and auditor appealed. The District Court of Appeal, Fourt, J., held that under circumstances board of directors of district could waive defense of statute of limitations, and judgment rendered against district by Municipal Court was not subject to collateral attack.

Affirmed.

1. Limitation of Actions 🔑165

Statute of limitations operates on the remedy and does not extinguish the right; the expiration of the statutory period does not extinguish the debtor's obligation.

2. Limitation of Actions 🔑180(6), 182(5)

Defense of statute of limitations, even as to a public body, is waived unless the question or defense is raised by demurrer or answer.

3. Health 🔑4

Where holder of county sanitation district bonds was out of the country for a number of years during war and did not present for payment the coupons attached to the bonds as they became due and payable and no presentation for payment was made until after statute of limitations had expired, board of directors of district could legally waive the defense of statute of limitations when sued for payment of the coupons.

4. Constitutional Law 🔑308
Municipal Corporations 🔑871

Action of board of directors of county sanitation district in waiving defense of statute of limitations against holder of district bonds who had been unable to present them for payment because of absence from country did not violate Fourteenth Amendment of United States Constitution or State constitutional provision forbidding gifts of public money or of a thing of value. U.S.C.A.Const. Amend 14; West's Ann.Const. art. 4, § 31.

5. Judgment 🔑478

Where board of directors of county sanitation district waived defense of statute of limitations against holder of district's bonds and judgment was entered in the Municipal Court against district for the amount of such bonds, judgment was not subject either to direct or collateral attack in proceeding for writ of mandate to compel county auditor to issue warrants for payment of judgment.

Harold W. Kennedy, County Counsel for Los Angeles County, Alfred Charles De Flon, Deputy County Counsel, Los Angeles, for appellant.

F. J. Finucane, Los Angeles, for respondent Mitchell.

Gordon, Knapp & Gill, by Joseph C. Gill, Los Angeles, for respondent County Sanitation Dist.

FOURT, Justice.

This is an appeal from a judgment granting a writ of mandate wherein J. M. Lowery, County Auditor of Los Angeles county, was directed to draw certain warrants in favor of the petitioner.

The material facts were stipulated to and are substantially as follows: County Sanitation District Number One of Los Angeles County, hereinafter referred to as the District, was during all of the times in question, and still is, a political subdivision of the state. In June, 1925, the District issued $1,800,000 face amount of 5½ per cent coupon bonds, interest payable semi-annually. The petitioner and respondent, hereinafter referred to as Mitchell, bought twenty-five $1,000 bonds. Twenty-five coupons of the amount of $687.50, attached to Mitchell's bonds became due and payable on May 1, 1941; twenty-five more in the face amount of $687.50, became due and payable on November 1, 1941; twenty-five more in the face amount of $687.50, became due and payable on May 1, 1942, and twenty-five more in the face amount of $687.50, became due and payable November 1, 1942. Mitchell was outside of the United States, working for the United States Government as an engineer, during the times just mentioned, but he returned to the United States in 1945. In 1947, after his return to this country, and after the statute of limitations had expired, Mitchell presented the coupons for payment and such was refused by J. M. Lowery, the auditor of the county of Los Angeles, and ex officio the auditor of the District. The coupons were again presented for payment, with the same result as before.

On August 11, 1954, Mitchell, acting through his attorney, appeared before the board of directors of the District and requested the District to direct its counsel to waive the defense of the statute of limitations if and when the answer would be filed to a complaint about to be filed on behalf of Mitchell for recovery of the face value of the subject bond coupons.

The reasons given by the attorney for Mitchell for such request were presented in a forthright manner, which in substance were that Mitchell had been out of the country during the war years; that the District had colleced the taxes for the payment of the obligation and that the money was on hand to pay such; that the board of directors could not very well return the money to the individual taxpayers who had paid such amounts into the District and hence the District was in the position of having collected the money to pay the obligations and then not paying them. The attorney further explained that the District did not have to pay the obligation and that it could assert the statute of limitations; that, however, the only way he could get the auditor to honor the obligation would be to reduce it to a judgment and if an action were brought to secure such a judgment, counsel for the District would, in all probability, plead the statute of limitations, which was a defense to the action. The board of directors was then told by the attorney for Mitchell that it could waive the statute of limitations and if the board wanted to honor the obligation, it could instruct its counsel to waive the defense and not assert it.

The attorney for Mitchell had never seen nor heard of any of the members of the board of directors, or the attorney for the District, before the public meeting at which the presentation or request was made, and had never discussed the matter with any member of the board individually, or at all, excepting in the open public session. At a later meeting of the board of directors, after the action in the municipal court had been filed, substantially the same matter was related to the board of directors by the attorney for Mitchell, in an open public meeting and not otherwise.

The directors expressed a desire to pay what appeared to them to be a just and existing legal obligation of the District. Counsel for the District expressed the opinion to the board that, "it is apparently within the power of the Board of Directors to waive the Statute of Limitations as a defense in such an instance, but that, unless the attorney for the District was instructed by this Board of Directors [not] to do so, the attorneys would answer and plead as a complete defense the Statute of Limitations in the event suit was filed for payment of the bond coupons."

The board thereupon instructed its counsel to waive the statute of limitations.

On September 14, 1954, a complaint was filed in the municipal court, Los Angeles District, for recovery of the amounts represented by the coupons. The plaintiff in that action is the petitioner here, and the defendant is the County Sanitation District Number One. The auditor was not joined as a party in the municipal court action. The board of directors was requested by its attorney to reconsider its prior decision to waive the statute of limitations and on January 12, 1955, the board of directors reaffirmed its prior decision. Later the answer of the District was filed wherein, among other things, it was specifically set out "that on August 11, 1954, the Board of Directors of County Sanitation District No. 1 of Los Angeles County instructed its attorney to waive the defense of the statute of limitations in the event suit was filed by plaintiff herein; a true and correct copy of said resolution is attached hereto and by reference incorporated herein as a part hereof as Exhibit 'A.'" The District prayed that "the court grant such relief to the plaintiff as may seem just and proper in the premises."

On February 3, 1955, Mitchell moved for a summary judgment. The attorney for the District was in court at the time of the hearing and advised the judge of the court that the District had intentionally waived the statute of limitations as set forth in the answer. The judgment was granted and the judgment itself contains a recital that the statute of limitations was waived.

The judgment was entered and became final and thereafter Mitchell made a demand upon the auditor for payment of the coupons from the funds of the District. The auditor refused and Mitchell sought a writ of mandate to compel the auditor to pay the amount of the municipal court judgment. The writ of mandate issued and the auditor has appealed from the judgment granting such writ.

The appellant auditor asserts that the board of directors lacks the legal power, under the circumstances of this case, to waive the defense of the statute of limitations and that the judgment in the municipal court action is subject either to direct attack or to collateral attack in this proceeding.

The stipulation as to the facts indicates that the municipal court had jurisdiction over the subject matter. The amount was within the jurisdiction of that court, the action was upon a contract made and payable in Los Angeles county, and all parties were properly served and appeared in the action. In the municipal court there were no proceedings for a new trial, no request for relief under section 473, Code of Civil Procedure, and no appeal was taken from the judgment. There is no contention in this, or in any other proceeding having to do with the matter, that there was any fraud whatsoever.

[1] We are of the opinion that the writ was properly granted. In this state the rule is that the statute of limitations operates on the remedy and does not extinguish the right. Wells, Fargo & Co. v. Enright, 127 Cal. 669, 60 P. 439, 49 L.R.A. 647; Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L.R.A. 137; McCormick v. Brown, 36 Cal. 180; Mitchell v. Automobile, etc., Underwriters, 19 Cal.2d 1, 118 P.2d 815, 137 A.L.R. 923; Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 164 A.L.R. 685.

Unlike some other states, California has adhered to the rule that the expiration of the statutory period within which an action can be commenced does not extinguish the debtor's obligation.

In the very early case of Hewel v. Hogin, 3 Cal.App. 248, at pages 252–253, 84 P.1002, 1005, the court said, among other things:

> "It was urged in the petition for rehearing that the facts pleaded and

proven show that a number of the interest coupons became due and payable more than four years before the action was commenced, and it is argued that defendant as a public officer was bound to refuse payment as to such coupons. In other words, it is said that under the facts it was not defendant's duty, specially enjoined by law, to pay the 'outlawed' coupons. As a conclusion from his premise and argument, counsel for appellant earnestly insists that in a proceeding of this kind against an officer of a municipal corporation, the bar of the statute of limitations is always an issue, whether it is pleaded or not. At the outset we were impressed by the plausible and able argument of counsel in support of his position, but careful analysis and research have convinced us that the rule is and should be, the other way. For many years, able lawyers in this state and elsewhere contended that a municipal corporation held its funds as a trustee for those having demands, for the payment of which the money was provided, and that it could not plead the statute of limitations against a person having a claim which was payable out of such funds. It was argued that a municipal corporation, like a bank, was simply the custodian of special funds, holding the same for the benefit of those who were or might be entitled thereto.

"* * * we understand the rule to be that the defense of the statute of limitations is a privilege personal to the debtor, and that a municipal corporation, in common with other debtors, may waive or avail itself of such defense in any legal proceeding. Code Civ.Proc. §§ 1089, 1091; Bates v. Gregory, 89 Cal. [387,] 398, 26 P. 891, * * *; Underhill v. Trustees, 17 Cal. 178; Barnes v. Glide, 117 Cal. [1,] 8, 48 P. 804, * * *. Our attention has not been directed to any statute forbidding payment of such demands after the bar of the statute has intervened, and as all municipal corporations and bodies act through public officers, it follows that, unless the statute of limitations is set up by demurrer or answer, in this or any other legal proceeding against a public officer, the defense must be deemed waived."

There is an exception to the rule that the statute is waived unless pleaded in the matter of claims against estates, Prob.Code, § 708, but we are not here confronted with a situation which in any wise involves such a proceeding, and no useful purpose would be served by further referring to the exception.

[2] Suffice it to say that we understand the rule to be that the defense of the statute of limitations, even as to a public body, is waived unless the question or defense is raised by demurrer or answer. Sheeter v. Lifur, 113 Cal.App.2d 729, 739, 249 P.2d 336; Bliss v. Sneath, 119 Cal. 526, 528, 51 P. 848; Hewel v. Hogin, supra, 3 Cal.App. 248, 253, 84 P. 1002; Grattan v. Wiggins, 23 Cal. 16; Barber v. Mulford, 117 Cal. 356, 49 P. 206; Kelley v. Kriess, 68 Cal. 210, 9 P. 129; Bates v. Gregory, 89 Cal. 387, 26 P. 891; Gilbert v. Sleeper, 71 Cal. 290, 12 P. 172.

[3] As we view it, the District determined properly that it wanted to honor and pay its legitimate debts if it could possibly be done. The attorney for the District advised the judge of the municipal court at the time of the hearing of the desires of the District. The auditor admits that if, through inadvertence or neglect, counsel for the District had not set up the statute of limitations as a defense, that then and in such event, the judgment would be good and valid. In other words, it is his contention that the District can do something indirectly through inadvertence or neglect, but that it cannot do the same thing consciously and affirmatively.

Counsel for the auditor has cited us to no California cases which support his basic position, but has pointed to two Oklahoma cases, Nordman v. School Dist. No. 43 of Choctaw County, 190 Okl. 135, 121 P.2d

290 and Lowden v. Stephens County Excise Board, 190 Okl. 276, 126 P.2d 1023, which appear to be in conformity with his view. A complete answer to the cases cited is that they are not the law of California. The dissenting opinion in the Nordman case recognizes the rule in California as set forth in the Hewel case, and the dissenter states, 121 P.2d at page 294: "Like other municipal corporations, rules of pleading and practice ordinarily obtaining in civil actions apply to them, in the absence of statutes providing otherwise (we have no such statute pertaining to defense of limitations), and like other litigants, municipal corporations must plead affirmative defenses, such as the statute of limitations, otherwise they will be considered waived. [Citing cases.]"

The auditor has also cited us to the case of Hicks v. Fox, 190 Tenn. 82, 228 S.W.2d 68, to the point that the district does not have the power to waive the statute of limitations. The very language of the case demonstrates that it is not in point here, for it is said in 228 S.W.2d at page 69: "In the absence of statutory authority a former liability of a county *extinguished* by the bar of the Statute of Limitations is no debt." (Emphasis added.) As heretofore pointed out, California law is and has been that the debt is not extinguished by the *lapse* of time.

[4] The auditor further claims that if the District were permitted to waive or assert the defense of the statute of limitations, it would be in violation of the United States Constitution, 14th Amendment. He also asserts that under the California Constitution, sec. 31, Art. IV, to waive the statute would constitute a gift of "or thing of value". We do not believe there is any merit to either contention. The latter was settled in Bickerdike v. State, 144 Cal. 681, 78 P. 270.

[5] Regarding the auditor's assertion that the judgment in the municipal court is subject either to direct attack or collateral attack in this proceeding, he cites in support of such contention Hill v. City Cab & Transfer Co., 79 Cal. 188, 21 P. 728; United States v. Throckmorton, 98 U.S. 61, 65, 25 L.Ed. 93, 95; Kane & Co. v. Independent School-Dist. of Rock Rapids, 82 Iowa 5, 47 N.W. 1076 and Wuest v. Wuest, 53 Cal. App.2d 339, 127 P.2d 934. In our opinion, the facts in each of the cases cited are in no wise similar to the facts in the case at hand.

In the case of Gray v. Hall, 203 Cal. 306, 265 P. 246, there was entered a default judgment ordering the defendant to execute certain transfers to the plaintiff, and in the event he failed to do so, the clerk was directed to do so. The defendant and the clerk refused to comply with the order, the clerk contending that the judgment was void on its face. The plaintiff sued for a writ of mandate which the superior court denied. The Supreme Court reversed the judgment and issued a writ of mandate requiring the clerk to comply with the judgment, and in so deciding said, among other things, 203 Cal. at pages 313–317, 265 P. at page 251:

> "Notwithstanding that it was error for the trial court to enter the default of Yarbrough in the original case, the judgment thereafter entered is not subject to collateral attack in this *mandamus* proceeding. It is not void on its face. Whether or not the defendant Yarbrough should have been permitted to answer was a question of law necessarily involved in the original case, and there can be no doubt that it was within the jurisdiction of the superior court to decide that question. The judgment rendered there is in full force and effect, for it was not appealed and has not been vacated or set aside. The decision of the court was final and cannot be reviewed on appeal, for there is now no appeal. Nor will a review be permitted upon this application for a writ of mandate. Assuming that *mandamus* is a remedy open to the petitioner, there is nothing in the law relating to such a proceeding to indicate that the respondent may avail

himself of the position, which he now takes, to review the decision of the court in the original action upon a question of law which does not involve the jurisdiction or powers of the court to act in the matter. If the court had determined in the original action that the answer of the defendant there was sufficient, or had refused to enter his default for not answering, the respondent would not now be contending that the court had no jurisdiction to so decide. It is fundamental that it had jurisdiction to decide the matter either way. Jurisdiction in cases of this character implies the power of the court to decide a question wrongly as well as rightly. It was not necessary for us to determine in this proceeding whether the ruling of the court in the original action was correct or not.

"* * * Jurisdiction is but the power to hear and determine, and it does not depend upon the correctness of the decision made. [Citing cases.] The court having acquired jurisdiction of the subject-matter and of the parties, its judgment is not void for the mere erroneous decision on a question of law, however important that question may have been in contemplation of the rights of the parties in the original action. A judgment is never absolutely void if the court had jurisdiction of the subject-matter and the person of the defendant no matter how erroneous it may be. [Citing cases.] The manner of exercising its jurisdiction cannot make void the action of the court. [Citing case.] Neither will such judgment be in the least affected because its impotency appears from the judgment roll. [Citing cases.] In 1 Freeman on Judgments (5th Ed.) par. 360, the author says: 'The character and scope of the issue upon collateral attack have already been defined. Jurisdiction appears to be the keynote of every such controversy. Efforts to avoid the judgment must be directed to proving a want of power in the court rendering it. Upon this point the cases are clear. * * *

* * * * * *

"* * * But it is a fundamental principle, everywhere prevailing, that where a court has jurisdiction of the person of the parties and the subject-matter of the controversy submitted to it by them, its judgment thereon cannot be impeached collaterally or otherwise than by some form of direct attack, although it may appear on the face of the record that error was committed by the court in determining the question. [Citing cases.] If it were the rule that judgment in every case in which it appeared on the face of the record that error was committed by the court rendering it is subject to collateral attack the doctrine of the finality of judgments would become a myth."

In the case of Travis County v. Matthews, Tex.Civ.App., 235 S.W.2d 691, Judge Matthews sued the county for added compensation claimed to be due to him. The judgment in the trial court was in favor of Matthews. The statute of limitations was for all intents waived during the trial. The county appealed, and while the appeal was pending the county commissioners satisfied the judgment by payment. The appeal was dismissed as being moot. The county then sued the court commissioners and their bondsmen, contending that the county should recover in any event, the money paid to Matthews, which was barred by the statute of limitations. The court said in 235 S.W.2d at pages 696, 697, 698:

"The final judgment of a district court is just as decisive and just as enforceable as a final judgment of the Supreme Court. The question is then: Should the acceptance of this District Court judgment by Travis County furnish any evidence of fraud, bad faith, or impure motives on the part of the Commissioners' Court? If so, then a similar taint of fraud would attach to a great majority of district court judgments because only a small per cent of them are appealed.

"There is no statute which requires a county to appeal from an adverse judgment. The question of whether to appeal involved a matter of discretion. * * *

* * * * * *

"It is quite true that a major portion of the amount sued for by Judge Matthews in the former suit was barred by limitation. [Citation.] In spite of the plea of limitations in such suit the trial court rendered judgment for Judge Matthews. This judgment must have been based upon a finding that Travis County had waived or abandoned the plea of limitations because appellant alleges in this suit that the Commissioners' Court and its members 'were under a legal duty to assert all available legal defenses on behalf of Travis County in said cause No. 82,254, including the defense of the statute of limitations, and they had no right or authority to waive said statute of limitations, and any waiver or attempted waiver on their part was illegal and of no effect.'

"We need not determine and we do not determine whether or not a county may waive the statute of limitations. All that we need determine is whether the Commissioners' Court in accepting the judgment of the District Court that limitations could be waived by the county was acting with impure motives and in bad faith.

"The judgment of the District Court, in this respect, was not patently wrong. It was not such a judgment as to shock the conscience of a layman, nor even to disturb the aplomb of those learned in the law.

"It would be an odd conscience indeed which would be outraged by the payment of a just debt which was uncollectible simply by reason of the lapse of time.

* * * * * *

"The principal argument of appellant is based, by analogy, on the rule which requires a representative of a decedent's estate to plead limitations. The reason for this rule was stated long ago by Chief Justice Hemphill: 'That, as a general rule, administrators must avail themselves of the statute, where the demand is barred by limitation, is admitted. It has been recognized and adopted by this court; and administrators would, if they transcend the rule, subject themselves to personal liability. But this rule, as most other general principles, has its exceptions. It is based on sound policy. Administrators, generally, cannot know with certainty, whether a demand against the deceased has been paid or not. This is especially the case where the demand has become stale or obnoxious to the laws of limitation, from the lapse of time. As a matter of policy, then and as one very beneficial to estates, administrators are required to set up the statute, in cases to which it applies.' Estes v. Browning, 11 Tex. 237.

"It would seem very incongruous to apply this reasoning to a county which never dies and whose business is reflected by official records open to public inspection.

"On the other side of the ledger we find that the State may waive limitations. [Citing case.] A school district may waive limitations. [Citing case.] The Supreme Court did not question the power of a city to waive limitations in City of Houston v. Jankowskie, 76 Tex. 368, 13 S.W. 269. See also City of Tyler v. L. L. Jester & Co., Tex.Civ.App., 74 S.W. 359, * * *."

It is difficult to see how or in what manner the District was imposed upon in the present case. Certainly the just and proper thing was to pay the legitimate debts of the District. The money was collected for the very purpose of paying the coupons in question and was available for payment.

We believe, under the circumstances of this case, that it was proper for the governmental agency to waive the statute of limitations.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

150 Cal.App.2d 90

Maria SORCI, Plaintiff and Appellant,

v.

Rosina CRISCI, Individually and Rosina Crisci, as Executrix of the Estate of Giovanni Crisci, deceased, Defendants and Respondents.

No. 16950.

District Court of Appeal, First District, Division 1, California.

April 15, 1957.

Rehearing Denied May 15, 1957.

Hearing Denied June 12, 1957.

Action to set aside judgment rendered against plaintiff in prior action on grounds that she was never served with process and never appeared or retained counsel to represent her. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where plaintiff filed suit in September, 1953, and cause was put on court calendar for trial on December, 1954, but when plaintiff's attorney withdrew before trial court granted continuances until February 28, 1955, refusal of court to grant further continuance on February 28, when plaintiff's husband appeared stating that plaintiff was ill and that attorney he had engaged on February 25 had withdrawn day before trial, was not abuse of discretion, where husband offered no proof of his representations nor proof that he was authorized to speak for plaintiff.

Affirmed.

1. Continuance ⇨51(6)

Where plaintiff filed suit in September, 1953, to set aside prior judgment, and cause was put on court calendar for trial in December, 1954, but when plaintiff's attorney withdrew before trial, court granted continuances until February 28, 1955, refusal of court to grant further continuance on February 28, when plaintiff's husband appeared stating that plaintiff was ill and that attorney he had engaged on February 25 had withdrawn on day before trial, was not abuse of discretion, where husband offered no proof of his representations nor proof that he had authority to speak for plaintiff.

2. Judgment ⇨461(1)

Plaintiff who brought action to set aside judgment in prior action alleging that she had not been served and had not appeared had burden of proving such allegations.

3. Judgment ⇨461(4)

Where plaintiff brought action to set aside judgment in prior action on ground that she had not been served and had not appeared but introduced no evidence on that subject and file of former action, introduced into evidence, contained proof of service of summons and complaint, plaintiff failed to sustain her burden of proof. West's Ann.Code Civ.Proc., § 1981.

4. Evidence ⇨98

Where no evidence is introduced upon issue, finding thereon should be against party who has burden of proof.

5. Appeal and Error ⇨1040(12, 14), 1042(5)

In proceeding to set aside judgment in prior action on ground that plaintiff had not been served and had not appeared therein, wherein plaintiff demurred to portions of answer and cross-complaint and made motion to strike other portions, even though overruling of demurrers had been improper, and although one motion should have been granted, there was no basis for reversal where court properly found that plaintiff was served with process in former action. West's Ann.Probate Code, §§ 700–739; West's Ann.Code Civ.Proc., §§ 312, 318–327, 335, 336, 338, 343, 1091, 1624, subds. 1, 4, 6, 1973, subds. 1, 4, 6.

6. Appeal and Error ⚷1042(3)

In proceedings to set aside judgment in prior action on ground that plaintiff had not been served nor appeared therein, wherein plaintiff's lay husband tried case without legal counsel, trial court's failure to exclude alleged improper defenses and cross-complaints was not basis for reversal where trial judge told husband that all he had to prove was that his wife was not served and did not appear, and husband indicated that he clearly understood those issues.

7. Jury ⚷14(9)

Where plaintiff sought to set aside judgment in prior quiet title action and cross-complaint alleged that defendants had at all times been owner and entitled to immediate possession of property, that plaintiff's claim was wholly without right, and prayed that defendants' title be declared and quieted, and plaintiff's answer to cross-complaint which joined issue as to title did not allege that plaintiff had possession, pleadings presented equitable issue of title, not legal issue of possession, and did not entitle plaintiff to jury trial.

◆

Michael L. Haun, San Francisco, for appellant.

J. A. Pardini, Elda Granelli, F. Campagnoli, San Francisco, for respondents.

FRED B. WOOD, Justice.

Maria Sorci brought this action to set aside a judgment rendered against her and affirmed upon appeal in Crisci v. Sorci, 115 Cal.App.2d 76, 251 P.2d 383, claiming that she was never served with process in the former action and never appeared or retained counsel to represent her therein.

[1] (1) *The principal question is whether or not it was an abuse of discretion to deny a continuance on the day last set for the trial to commence.* We can not say that it was. There was a background of delays and continuances with which the trial judge was conversant and no actual proof of a substantial basis for a further continuance. This gives support to an implied finding that the cause of justice would not be served by a further continuance.

Maria filed the present action on September 8, 1953, acting in propria persona. On the 16th of the following March, defendant Rosina Crisci, individually and as executrix of the estate of her deceased husband Giovanni Crisci, filed an answer and cross-complaint. There is no proof that Rosina was served with process. Rosina states in her brief that the summons herein was not served, a statement which Maria mentions but does not deny in her closing brief. There is thus a basis for an inference of several months' delay at the very inception of the present action.

On June 15, 1954, Maria, by attorney, interposed demurrers and motions to strike portions of the cross-complaint, which were overruled and denied on July 2. On August 10 she answered the cross-complaint and filed a demand for a jury trial.

In November, the court granted a motion by Rosina to strike Maria's demand for a jury trial (this being an equity case) and put the cause on the court calendar for trial commencing December 20, 1954. In her affidavit in support of that motion Rosina, after referring to the judgment in the former action, said "this action is brought by plaintiff in order to harass, vex and annoy this defendant and cross-complainant, to prevent her continuous and present enjoyment of the parcels of real property described in the complaint and to prevent her from freely dealing with said property as her own; and, that plaintiff's husband has often stated to this Affiant and others that he will continue, through himself and his said wife, plaintiff herein, to harass, vex and annoy this Affiant in the quiet possession of said real property." The record before us does not disclose any counter affidavit.

On December 16 plaintiff's attorney withdrew and on December 17 Rosina served notice on Maria to get another attorney or appear in person. On December 20, according to Rosina's brief (not denied by Maria in her closing brief) Maria, "who was now acting *in propria persona,* by a person not an attorney, obtained a 'final continuance' from the presiding judge of the Court of over one more month to January 26, 1955, to procure counsel." On January 26 Maria was given to and including February 28 "within which to obtain an Attorney." On March 2, 1955, the cause was assigned to department 21 of the superior court, then presided over by the judge who had vacated Maria's demand for a jury trial.

On the day of the trial plaintiff did not appear. Her husband, Joseph Sorce, did appear. He referred to the continuances that had been granted to get an attorney and reported he had gotten an attorney the preceding Friday (February 25, 1955) but that the attorney withdrew the day before the trial; that another attorney had agreed to take the case but required a retainer before undertaking it and that plaintiff was ill. No proof of these representations was made by affidavit or otherwise. Nor was there any proof of Joseph's authority to speak for plaintiff, a matter of some significance in view of the fact that her complaint herein negatives his assumed authority to have engaged counsel to represent her in the very action which culminated in the judgment which the present action was designed to set aside. Moreover, it is inferable that Joseph waited until virtually the end of the two and one-half months' extension before engaging an attorney, leaving the attorney less than five days within which to become thoroughly familiar with the case and discover that he did not wish to go ahead with it.

In denying the requested continuance the trial judge made these observations among others: "The matter has been sent in here for trial by the Presiding Judge who evidently believed there should be no further continuance. I know last year * * * I granted you * * * a continuance for the purpose of providing yourself with counsel * * *. There should be no difficulty in getting counsel for a just case * * *. I think the adverse parties in these proceedings are entitled to have the case determined one way or the other * * *. You are not entitled to delay a matter. You are supposed to be prepared. When you start litigation you are supposed to be prepared to go through with it * * *. You will have to proceed. * * * I have no evidence here to testify that your wife is ill; I have no affidavits of witnesses or anything of the kind * * *. The matter has been continued and continued and continued to give you the opportunity [to get an attorney] * * * You may present your case and call any witnesses you want."

Before the first witness started to testify Joseph was permitted to and did phone an attorney, but, after talking to Joseph and to Rosina's counsel, the attorney also declined to take the case.

We find no abuse of discretion in the denial of a further continuance.

[2-4] (2) *Maria questions the sufficiency of the evidence* but she had the burden of proving that she was not served and did not appear in the former action. Code Civ.Proc. § 1981; Church v. Church, 40 Cal.App.2d 701, 705-706, 105 P.2d 643. She introduced no evidence on that subject. Where no evidence is introduced upon an issue, the finding thereon should be against the party who has the burden of proof. Heesy v. Vaughn, 31 Cal.2d 701, 708-709, 192 P.2d 753; Wheeler v. Gregg, 90 Cal.App.2d 348, 370-371, 203 P.2d 37; 18 Cal.Jur.2d 538, Evidence, § 106.

Moreover, the file of the former action was introduced in evidence and it contains proof of service of summons and complaint therein upon the plaintiff herein.

[5] (3) *Was it prejudicial error to overrule plaintiff's demurrers to certain portions of defendant's answer and cross-complaint?*

Among the defenses attacked by demurrer were those of res judicata, laches, sections 700–739 of the Probate Code, section 738 of the Code of Civil Procedure (relative to admissibility and determination of the meaning of a will), the statute of frauds, Code Civ.Proc. § 1973, subdivisions 1, 4 and 6; Civil Code, §§ 1091 and 1624, subdivisions 1, 4 and 6) and statute of limitations, Code Civ.Proc. §§ 312, 318–327, 335, 336, 338 and 343.

Few, if any, of these pleas would be a defense to the cause of action pleaded by the complaint herein. However, even if we assume it was error to overrule the demurrer, there was no prejudice to plaintiff's case thereby, no basis for reversing the judgment appealed from. The court properly found that plaintiff herein was served with process in the former action, in itself a sufficient defense to the complaint herein.

(4) *Was it prejudicial error to deny plaintiff's motions to strike certain portions of Rosina's answer and cross-complaint?*

One motion was directed to the plea of res judicata and should have been granted but, as we have seen with reference to the demurrer on the same ground, no prejudice resulted.

[6] The other motions were to strike those portions of the cross-complaint which sought to quiet title to the property involved. Maria claims that such a plea was redundant, a merely repetitious answer. Rosina says it was not because plaintiff had filed two lis pendens notices since the rendition of the judgment in the former action. If this portion of the cross-complaint was merely redundant, we fail to see how its remaining in could prejudice anyone. Plaintiff argues, in part, that allowing these defenses and cross-complaints to stand presented extraneous issues too complicated for a layman to try. But, we recently held that a "litigant appearing in propria persona is entitled to the same, but no greater, consideration than other litigants and attorneys." Muller v. Muller, 141 Cal.App.2d 722, 732, 297 P.2d 789, 795. Matters which are not prejudicial to litigants represented by attorneys should not be prejudicial to litigants without them. Moreover, in the instant case, the trial judge told Joseph Sorce that all he had to prove was that his wife was not served and did not appear in the former action. Joseph unmistakably indicated that he clearly understood those issues.

[7] (5) *Was it prejudicial error to quash plaintiff's demand for a jury trial?*

Maria concedes that the complaint seeks equitable not legal relief and does not of itself entitle her to a jury trial. She argues that because the cross-complaint did not allege that Rosina was "in possession" but instead alleged that she was "entitled to the immediate possession" of the property, it presented legal issues similar to those presented in an action at law for ejectment.

That is taking too narrow a view of the pleading. Rosina alleged that she has at all times been and now is "owner of in fee simple absolute and entitled to the immediate and peaceful possession of" the described property; that Maria "claims some right, title, interest, claim or estate in or to * * * [said property] * * * adverse to * * * [Rosina's and her husband's estate] * * * but that the * * * claim * * * is wholly without right * * *"; and then prays that defendants' title be declared and quieted, all without expressly asking to be let into possession of the property. In her answer to the cross-complaint, Maria joins issue as to title and does not allege that she has possession of the property. These pleadings presented the equitable issue of title, not the legal issue of possession, and justify the denial of plaintiff's demand for a jury trial.

We note, also, that Rosina testified that she was in possession of at least a part of the property involved, where she maintains her home, and the judgment declared her title, stated that she is entitled to the "continuing" possession of the premises and said nothing about putting her in possession.

Under these circumstances, we conclude that the court correctly ruled that plaintiff was not entitled to a jury trial as a matter of right. If authority be needed, it is furnished by Santa Ana Mortg. & Inv. Co. v. Kinslow, 30 Cal.App.2d 107, 109–110, 85 P.2d 899.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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150 Cal.App.2d 96

Rosina CRISCI, Individually, and Rosina Crisci, Executrix of the Last Will and Testament of Giovanni Crisci, a/k/a G. Crisci, deceased, Plaintiffs and Respondents,

v.

Joseph SORCE, a/k/a Joseph Crisci, a/k/a J. Crisci, and Maria Sorce, his wife, a/k/a Mary Sorce, a/k/a Mary Sorci, et al., Defendants and Appellants.

No. 16951.

District Court of Appeal, First District,
Division 1, California.
April 15, 1957.

Rehearing Denied May 15, 1957.
Hearing Denied June 12, 1957.

Suit by mother, individually and as executrix of will of father against son and his wife to quiet title to certain property. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., rendered judgment for mother, and son and wife appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained findings that property was deeded to mother and her husband, that mother paid for it with her own money, that son gave her no money for its purchase, and that mother had been in continuous possession and acted as owner, paying taxes and insurance and collecting rents, ever since purchase.

Affirmed.

1. Quieting Title 🔑44(4)

In action by mother, individually and executrix of will of father, against her son and his wife, to quiet title to property, evidence sustained findings that property was deeded to mother and father, that mother paid for it with her own money, that son gave her no money for its purchase, and that mother had been in continuous possession and acted as owner, paying taxes and insurance and collecting rents, ever since its purchase.

2. Evidence 🔑158(2)

In suit by mother against her son and his wife to quiet title to property, mother's oral testimony that she paid purchase price money was competent as against claim some record should have been produced.

3. Gifts 🔑47(1)

Where son testified in suit to quiet title that he gave his mother the money to buy property, but not until filing of suit by mother had he made any claim to it, basis was furnished for presumption that he intended property to be gift to his mother.

4. Witnesses 🔑275(1)

In suit by mother against son and his wife to quiet title to property, wherein, after direct examination of mother, court asked son if he wanted to ask her any questions, statements by son and court did not constitute request for and denial of cross-examination, especially in view of fact that mother later returned to stand and son cross-examined her to full extent.

5. Discovery ⚷97(1)

In suit by mother against her son and his wife to quiet title to property, remarks of son during cross-examination of mother, that he would like to have her bring records in connection with her statement that son gave her no money to buy the property, did not constitute request for order for inspection of and copies of documents in possession of opposite party where transactions had occurred some 25 years before, and it was not clear whether son referred to records which mother had kept or seller of property had kept or that some bank had kept. West's Ann.Code Civ.Proc., § 1000.

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Michael L. Haun, San Francisco, for appellants.

J. A. Pardini, Elda Granelli, F. Campagnoli, San Francisco, for respondents.

FRED B. WOOD, Justice.

This is a suit by Rosina Crisci, individually and as executrix of the will of Giovanni Crisci, against her son Joseph Sorce and his wife Maria, to quiet title to certain real property. It was tried at the same time as Sorci v. Crisci, Cal.App., 309 P.2d 937, but involves a different piece of realty.

(1) *Here, as in that case, the principal question is whether or not the trial court committed an abuse of discretion in refusing a continuance* at the request of Joseph, to enable him to obtain an attorney. The facts concerning this are substantially the same as there,[1] a history of delays and continuances. We find no abuse of discretion.

[1] (2) *The findings are supported by evidence* that the property was deeded to Rosina and her husband, that Rosina paid for it with her own money, that Joseph gave her no money for its purchase, that she had been in continuous possession and acted as owner, paying taxes and insurance and collecting rents, ever since its purchase.

[2] Joseph and wife argue that Rosina's testimony is incredible and that they were not accorded an opportunity to demonstrate its incredibility. By this they seem to mean that some kind of records should have been produced, as the best evidence, instead of permitting Rosina to testify that she paid the purchase price money. We know of no such rule of evidence. Rosina's oral testimony was quite competent.

[3] Moreover, Joseph testified that he gave his mother the money to buy that property and not until the filing of this suit (a good many years later) did he make any claim to it. That would furnish a basis for a presumption that he intended the property to be a gift to his mother. Elliott v. Merchants Bank etc. Co., 21 Cal.App. 536, 541, 132 P. 280; 25 Cal.Jur. 193, Trusts, § 60.

[4] (3) *Was Joseph denied the right of cross-examination? No.*

When direct examination came to an end the court asked Joseph if he wanted to ask his mother any questions, whereupon the following ensued: "Mr. Sorce: Well, proof she paid the money for the house, at the time she bought this property. The Court: She has got a deed. She has presented a deed which says the property is hers. Mr. Sorce: The husband didn't have anything to do with the original deal. The Court: The deed is on file here. Mr. Sorce: Well, I know. The Court: All right, you can step down. I don't presume he has any questions. You step forward, Mr. Sorce." Thereupon, Joseph was sworn and testified. We do not perceive in that a request for and denial of cross-examination, especially in view of the fact that Rosina later returned to the stand and Joseph cross-examined her to the full extent, apparently, that he desired.

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[1] In this case, Maria, a defendant, obtained 30 days of extensions of time to plead, and then defaulted. Meanwhile, Joseph's time was extended and they jointly filed an answer on August 20, 1954. From that time on, the history of significant delays and continuances was the same as in the other case.

The last name of Maria and Joseph appears as Sorce in the instant case and as Sorci in No. 16950.

[5] (4) *Did the court erroneously refuse a demand of the defendants for production of documentary proof?*

During his cross-examination of Rosina she testified that Joseph gave her no money to buy the property, gave her no money at all. Thereupon he said "I would like to have her bring the records. Her statement isn't true, your Honor, and I would like her to bring the records." The court said: "That is all" and Joseph responded: "Well, she didn't pay for the land, your Honor; I paid for the land * * *."

Joseph's counsel would construe this as a request for an order under section 1000 of the Code of Civil Procedure for an inspection and copies or permission to make copies of documents relating to the action and in the possession or control of the opposite party. Such a request should describe the books and records sought. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 396, 159 P.2d 944. He is speaking of a transaction which occurred some twenty-five years ago. Does he refer to records which Rosina kept or the seller of the property kept or that some bank kept? His remark was altogether too indefinite to serve the purpose which his counsel would now have us read into it.

(5) *Were the appellants given a fair trial?*

Under this head appellants' counsel reargues in part the question whether the court abused its discretion when it denied Joseph a continuance, a matter which we have already considered. Some of the remarks to which Joseph's counsel would now take exception pertained to the case of Sorci v. Crisci, above-mentioned, not to this case. None of the remarks complained of indicate to us anything other than the proper exercise of reasonable control over a judicial proceeding, to keep it within the issues and to keep it moving.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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150 Cal.App.2d 385

Edith E. GREENLEAF, Plaintiff, Cross-Defendant and Respondent,

v.

S. A. CAMP GINNING COMPANY, a corporation, et al., Defendants, Cross-Defendants and Appellants,

Lerdo Land Company, a corporation, Defendant and Cross-Complainant,

Edith E. Greenleaf et al., Cross-Defendants.

Civ. 5387.

District Court of Appeal, Fourth District, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Original action for declaratory relief seeking a determination of the rights of the parties under certain deeds to mineral land. From an adverse judgment in the Superior Court of Kern County, R. B. Lambert, J., the cross defendants appealed. The District Court of Appeal, Griffin, J., held that under the terms of the deed, grantees owned the minerals subject to the reservation, and that reservation in a subsequent deed by successors in interest was intended only to prevent the grantors from conveying a greater interest in the property than they owned, and not to reserve title to the oil royalties in question.

Judgment affirmed.

1. Mines and Minerals ⚿55(4)

Where deed conveyed land with reservation of minerals in the grantor for 50 years, and specifically provided that reservation was subject to a "covenant running with the land in reference to 24½ per cent interest in royalties, grantees owned the minerals, subject to the reservation.

2. Mines and Minerals ⚿55(4)

Where deed conveyed land with a reservation of the minerals in grantor for 50 years, and provided that reservation was subject to "covenant running with the land" in reference to an interest in royalties, and successors in interest granted to the grantees all of the described property "subject to the reservation" contained in the prior deed, intent of subsequent reservation was only to prevent the successors in interest from conveying a greater interest in the property than they owned, and not to reserve title to the oil royalties.

◆

Baker, Palmer, Wall & Raymond, Bakersfield, for appellants.

Kendall & Howell, Bakersfield, for respondent.

GRIFFIN, Justice.

The original action commenced by respondent Edith E. Greenleaf against S. A. Camp Ginning Company, a corporation, et al, including appellants James Camp (also known as Yelton Camp) and Betty Camp, husband and wife, was for declaratory relief seeking a determination of the legal rights of the respective parties, under certain deeds, to minerals lands in Kern County. Respondent claims a proportionate share of the royalty interest. Copies of the deeds in question are attached to and made a part of the complaint. In appellants' answer they contend they are entitled to 12¼ per cent of the 24½ per cent of all bonuses, royalties, etc. under any oil or gas lease upon the land described. Defendants Phil Ohanneson and Anina M. Ohanneson seek a declaration of their claimed rights in said royalties, to wit, 12¼ per cent of the 24½ per cent. Defendant Lerdo Land Company, a corporation, admits the execution of the deed (Exhibit B attached to the complaint) and admits the execution of two leases of its mineral rights in the property to Bell Petroleum Company, and that they received $13,949.38 as the first year's rent; admit that 24½ per cent of this amount or $3,104.89 (subsequently increased to $6,209.78 by reason of one more payment due) was received by it; admit that other named and unnamed defendants claim a proportionate share of this sum; and that they seek a declaration of their respective rights. It filed a cross-complaint bringing in those additional defendants in order that their claims might be adjudicated and paid from the impounded fund deposited in court. Disclaimers were filed by some of the named defendants. The final dispute was between Edith E. Greenleaf, as successor in interest of Lawson L. Lowe, Inc., a dissolved corporation, and appellants James and Betty Camp. The court found generally in favor of respondent, and by judgment awarded the cross-complainant Lerdo Land Company $450 as attorney's fees under section 386.6 of the Code of Civil Procedure, payable from said deposit, awarded Ohanneson $2,810.77, and the respondent Greenleaf $2,949.01, and by adjustment of acreage declared that a 51.2 per cent of 24½ per cent interest in the future royalties above mentioned belonged to respondent.

By deed (Exhibit 1) dated May 22, 1941, Lerdo Land Company conveyed to appellant James Camp and Phil Ohanneson the property involved, with the following reservation:

> "Reserving Unto Grantor for a period of fifty (50) years from date hereof all oil, gas or other hydrocarbon substances and minerals of every kind, nature and description in, under and that may be produced from said land, together with the right of ingress and egress during said time for the purpose of drilling and exploring for said minerals, oil, gas or other hydrocarbon substances and removing the same therefrom; said reservation, however, being subject to a covenant running with the land that grantor will endeavor to lease said premises for the production of minerals, oil, gas or other hydrocarbon substances upon such terms as in the opinion of grantor are advantageous, and in the event that grantor receive rent, royalties or bonuses from any such transaction, fifty-one per cent (51%) of the same shall be retained by grantor herein, twenty-four and one-half per cent (24½%) of the same shall be paid to grantees, and twenty-four and one-half per cent (24½%) of the same shall be paid to W. K. Lee * * *. In the event grantor conducts any such operations on its own account,

> then the net benefits so derived shall be divided as follows: fifty-one per cent (51%) to grantor, twenty-four and one-half per cent (24½%) to grantees and twenty-four and one-half per cent (24½%) to W. K. Lee * * *."

By deed (Exhibit 2) dated December 10, 1941, appellants Camp and the Ohannesons conveyed all the property received by them from Lerdo Land Company through said deed (Exhibit 1) to Ann O'Brien, for the purpose of dividing the property between the Camps and the Ohannesons with the following recital:

> "Subject to the reservation for a period of 50 years of all oil, gas or other hydrocarbon substances and minerals as contained in deed from Lerdo Land Company to Phil Ohanneson and James Camp, but including any and all interest of the grantors presently vested or that may vest in the future by virtue of the provisions of said deed, including the right to any and all rents or royalties that may accrue to the owner of said land under the provisions of said deed."

On the same date Ann O'Brien executed deeds (Exhibit 3 and Exhibit A) to the Camps as joint tenants and the Ohannesons, as joint tenants respectively, apparently dividing the property equally by metes and bounds description. These deeds contained the same clause as above set forth in respect to the reservations. On October 17, 1942, appellants Camp conveyed to Lawson L. Lowe (Exhibit 4) the land they received under their deed from Ann O'Brien. It contained the following additional recital:

> "Subject to the reservations contained in the Deed from Lerdo Land Company, a corporation, as Grantor to Phil *O'Hanneson* and James Camp, also known as Yelton Camp, as Grantees relating to Oil, Gas or other hydrocarbon substances. * * *.
>
> "Also subject to all conditions reservations and restrictions now of record."

By deed of May 6, 1948 (Exhibit 5) Lawson L. Lowe and his wife, Edith E. Lowe, now Edith E. Greenleaf, plaintiff and respondent in this action, conveyed that property to Lawson L. Lowe, Inc., a corporation. The deed contained the additional recital: "Subject to reservations, restrictions, rights of way and easements of record". Finally, by deed dated March 31, 1952 (Exhibit 6) Lawson L. Lowe, Inc. conveyed that property to S. A. Camp Ginning Company. It contained the additional recital: "Except all oil, gas and other hydrocarbon substances and minerals". Respondent Edith E. Greenleaf has succeeded to the right, title and interest of Lawson L. Lowe, Inc. in the property in question.

Appellants' contentions are, as we construe them, that the deed from Lerdo Land Company to Camp and Ohanneson (Exhibit 1) effected a severance of the subject real property into two estates, one being an estate in minerals for a term of years and the other being the surface together with the remainder in the minerals after the expiration of the fifty-year term; that appellants are entitled to the money and interest which the trial court awarded to respondent for the reasons that an examination of the recitals in the various deeds shows an intention on the part of the Camps *not* to convey to Lawson L. Lowe the Camps' interest in the 24½ per cent of the rentals from the minerals which the Lerdo Land Company covenanted in the originial deed to pay to Camp and Ohanneson. It is then argued that even if it did show the intention advanced by respondent, respondent is not entitled to the share of the rents for the reason that said share is *personal property* which would not pass without express words of assignment, and since there were none, no title passed; that the covenant agreeing to pay 24½ per cent royalties is a species of personal property and not a covenant of an oil and gas lease, which covenants normally run with the land.

Appellants admit they have found no California cases directly in point but rely on such authority as Tegarden v. Beers, 175 Kan. 610, 265 P.2d 845; and McIntosh v. Vail, 126 W.Va. 395, 28 S.E.2d 607, 151 A.L.R. 804.

The trial court found that as to the grantees Camp and Ohanneson the quoted covenant was a covenant that "ran with the land conveyed" and was not personal to Camp and Ohanneson. It is argued that under the law of California, a covenant to run with the land must benefit the land, citing section 1462 of the Civil Code; and that payment of rental or royalties from the estate reserved does not benefit the estate in the surface, citing McIntosh v. Vail, supra; 36 Am.Jur. p. 307, sec. 36; Berryman v. Hotel Savoy Company, 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5; and 14 Cal.Jur.2d pp. 22–23, secs. 14 and 15. It is argued, accordingly, that the right to the money due the Camps was never assigned nor conveyed to respondent nor to her predecessors in interest by the deeds described.

Two principal questions are involved: (1) Did the deed from Lerdo Land Company, as grantor, to Ohanneson and Camp, as grantees, contain a covenant running with the land conveyed therein? And (2) Did the deed from appellants Camp to the predecessor in interest of respondent contain a reservation in favor of appellants?

[1] The deed, Exhibit 1, to Ohanneson and Camp, as grantees, conveyed the land, with a reservation of the minerals in the grantor for fifty years. It specifically provided that this reservation was subject to a "covenant running with the land" in reference to the 24½ per cent interest in the royalties. The grantees therefore owned the minerals, subject to the reservation. This type of reservation comes within the recognized definition of covenants running with the land. Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927; Secs. 1462 and 1463 Civil Code; Sacramento S. F. L. Co. v. Whaley, 50 Cal.App. 125, 194 P. 1054; 15 Cal.Jur.2d 588–589, sec. 182; Barnard v. Jamison, 78 Cal.App.2d 136, 177 P.2d 341; Carlson v. Lindauer, 119 Cal.App.2d 292, 259 P.2d 925; Dos Pueblos Ranch & Imp. Co. v. Ellis, 44 Cal.App.2d 299, 112 P.2d 302; Callahan v. Martin, 3 Cal.2d 110, 124, 43 P.2d 788, 101 A.L.R. 871; Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050. The authorities cited by appellant are factually dissimilar or are in conflict with the California cases on the subject.

The question then arises whether there was a reservation in favor of appellants of the right to the receipt of their proportionate share of the royalties mentioned in the grant deed from them to the predecessor in interest of respondent, wherein grantors, in consideration of $85,000, granted to grantee, Lowe, all of the described property "subject to the reservations" contained in the deed from Lerdo Land Company to Ohanneson and Camp relating to oil, gas or other hydrocarbon substances, and subject to reservations of record.

[2] As will be noted, the Lerdo Land Company reserved the oil rights for a period of fifty years, with certain conditions attached. These conditions were stated in the deed to be a "covenant running with the land". Apparently, the reservation referred to in appellants' deed to Lowe was the reservation of the Lerdo Land Company to oil, gas and mineral rights in and to the land conveyed, together with the covenants attached, which run with the land. The obvious intent and purpose of the above provisions was only to prevent the grantors, the appellants, from conveying a greater interest in the property than they owned, and not to reserve title to the oil royalties in question. This is the construction placed on it by the trial court, and it has legal support. Tide Water Associated Oil Company v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945; Shell Oil Co. v. Manley Oil Corp., 7 Cir., 124 F.2d 714, 716; Bacon v. Grossmann, 71 App.Div. 574, 76 N.Y.S. 188, 189; Dagrosa v. Calabro, Sup., 105 N.Y.S.2d 178.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Alice F. ROZAN, Plaintiff and Respondent,
v.
Maxwell M. ROZAN, Defendant and Appellant.*
Civ. 21662.

District Court of Appeal, Second District, Division 1, California.
April 22, 1957.
Rehearing Denied May 17, 1957.
Hearing Granted June 19, 1957.

Divorce proceeding. The Superior Court, Los Angeles County, Harold C. Shepherd, J., rendered interlocutory judgment of divorce in favor of wife, and husband appealed. The District Court of Appeal, Doran, J., held that where wife was entitled to divorce on ground of extreme cruelty, award of 65% of North Dakota community property to wife was not an abuse of discretion.

Affirmed.

1. Divorce ⟹184(6)

Where trial of divorce case continued for several days and many exhibits were introduced, resulting in reporter's transcript of 886 pages and record contained conflicting evidence, reviewing court would not attempt appraisal or revaluation of evidence introduced at trial.

2. Appeal and Error ⟹994(3), 1012(1)

Questions of weight and credibility of evidence are for trial court rather than reviewing court.

3. Appeal and Error ⟹1010(1), 1011(1)

So long as record discloses substantial evidence in support of findings and judgment of trial court, trial court's determination of questions of fact must be deemed final, and fact that there is other and conflicting evidence does not interfere with application of rule.

4. Divorce ⟹130, 253

Domicile ⟹10

In divorce proceeding, evidence sustained finding that there was no consideration for transfers by husband of certain property, that certain transfers had been made for purpose of depriving wife of any interest therein, that husband was resident of California before he acquired certain very valuable property interests, and that wife was entitled to divorce on ground of extreme cruelty.

5. Divorce ⟹252

Where wife was entitled to divorce on ground of extreme cruelty, award of 65% of North Dakota community property to wife was not an abuse of discretion. West's Ann.Civ.Code, § 146.

Maxwell M. Rozan, in pro. per.

Gustave L. Goldstein, Los Angeles, for respondent.

DORAN, Justice.

The present appeal is from an interlocutory judgment of divorce in favor of the respondent wife, granting plaintiff the custody of the minor child and ordering the appellant husband to pay the sum of $75 for child support, $250 to the wife, and attorney fees of $12,500. The court adjudged that the parties had established residence and domicile in California in May—July, 1948, and that all property acquired thereafter was community property. The divorce was granted on the grounds of extreme cruelty and the trial court awarded the wife more than fifty per cent of the community property.

"Appellant herein does not challenge the lower Court for granting the divorce * * * to respondent (wife) * * * Altho, appelant contends there was no evidence, and certainly not sufficient evidence, to sustain that appellant was guilty of cruelty towards respondent, and make the property award the Court did make, awarding more than 50%, because of the cruelty finding", quoting from appellant's brief.

It is appellant's contention that certain oil properties outside of California, were not community property but the husband's separate property; that the trial court erred in holding that there was no consideration for the transfer by appellant of certain property, and that certain transfers had been made for the purpose of depriving the wife of any interest therein; that it was erroneously found that appellant was a resident of California in May—July, 1948. Appellant likewise complains of the award of attorney fees of $12,500 and of the alimony and support orders which the court made.

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* Opinion vacated 317 P.2d 11.

[1-3] Much of the appellant's brief is taken up with a general challenge of the weight and sufficiency of the evidence and the contention that from such evidence the trial court should have arrived at conclusions favorable to the appellant. As noted by the respondent, the trial continued for several days and many exhibits were introduced, resulting in a reporter's transcript of 886 pages. As is generally the case, the record contains conflicting evidence in respect to all of the matters questioned by the appellant. It is fundamental that in such cases an appellate court will not attempt an appraisal or revaluation of the evidence introduced at the trial. Questions of weight and credibility are for the trial court rather than falling within the purview of a reviewing court. So long as the record discloses substantial evidence in support of the findings and judgment, the trial court's determination on questions of fact must be deemed final. That the record herein does disclose such supporting evidence cannot be doubted. The fact that there is other and conflicting evidence does not interfere with the application of this rule.

[4] For example, there was the appellant's deposition stating, "I moved out here (California) when Mrs. Rozan came out here to give birth to our son"; that appellant had voted in California "By absentee ballot, at the last presidential election", and had "considered this your residence since '48". This evidence was entirely consistent with the wife's testimony as to renting and later buying a home in California and that Mr. Rozan lived there when he was in town. As an oil man, appellant was required to travel extensively. The trial court was amply justified in believing the above testimony rather than accepting appellant's denials of California residence.

The trial court found that when the parties left Colorado and came to California in 1948, there was very little property; that thereafter, through various oil and brokerage activities, the appellant acquired certain very valuable property interests deemed community property. Some of these interests appellant manipulated, assigned and transferred to other persons "without consideration * * * for the purpose of depriving plaintiff of her interest" therein, and for the purpose of "hindering, delaying, defeating and defrauding plaintiff", as found by the court. At the end of the trial the judge stated: "I will say, so far as the defendant is concerned, the fraud is so flagrant that it is without argument".

"As an illustration:", to quote from respondent's brief, "the Kvam property * * * at the time Appellant acquired same, consisted of 160 acres for which he paid only $2500.00. 40 of said acres were sold for $61,931.80 to one Louis Egan. The other 120 acres adjoining said 40 acres, on the basis of the Egan transaction, we urge are worth over $180,000.00. At the time of the trial, they were all in oil production, yielding a monthly income of $450.00 or thereabouts * * *. Thus, taking into account the Kvam 120 acres plus other holdings and properties of the parties, exceeding $200,000.00 in value, the amounts allowed Respondent for alimony, child support and attorney's fees were reasonable and proper".

Much evidence, pro and con, was introduced by the respective parties in reference to the questions of fact. The law in respect to these matters is open to no serious question. As respondent says, "the Reporter's Transcript could never convey to any reader thereof how Appellant and his witnesses appeared and acted in court". In this, the trial court was in a more advantageous position than any reviewing court which must depend exclusively upon the printed record. In the language of Maslow v. Maslow, 117 Cal.App.2d 237, 243, 255 P.2d 65, 69, "The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration". In the instant case, however, even with the printed record, it cannot be doubted that the conclusions reached are amply supported.

It is of no particular advantage to go into a detailed survey of the evidence. The fact remains that the appellant was accorded a fair trial of the issues involved. A tremendous mass of evidence, testimonial and documentary, was duly presented to the trial court and given due consideration. The record discloses substantial evidence from which the trial court could reasonably conclude that the respondent wife was entitled to a divorce on the ground of extreme cruelty. Such being the situation, the division of community property was a matter resting within the sound discretion of the trial court, and it will be presumed that such discretion was properly exercised.

[5] Section 146 of the Civil Code provides that "If the decree is rendered on the ground of * * * extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just". In this case appellant is complaining because the wife was awarded 65% of the North Dakota property, but it was actually within the discretion of the trial court to award all of the community property to respondent. Warren v. Warren, 120 Cal.App.2d 396, 261 P.2d 309, 312. As stated in the Warren opinion, "It is elementary that such an order will not be reversed in the absence of a clear showing of an abuse of discretion by the trial court". There is no such showing in the instant case. The findings are adequate, and no reversible error is apparent.

The judgment is affirmed. Application to produce additional evidence denied.

WHITE, P. J., and FOURT, J., concur.

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150 Cal.App.2d 403

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Roy A. ROGERS, Defendant and Appellant.

Cr. 3255.

District Court of Appeal, First District, Division 1, California.

April 23, 1957.

Hearing Denied June 19, 1957.

Proceeding against the defendant and from a judgment of the Superior Court of the County of Alameda, Edward J. Smith, J., the defendant appealed. The District Court of Appeal, Peters, P. J., held that where defendant by his own actions had induced his physical condition existing at trial, it amounted to a waiver of the right to be mentally present guaranteed by the code, and that refusing a further continuance to obtain counsel was not a denial of due process.

Judgment and order affirmed.

1. Criminal Law ⚷636(1)

The statute providing that defendant must personally be "present" at the trial in a felony case requires, in addition to the physical presence of the defendant, that defendant be mentally present during the course of the trial. West's Ann.Pen.Code, § 1043; West's Ann.Const. art. 1, § 13.

See publication Words and Phrases, for other judicial constructions and definitions of "Present".

2. Criminal Law ⚷636(1)

The fact that the statute requiring defendant to be personally present at a felony trial is apparently mandatory will not prevent a waiver of the right in a proper case. West's Ann.Pen.Code, § 1043.

3. Criminal Law ⚷636(1)

Where there was substantial evidence that defendant's physical condition was largely the result of his own voluntary actions and he had failed to cooperate with his doctor or with his former attorney and that his state of insulin shock was self-imposed, defendant's actions amounted to a waiver of his right to be mentally "present" required by the statute in a felony trial. West's Ann.Pen.Code, § 1043; West's Ann.Const. art. 1, § 13.

4. Criminal Law ⚷641(1)

The fact that defendant was himself an attorney did not affect his right to counsel, since a lawyer accused of crime has the same right to counsel as other persons. West's Ann.Const. art. 1, § 13.

5. Criminal Law ⚷641(1), 1152(1)

The right to counsel may be waived and waiver can be found if the defendant is unduly dilatory, and the matter rests largely in the discretion of the trial court, which can be upset only in event that discretion has been abused. West's Ann.Const. art. 1, § 13.

6. Criminal Law ⚷593

If the uncontradicted evidence shows that defendant is incapacitated and in bed for all but a short time between arraignment and trial, it is an abuse of discretion to deny him a continuance to secure counsel. West's Ann.Const. art. 1, § 13.

7. Constitutional Law ⚷268

Where eight months elapsed between filing of the information and trial and defendant's first counsel was permitted to withdraw because of lack of cooperation and the defendant for the first three days of the trial conducted a capable and vigorous defense, refusing a continuance to allow defendant to secure counsel did not deprive him of due process of law. West's Ann.Const. art. 1, § 13.

8. Criminal Law ⚷593

The fact that at trial defendant conducted a capable and vigorous defense is of some importance in determining whether there has been an abuse of discretion in refusing to grant a continuance in order to procure a counsel.

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Gordon K. Williams, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant, an attorney, was charged with five counts of grand theft, each count being based on the charge that by false pretenses he took money improperly from his law clients. He was tried by the court without a jury, and was found guilty on three of the five counts. He appeals from the judgment of conviction, and from the order denying his motion for a new trial. He makes no attack on the sufficiency of the evidence. His sole contention is that, because of his health, and because he had no attorney, the trial court, as a matter of law, abused its discretion in compelling him to go to trial over his objections, and in refusing him a continuance.

The trial court, between August 18, 1955, and March 12, 1956, granted him 13 continuances, all based on the claim of his ill health. Defendant was present in the courtroom on three of these occasions. The circumstances surrounding each continuance can be summarized as follows:

August 18, 1955: Defendant present in court and arraigned. He waived the right to be tried in 60 days. At the request of his then counsel, "in view of defendant's physical condition," the case was continued to September 7, 1955.

September 7, 1955: No appearance by or for defendant, and the matter was continued to September 12th.

September 12, 1955: Defendant's then counsel told the court that defendant was ill, and offered a certificate from defendant's doctor to the effect that defendant was suffering from diabetes, complicated by a heart condition. The case was continued to September 19, 1955.

September 19, 1955: The then counsel for defendant requested a continuance and told the court that defendant was still ill, but "in probably another ten days they expect that he will be able to get around and probably be able to come to court at that time." A continuance was granted to September 30, 1955.

September 30, 1955: The then counsel for defendant told the court that defendant was in the hospital and would be incapacitated for at least two weeks. Case continued to October 10, 1955.

October 10, 1955: The then counsel for defendant offered a certificate from defendant's doctor stating that since September 27, 1954, defendant had been under treatment for "hypertension and diabetes, complicated by a heart condition," and that defendant would be released for normal activity on about October 22, 1955. The prosecuting attorney requested that the court appoint a doctor to examine defendant. The trial court granted this request and continued the case to October 24, 1955.

October 24, 1955: The trial court read from a letter from the court-appointed doctor stating that defendant probably had not had a heart attack, but had diabetes and bursitis. He also stated that satisfactory treatment was difficult. The case was continued to November 7, 1955.

November 7, 1955: The then counsel for defendant referred to another doctor's certificate and requested another continuance. The case was continued to December 7, 1955.

December 7, 1955: The then counsel for defendant read from a letter from defendant's doctor stating that since the doctor's previous examination defendant had "suffered an exacerbation of his diabetic condition," and that, in his present condition, it was "imperative that he be kept at home, and at rest, to prevent any aggravation to his coronary disease." The case was continued to January 15, 1956 (a Sunday).

January 16, 1956: The then counsel for the defendant requested another continuance. The prosecuting attorney consented, but requested that a court-selected doctor be appointed to examine the defendant. Both requests were granted, and the case continued to January 23, 1956.

January 23, 1956: The trial court read a portion of a letter from the court-appointed doctor to the effect that the doctor had been unable to contact the defendant for the purpose of examining him; that he could not reach defendant by telephone or by visits to his home, where he was supposed to be confined. Defendant's then counsel stated that he intended to move for permission to withdraw as defendant's counsel because "I can't talk to him or get any cooperation from him either." The case was continued to January 26, 1956.

January 26, 1956: The court read from a letter from the court-appointed doctor which stated, in part, that the defendant "is completely disabled physically and is unable to stand trial." The case was continued to January 31, 1956, so that the doctor could be orally examined.

January 31, 1956: Defendant was present. His then counsel was not present, but pursuant to his formal request to withdraw, such permission, with the consent of defendant, was granted. The district attorney offered to produce witnesses to substantiate his assertions that during January, 1956, defendant conducted his legal business, and drove his automobile. The court-appointed doctor testified that his examination disclosed that defendant had a rapid heart, an enlarged and tender liver, diabetes, and was in a state of partial decompensation. If the diabetes could be controlled, the heart and liver condition would improve. He first estimated that if defendant followed the prescribed treatment he would be able to stand trial in 60 to 90 days, and a little later testified that he could be tried in one or two months. It was his view that defendant should not practice law until his condition improved. The doctor stated that some of the symptoms could be feigned, and that defendant was probably not cooperating with his own doctor in taking care of the diabetes. It was his opinion that, if the defendant did not follow his doctor's orders, he would never be able to stand trial. He opined that treatment with digitalis, which he was not then taking, might so improve the heart condition that he could stand trial in about a month or two months. The doctor stated that the defendant's physical condition was up to him and his doctor, and that if he cooperated in keeping the diabetes under control he could stand trial. The prosecuting attorney summarized the long delay, objected to further continuances, and recommended that a definite date be set for trial. The court warned defendant that he must secure new counsel, which defendant promised to do, and set March 12, 1956, as the definite date of trial. Defendant was warned that if a continuance were requested beyond that date the burden would be on him, and that if another continuance was requested, defendant's doctor must be present for cross-examination, and notice in writing must be given of such request sufficiently in advance so that the prosecuting attorney could prepare a defense.

March 12, 1956: Defendant was not present when the case was called at 10 a. m. but a new lawyer representing defendant was present. He informed the court that defendant did not have regular counsel and that he was appearing specially for the sole purpose of moving for another continuance because of the illness of the defendant. The doctor for defendant testified that he had examined defendant that very morning and found him suffering from a "severe uncontrolled diabetes, essential hypertension, severe arterioscleroses, obesity, and a hemorrhage into the right sclera," that is of the eye. The doctor testified that until March 9th defendant "was getting along fairly well," but on the 10th defendant's diabetes was "uncontrolled again," and he was very nervous. The doctor had ordered him to bed, and was of the opinion that defendant was in no condition to stand trial that morning, but that the diabetes could be "readily controlled in a period of 30 days, with cooperation." The doctor stated that for the past two months defendant had been a cooperative patient, but a little later admitted that defendant was obese and had not lost weight, which would indicate that he was not following the prescribed diet. On the morning of March 12th defendant was ambulatory because he had come to the doctor's office and was in condition to drive a car and to walk up stairs. The doctor had no way of knowing whether the prescribed dosage of insulin was being taken, and he admitted that a failure to take the insulin could have caused defendant's present physical condition, and also stated that tension in anticipation of the trial was a factor.

The prosecuting attorney requested that defendant be compelled to present himself at the court that day. After some discussion the bail bondsman was contacted and he agreed to surrender the defendant at 11 a. m. that morning. Defendant appeared shortly after 11 a. m. He stated that, because of his illness, he had been unable to secure counsel, that he was attempting to do so, and requested a continuance. The court pointed out that the request for a continuance by special counsel had already been denied, ascertained that defendant was an attorney, and ordered that the trial proceed. Defendant stated that "I object to the proceeding in the absence of counsel and in view of my condition." The defendant then waived a jury trial, and asked that the record show that he had no records with him. He later, however, offered various exhibits for identification.

For the balance of that day and for the next two succeeding days the defendant conducted a vigorous defense. He offered numerous objections to testimony, many of which were sustained. He conducted effective cross-examination. Twice the trial judge commented on defendant's competence. On the afternoon of the first day of the trial, when the court suggested a 4:30 p. m. adjournment, the defendant offered to continue until 5 p. m., an offer that was not accepted. When the court asked defendant if he would be present the next day, with or without counsel, the defendant replied: "I will be here. I have started this; I will finish it." On the second day of trial defendant continued his vigorous defense, as he also did on the third day of the trial. At the conclusion of the third day of trial defendant stated that there were quite a few questions that he wanted to ask one of the prosecution's witnesses.

On the morning of the fourth day of trial defendant asked leave to file a medical certificate and, based thereon, requested a continuance. The court commented on the fact that defendant's doctor had not been produced for examination, suggested that defendant should have filed a writ in the appellate court, and then stated: "I have been in and out of the courts for 35 or 40 years, and I have never seen anybody handle themselves any better than you have handled yourself during the course of this trial, with the exception of yesterday; your voice was affected * * * "I have commented to numerous people about what I considered the ability you displayed in handling the case." The court, after reviewing the past history of the case, denied the motion for a continuance. Thereupon defendant stated that he was not in a "position to cross examine" the witness who was then under direct examination. Nevertheless, he did cross-examine the witness. The direct examination covers four pages of transcript, and the cross-examination covers six pages. Defendant then stated to the court that "I don't think I can go on, Your Honor. I have these blackouts from insulin." The court then declared a recess (for an hour and a half) and appointed a doctor to examine defendant. The doctor testified that he had examined defendant and "The results of my examination led me to the conclusion that this man may have had his difficulty being precipitated this morning by using a large dose of insulin without covering it with an adequate breakfast. This tends to produce a situation called an insulin shock." Defendant, when the doctor examined him, had "no unusual reflex changes; his heart sounds were good; his blood pressure, for him, was within normal limits." The doctor had given the defendant some sugared orange juice, and believed that he no longer was in insulin shock. Moreover, the doctor had discovered some discrepancies in defendant's symptoms which were not compatible with a state of insulin shock. He had discussed the case with defendant's doctor who stated that defendant was "not a very cooperative diabetic patient; that he has been on reducing diets without any satisfactory response. And this, of course, must come from the fact that the diet is not well adhered to." The doctor was positive that the defendant then (shortly after 11:30 a. m.) was not in insulin shock, and that within a couple of hours could continue with the trial, but that it was important that defendant eat a normal lunch because he still "has a large supply of insulin in his system that needs to be covered." The bail bondsman offered to take defendant and his son to lunch, but when he could get no response from defendant, surrendered defendant into custody, and a recess until 1:30 p. m. was taken. After the noon recess the court admitted into evidence some people's exhibits, and the prosecution rested its case. The defendant was told that he could proceed. He replied that he could not, that "I am too sick. I can't even see. My vision is blurred. I can't see." On his own motion the trial judge then admitted the exhibits previously offered by defendant, and stated: "I take it, Mr. Rogers, that you rest, if you are offering no defense?" There was no response, and the court declared: "The matter may be submitted."

The prosecution then presented the jailer who had had custody of defendant during the noon recess. He testified that the defendant ordered a normal lunch, but refused to eat anything, stating: "I can't; I am too sick." The court thereupon found the defendant guilty of three counts of grant theft and not guilty on two of the counts charged.

Before discussing the legal points involved there are certain other facts that should be mentioned. During the four-day trial defendant made several requests for a continuance. He made one such request after the noon recess on the first trial date, also asking that the court appoint a doctor to examine him and a lawyer to represent him, because his own counsel "can't be here until tomorrow or the next day." A short time later the judge noticed a lawyer in the courtroom and appointed him to represent defendant. This lawyer was permitted to withdraw when it developed that he had been a member of the district attorney's staff at the time defendant was indicted. The public defender also declined to represent defendant because defendant had sufficient assets to disqualify him for such aid.

Again, on the third day of the trial, just before the noon recess, defendant moved for a continuance because of his failing voice. After two hours, the trial proceeded, defendant stating that he could not raise his voice. The record shows, however, that he was quite active the balance of that afternoon.

Defendant does not challenge the sufficiency of the evidence. His sole contentions are that because of his illness he was not "present" at the trial, and that also, because of his illness, the failure to secure counsel between January 31st and March 12th, was excusable.

Article I, section 13 of the state Constitution, provides: "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel * * *."

Penal Code section 1043, which implements the constitutional provision, provides: "The defendant must be personally present at the trial; provided, that in case of a misdemeanor charge, if he absents himself with full knowledge that a trial is to be or is being had, the trial may proceed in his absence. If the defendant in a felony case fails to appear at any time during the course of the trial and before the jury has retired for its deliberations or the case has been finally submitted to the judge, and after the exercise of reasonable diligence his presence cannot be procured, the court shall declare a mistrial and the cause may be again tried."

[1] In the case of People v. Berling, 115 Cal.App.2d 255, 251 P.2d 1017, 1022, it was held that in addition to physical presence the above section requires that the defendant be mentally present during the course of his trial. That was a murder case and it appeared that the defendant was at times during her trial "woozy," "dizzy," "not clear in her mental behavior," "not alert," "listless and apathetic," and suffered numerous fainting spells. In her affidavit for a new trial she averred that she was unconscious during most of the proceedings, recalled only occasional happenings in the courtroom, and had no recollection of certain conferences with her attorney. The appellate court noted 47 separate record references to her mental and physical condition, including many recesses granted for that reason, extending from a few minutes to five days. A physician testified that the condition was functional, being an emotional and nervous upset from strain. The trial judge made various remarks indicating that, in his opinion, the defendant was suffering from these conditions in good faith, and once "the District Attorney called attention to * * * [defendant's] tired and worn appearance * * *" 115 Cal.App.2d at page 265, 251 P.2d at page 1022. The recesses were taken at the suggestion of the judge on most occasions; the defendant usually indicated her willingness to continue despite her condition. A woman deputy reported that defendant's condition was "very poor," that she seemed on "the verge of consciousness and that is all," and that "it is touch and go." 115 Cal.App.2d at page 266, 251 P.2d at page 1023.

The appellate court reversed defendant's conviction for the reason that "the conviction cannot be approved because of the violation of defendant's fundamental right to be physically and mentally present and fully conscious during all stages of the trial." 115 Cal.App.2d at page 272, 251 P.2d at page 1026. The court also stated, 115 Cal.App.2d at page 267, 251 P.2d at page 1023: "Frequent remarks by the trial judge to the effect that 'the defendant gives evidence of not being in a condition to proceed', cannot but indicate that the court entertained serious doubts as to whether appellant was conscious, semi-conscious, or unconscious during various phases of the trial. It is well to note that in the present case there appears to be no charge that Miss Berling was malingering. Indeed, appellant's condition was readily observable, not only calling forth comment from the trial judge but also from the deputy district attorney who openly questioned the advisability of continuing with cross-examination. That the situation was of an especially serious nature seems to have been recognized by everyone connected with the case."

The court interpreted the statutory provision involved as follows, 115 Cal.App.2d at page 267, 251 P.2d at page 1023: "The only reasonable interpretation of the above requirement that a defendant be present at every stage of a felony prosecution is that the accused person must be both physically and mentally present. * * * An interpretation of the rule as requiring only physical presence would lead to such an absurdity as the purported trial of an imbecile or an insane person without the least understanding of what was taking place in the courtroom."

Defendant argues that the Berling case is here applicable, placing particular emphasis on his claim of a diabetic coma, resulting in a "blackout" on the last morning of the trial.

It should be noted that when defendant was summoned before the court on the morning of March 12th there is ample evidence in the record that, so far as his then physical and mental condition is concerned, he was in a fit condition to be tried. The record amply demonstrates that during the first three days of the trial defendant was physically and mentally able to and did handle his own defense. Therefore, so far as this point is concerned, the claimed error in refusing a continuance did not occur on March 12th, but occurred on the fourth day of the trial on March 15th. The evidence does show that on the morning of March 15th defendant was probably in a state of insulin shock, and it probably shows that he was still suffering from the effects of that shock on the afternoon of March 15th, when he failed to put on any defense to the prosecution's case. Was it reversible error to refuse him a continuance on that day? Is the rule of the Berling case applicable to the facts of this case? These are the questions we must answer.

This case differs fundamentally from the Berling case in that there was no evidence in that case that the mental condition there involved was self-inflicted, and there was no evidence of malingering on the part of the defendant. In the instant case there is substantial evidence that defendant's condition was largely the result of his voluntary actions. There is ample evidence that long prior to March 12th defendant had failed to cooperate with his doctor or with his former attorney. The latter, in fact, was permitted to withdraw because of defendant's lack of cooperation. There is also substantial evidence that, if the defendant was in a state of insulin shock on March 15th, such condition was self-imposed. There is evidence that on the morning of March 15th he took a large dosage of insulin without covering it with breakfast. This, of course, would result in insulin shock. When defendant first complained of shock, the trial court declared a recess and appointed a doctor to examine defendant. This doctor testified that just before noon on that day, because of giving the defendant some sugared orange juice, he was no longer in insulin shock. Moreover, this doctor reported no unusual reflex changes and a good heart condition, and discussed various discrepancies in defendant's symptoms not compatible with a state of insulin shock. The doctor was definitely of the opinion that, after the noon recess, defendant could proceed but that it was important that defendant eat a normal lunch. The bondsman offered to take the defendant to lunch. This offer was not accepted. The jailer secured a lunch ordered by defendant but he refused to eat. Thus, the record shows that whatever condition defendant was in on the afternoon of the 15th was self-inflicted. It is a reasonable inference from the record that the state of affairs existing on that afternoon was intentionally brought on by defendant for the purpose of forcing a continuance. Thus, the issue is a more limited one than was involved in the Berling case. It is whether this voluntary "mental absence" of the defendant at the conclusion of his trial was a violation of defendant's constitutional and statutory right to be "present" when his case was tried. This, in turn, depends upon whether a defendant in a felony case can waive his right to be mentally present at his trial by voluntarily absenting his mental self after the trial has commenced.

The problem of waiver was not involved in the Berling case because there the condition was not self-imposed.

The majority rule in the United States is that in a non-capital felony case the accused is deemed to have waived his right to be physically present if he voluntarily absents himself after the trial has commenced. See cases collected 14 Am.Jur. p. 905, § 199; 23 C.J.S., Criminal Law, § 975 a, p. 309; annotations 100 A.L.R. 480; Ann.Cas.1913C, p. 1146. This is the rule adopted by the United States Supreme Court. In Diaz v. United States, 223 U.S. 442, 455, 32 S.Ct. 250, 254, 56 L.Ed. 500, it was held that where a defendant voluntarily absented himself from the courtroom after his trial has begun "this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." The rationale of the majority rule is that, since the accused may waive any trial at all by pleading guilty, he may waive the procedural safeguards which are an incident of the trial.

There is, however, a minority rule to the effect that voluntary physical absence does not amount to a waiver of physical presence, and, it may be true that, by the adoption of section 1043 of the Penal Code, California has adopted the minority rule. But this does not mean that section 1043, under no circumstances, can be waived. There are other Penal Code sections that permit important steps to be taken in a felony case where the defendant voluntarily absents himself. Thus, under proper circumstances, a verdict can be received in the absence of the defendant, Pen.Code, § 1148, and judgment may, in a proper case, be pronounced in the defendant's absence, Pen.Code, § 1193. Moreover although viewing the scene of a crime by the jury is in effect taking evidence, in People v. Mathews, 139 Cal. 527, 73 P. 416, it was held that the right of a defendant to be present at such viewing could be waived by a failure to request to be present. There are other cases holding that defendant's right to be physically present at his trial on a felony charge is not an absolute right, and that, if the proceedings taken in his absence did not prejudice him, it is not prejudicial error. People v. Isby, 30 Cal. 2d 879, 186 P.2d 405; People v. Trubschenk, 134 Cal.App.2d 796, 286 P.2d 436; see Penal Code, § 1181(1).

[2] The fact that Penal Code section 1043 is apparently mandatory in its language will not prevent a waiver in in a proper case. There are many Penal Code sections, mandatory on their face, which have been held subject to waiver. Thus, section 686(3) provides that a defendant is entitled "to be confronted with the witnesses against him." In People v. Wallin, 34 Cal.2d 777, 215 P.2d 1, it was held that this right could be waived. Section 1382 provides that the "court, unless good cause to the contrary is shown, *must* order the prosecution to be dismissed * * * [i]f a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within sixty days after the finding of the indictment, or filing of the information * * *." This section is subject to waiver by the failure of a timely assertion of the right. People v. O'Leary, 130 Cal.App.2d 430, 278 P.2d 933. Penal Code sections 654, 687, and 1023 imperatively

provide that no person shall be twice put in jeopardy for the same offense, but again, the failure to raise the plea of once in jeopardy results in a waiver. In re Hess, 45 Cal.2d 171, 288 P.2d 5. Another example of an apparently unconditionally guaranteed right, but one which is subject to waiver, is the right to a public trial. Penal Code, § 686(1); People v. Stanley, 33 Cal.App. 624, 166 P. 596; People v. Tugwell, 32 Cal.App. 520, 163 P. 508. And, of course, the right to defend "with counsel" can be waived. People v. Justice, 125 Cal.App.2d 572, 270 P.2d 859. A plea of guilty obviously waives the right to any trial at all. People v. Ryan, 121 Cal.App.2d 651, 263 P.2d 850.

[3] Thus, there is ample authority for holding that a statute granting a right to an accused in categorical terms may be waived by the voluntary act of the person entitled. That is this case. The defendant, by his own actions, induced the condition existing in the afternoon of the fourth day of the trial. This amounted to a waiver of the right to be mentally present granted by section 1043 of the Penal Code. If this were not the rule, many persons, by their own acts, could effectively prevent themselves from ever being tried. A diabetic can put himself in insulin shock by simply taking insulin and then not eating, or by refusing to eat, or can disable himself by failing to take insulin. Surely, the Legislature in adopting section 1043 did not intend such an absurd result. Moreover, in the instant case there is some evidence that the claimed symptoms were feigned. The trial judge saw and heard the defendant. He heard the doctor's testimony. He could tell far better than we can tell from a cold record whether defendant was able to proceed.

For these various reasons it must be held that the trial court did not commit prejudicial error in refusing a further continuance on either March 12th or March 15th.

Defendant's only other argument is that failure to grant a further continuance deprived him of the opportunity of securing counsel in violation of due process and of Article 1, section 13, of the state Constitution.

[4-6] Of course, the fact that defendant was himself an attorney did not affect his right to counsel. A lawyer accused of crime has the same right to counsel as other persons. People v. Napthaly, 105 Cal. 641, 39 P. 29. But this right may be waived, and such waiver can be found if the defendant is unduly dilatory. The matter largely rests in the discretion of the trial court, and the trial court's determination can be upset only in the event such discretion has been abused. People v. Davis, 43 Cal.2d 661, 276 P.2d 801; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13; People v. Dowell, 204 Cal. 109, 266 P. 807; People v. Flannelly, 128 Cal. 83, 60 P. 670; In re Major, 135 Cal.App.2d 405, 287 P.2d 359; People v. Simeone, 132 Cal.App.2d 593, 282 P.2d 971. Of course, if the uncontradicted evidence shows that defendant has been incapacitated and in bed for all but a short period between arraignment and trial, it is an abuse of discretion to deny him a continuance to secure counsel, In re Masching, 41 Cal.2d 530, 261 P.2d 251, as it is where defendant was in jail and thus unable to secure counsel. People v. Robinson, 42 Cal.2d 741, 269 P.2d 6.

[7, 8] But in the present case defendant knew on January 31, 1956, that the case was going to trial on March 12, 1956, and his failure to secure counsel in the interim was inexcusable. It must be remembered that a period of about eight months elapsed between the filing of the information and the trial. Moreover, defendant's first counsel was permitted to withdraw because defendant refused to cooperate with him. Defendant was ambulatory between January and March. It is also true, as pointed out in the discussion of the first point raised, that the condition defendant was in was largely self-imposed, and that for the first three days of the trial defendant conducted a capable and vigorous defense, a factor of some importance in determining whether there has

been an abuse of discretion. People v. Dorman, 28 Cal.2d 846, 172 P.2d 686. Under these circumstances it was not error to refuse a continuance to allow defendant to secure counsel.

The judgment and order appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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150 Cal.App.2d 260

Bruce Anthony DUNFORD, a minor, by Rose Dunford, his guardian ad litem, and Rose Dunford, individually, Plaintiffs and Appellants,

v.

GENERAL WATER HEATER CORPORATION, and Arthur G. Camel, Defendants and Respondents.

Civ. 22051.

District Court of Appeal, Second District, Division 2, California.

April 18, 1957.

Actions by mother as guardian ad litem and individually for damages on account of personal injuries received when minor who was riding bicycle was struck by vehicle owned by defendant corporation and operated by corporation's employee. From judgment for defendants entered in Superior Court, Los Angeles County, Edwin L. Jefferson, J., and from order denying new trial, plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that where plaintiffs failed to file affidavits showing that plaintiffs and counsel were ignorant of the facts constituting the juror's claimed misconduct prior to rendition of verdict for defendants, trial court's denial of new trial was not an abuse of discretion.

Judgment affirmed.

1. Appeal and Error 🔑977(5)

An order denying a new trial will not be disturbed on appeal except upon affirmative showing of a gross, manifest or unmistakable abuse of discretion.

2. Appeal and Error 🔑686

Where stenographic report of the voir dire proceedings in trial court were not furnished by appellants who relied solely upon the affidavits of counsel summarizing the voir dire examination, District Court of Appeal could not determine whether juror's answers on voir dire were untrue as alleged and constituted an irregularity which prevented the appellants from having a fair trial.

3. New Trial 🔑140(1)

It is essential that affidavits showing that litigant and litigant's counsel were ignorant of facts constituting the juror's claimed misconduct prior to rendition of verdict be filed in trial court in support of motion for new trial.

4. Appeal and Error 🔑933(1)

All intendments are in favor of the order of the trial court denying a new trial.

5. New Trial 🔑27

Prejudice must be affirmatively shown by the party seeking a new trial.

6. New Trial 🔑140(3)

Where plaintiffs, in action for damages sustained when minor riding bicycle was struck by vehicle owned by corporation and driven by corporation's employee, failed to file affidavits in trial court showing that plaintiffs and counsel were ignorant of the facts constituting the juror's claimed misconduct prior to rendition of verdict for defendants, trial court's denial of new trial was not an abuse of discretion.

◆

Arthur Strock, Charles L. Nichols, Robert R. Mallicoat, Beverly Hills, and Christopher Hall, Los Angeles, for appellants.

Betts, Ely & Loomis, Los Angeles, for respondents.

MOORE, Presiding Justice.

Bruce Dunford, a minor, through his mother Rose, as guardian ad litem, sued defendants for damages on account of injuries received when riding his bicycle on a public highway. He was struck by a vehicle of defendant corporation operated by defendant Camel, an employee. Also, Rose sued on her own behalf for loss of wages while nursing Bruce. The jury returned a verdict in favor of defendants and judgment was entered thereon. Plaintiffs filed their motion for a new trial on the statutory grounds: (1) irregularity in proceedings of the jury, by which plaintiffs were prevented from having a fair trial; (2) misconduct of the jury, and (3) error in law occurring at the trial and excepted to by plaintiffs. It was denied.

Plaintiffs now demand reversal on the sole ground that the trial court erred in denying their motion. They claim that the foreman of the jury, Miss Goodwin, gave untrue answers and concealed beliefs and prejudices when questioned on *voir dire* which, had the truth been disclosed on the examination, would have given rise to a successful challenge for cause or, failing that, would have justified counsel for plaintiffs in exercising a peremptory challenge. It is contended this was an irregularity in proceedings of the jury which prevented plaintiffs from having a fair trial, relying primarily upon Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964. That the cited case is not a happy decision for guidance will hereinafter appear from the record of the trial and of the proofs admitted on the hearing of the motion for a new trial. There was no evidence that any juror consciously concealed his true sentiments with respect to the nature of the action or with reference to the issues involved.

From the averments in the affidavits filed in support of and in opposition to the motion for new trial, the following alleged facts appear:

Mr. Strock, counsel for plaintiffs in charge of the trial, averred in his affidavit in support of the motion that while not one of the first twelve prospective jurors to be seated, Miss Goodwin was in the courtroom during the examination of the others prior to her being called; that she heard the judge inform the prospective jurors of the nature of the case and ask them "if there was anything about the nature of the case, or its parties, which would cause any juror to be prejudiced or biased"; that no prospective juror, including Miss Goodwin, made an affirmative answer. In reply to questions addressed to her, Miss Goodwin stated in substance that she was employed as private secretary to a vice president of a steamship company; there was nothing in her mind, thinking or emotional and mental conditioning that would prevent her from giving a fair verdict on the facts and according to the law and instructions given by the judge to each and every party to the action; that she had no mental or emotional attitudes or reservations that could prevent or influence her from arriving at a fair verdict; that her verdict would not and could not be influenced by the mere facts that plaintiffs were a boy and his mother or that one defendant was a truck driver and the other was a large corporation; and that if she were in the position of attorney for plaintiff she would be satisfied with a juror like herself.

The affidavit further averred that Miss Goodwin, and the other prospective jurors, were asked by affiant: "Whether the juror, by reason of philosophical or religious conviction, or otherwise, believed that a person who had suffered personal injuries because of the negligence of another should not seek redress in a court of law. That question was always answered in the negative; the answers always were that the jurors had nothing against an injured person who went to court for compensation for his injuries."

Mr. Strock's affidavit sets forth that after the close of the trial he came upon Miss Goodwin in the company of several other jurors, Mr. Shield, counsel for defendants, and Mr. Mallicoat, associate counsel for plaintiffs. "Then and there, I inquired of those jurors generally, but particularly to Miss Goodwin, of their reasons for their verdict * * * Miss Goodwin * * * stated * * * she was then employed by a large corporation and an executive thereof; she knew that large corporations did not like to be bothered by such lawsuits; that such corporations always made fair and reasonable offers of settlement in such cases; that she assumed that since a defendant was a corporation, a fair offer of settlement had been made by it to plaintiffs; that she could not understand why that offer had not been accepted. Mr. Shield then informed her that an insurance company was involved and that any offers of settlement would be made through the insurance company. Miss Goodwin then stated that was the same thing in her mind. I then asked her if she believed that insurance companies and corporate defendants always make fair offers where personal injury claims are made against them. She answered that, 'Yes', and added that she believed that the fairness of the offers made by insurance companies was due to their extensive experience in the field. I then and there inquired of Miss Goodwin if at the time of the *voir dire* she held the same beliefs she had just expressed, and she said she did." Mr. Strock's affidavit then averred, in effect, that had he known of Miss Goodwin's beliefs, as expressed by her after the trial, at the time of her *voir dire* examination, he would have challenged her for cause or peremptorily have excused her.

The only affidavit in opposition to the motion was that of Miss Goodwin. She did not deny the conversation as averred in Mr. Strock's affidavit, but stated as follows:

"At the time of the voir dire examination of the jury and throughout the trial of the case and during the deliberations of the jury, I was not prejudiced for or against any party to the action.

"The subjects of large corporations, insurance companies, and the settlement of cases were never discussed during the deliberations of the jury by myself or by any other member of the jury. These matters never entered my mind until they were interjected by Mr. Strock into a conversation in the corridor outside the court, after the verdict was returned.

"The verdict of the jury in this case, as far as I was concerned, was reached by a mature consideration of the evidence and by following the instructions of law given by the court."

[1] Plaintiffs urge that had Miss Goodwin disclosed on *voir dire* the beliefs she later expressed after the verdict she would have been subject to challenge for cause and that her allegedly untrue answers on *voir dire* constituted an irregularity in the proceedings of the jury that prevented plaintiffs from having a fair trial. They rely upon Shipley v. Permanente Hospital, supra, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964, in which case the court affirmed an order granting a new trial. The order there made was based primarily upon affidavits of jurors which disclosed that certain of their number were disqualified and gave untrue answers on *voir dire* and thereby failed to reveal their disqualification. But in that case, the appellate court had before it a complete record of the *voir dire* examination. Also, the affidavits were by the jurors themselves instead of hearsay affidavits of counsel. There is nothing in the record of questions asked Miss Goodwin which should have called to her mind at that time her beliefs and sentiments which she later expressed to Mr. Strock after the rendition of the verdict and the discharge of the jury. In the Shipley case, the court held that jurors' failure to reveal disqualification constituted irregularity in the proceedings of the jury which prevented the complaining party from having a fair trial. Also, it held that the granting of a motion for a new trial rests so completely within the discretion of the trial court that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. This rule applies equally to an order denying a new trial. Such order will not be disturbed except upon an "affirmative showing of a gross, manifest, or unmistakable abuse of discretion."

Schultz v. Sussman, 7 Cal.App.2d 100, 102, 45 P.2d 409, 410.

[2] We do not determine whether Miss Goodwin's answers on *voir dire* were untrue and constituted an irregularity in the proceedings of the jury which prevented plaintiffs from having a fair trial, for the reason that plaintiffs have failed to supply us with the record of the *voir dire* proceedings by which only could that question be determined from the record.[1] It is incumbent upon an appellant to present a record which affirmatively shows error on its face, and where, as here, it is claimed a juror made false answers on *voir dire* examination, the question can be resolved only by an examination of the stenographic report of the *voir dire* proceedings. Appellants have furnished us with no such report but rely solely upon the affidavits of counsel summarizing such examination. This method of presenting the questions and answers on *voir dire* may be sufficient in the lower court where the trial judge has heard the proceedings, but not in an appellate court where the proceedings are in print and take life from the law. In the case at bar, the affidavits of counsel for plaintiffs are equivocal and do not present a complete and accurate picture of the questions and answers. For example, Mr. Strock in his affidavit avers: "A general question I often put to prospective jurors during that *voir dire* examination, heard by Miss Goodwin, and probably directly addressed to her, was in effect * * *" By what character of clairvoyance can this court determine from such inclusive averments whether Miss Goodwin was asked questions which, if truthfully answered, would have brought out bias and prejudice, if any existed? Furthermore, although Mr. Strock averred that Miss Goodwin stated to him that she held her ideas at the time of the *voir dire*, this she denied and stated in her affidavit that: "These matters never entered my mind until they were interjected by Mr. Strock into a conversation in the corridor outside the court, after the verdict was returned." It is clear that without a stenographic report of the *voir dire* examination this court cannot determine whether questions were asked Miss Goodwin which should have called to her mind *at that time* her alleged bias and preconceived ideas about fair offers of settlement.

[3] But in addition to the insufficiency of the record, the appeal must fail for lack of complete affidavits in the lower court in support of the motion for a new trial. It is essential, not only that there be affidavits showing that plaintiffs' counsel were ignorant of the facts constituting the claimed misconduct prior to the rendition of the verdict, but also that plaintiffs file an affidavit to the same effect, stating that they had no knowledge prior to the rendition of the verdict. Forman v. Alexander's Markets, 138 Cal.App.2d 671, 674–676, 292 P.2d 257; Sherwin v. Southern Pacific Co., 168 Cal. 722, 726, 145 P. 92; Newman v. Los Angeles Transit Lines, 120 Cal.App.2d 685, 694, 262 P.2d 95; Gray v. Robinson, 33 Cal.App.2d 177, 183, 91 P.2d 194; Lafferty v. Market Street Railway Co., 7 Cal.App.2d 698, 702–703, 46 P.2d 996; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 495, 55 P.2d 870.

In Forman v. Alexander's Markets, supra, this court held, 138 Cal.App.2d at page 675, 292 P.2d at page 260: that plaintiffs had failed to show affirmatively in support of their motion for a new trial that both they and their counsel were ignorant of the facts constituting the asserted misconduct prior to the rendition of the verdict; that the absence of such a showing in support of the motion for a new trial is fatal; that plaintiffs having failed to make the affirmative showing that neither they nor their counsel had knowledge of the misconduct relied on prior to the rendition of the verdict, the order denying their motion for a new trial was properly made. By reason of the absence of such requirements, to grant the motion would have been reversible error.

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[1] Neither do we consider or pass upon the question of whether or not concealment or untrue answers by a venireman on *voir dire* examination are required to be *intentional or conscious* in order to justify a new trial on the ground of irregularity in the proceedings of the jury.

[4–6] The same rule is applicable in the case at bar. Plaintiffs not only failed to supply a sufficient record by which to pass upon the merits of the case, but also they failed to provide the lower court with the necessary affidavits in support of their motion. Since all intendments are in favor of the order of the trial court, Schultz v. Sussman, supra, 7 Cal.App.2d 100, 45 P.2d 409; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 468, 271 P. 509; Lindemann v. San Joaquin Cotton Oil Co., supra; In re Estate of Mesner, 77 Cal.App.2d 667, 677, 176 P.2d 70, and because prejudice must be affirmatively shown by the party seeking a new trial, Anderson v. Pacific Tank Lines, 52 Cal.App.2d 244, 249, 126 P.2d 153, the plaintiffs have failed to show an abuse of discretion on the part of the trial court in denying the motion.

Judgment affirmed.

FOX, J., concurs.

ASHBURN, Justice (concurring).

I concur in the judgment and generally in the opinion of Mr. Presiding Justice MOORE, but certain further observations seem to be in order. By citing or factually distinguishing Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964, as we have done in Forman v. Alexander's Markets, 138 Cal.App.2d 671, 292 P.2d 257 and De Wit v. Glazier, 149 Cal.App.2d 75, 307 P.2d 1031, we tacitly lent approval to the doctrine, that a constructive concealment by a juror on *voir dire* affords good ground for impeaching the verdict. The majority's present failure to pass specifically upon the question leaves the Shipley case and its doctrine unchallenged. I think the law should be clarified in this regard.

Shipley v. Permanente Hospital, supra, holds that "proof of intentional (conscious) concealment" by the venireman is not essential (127 Cal.App.2d at page 423, 274 P.2d at page 57), saying, 127 Cal.App.2d at page 424, 274 P.2d at page 57: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' [Citations.] The deprivation of this inalienable part of the right to trial by jury without fault of the party prejudiced is independent from the intent of the juror to conceal and the means to show such deprivation should therefore not differ depending on whether the concealment was intentional or not." This language was used in affirming an order granting a new trial. There was no application for a hearing in the Supreme Court. The ruling seems to be opposed to a uniform current of authority in this State and in my opinion it declares a doctrine fraught with danger to the jury system.

The rule that the minds and the deliberations of jurors can occasionally be looked into after rendition of their verdict constitutes a narrow exception to the general recognition of the sanctity of the jury room. It should be carefully limited to cases of wilful concealment upon the juror's *voir dire* examination. Otherwise, ingenious lawyers will be indefatigable in their efforts to examine the jurors after the event and to build constructive misconduct through synthetic concealment,—all based upon matters which were absent from the juror's mind at the time of his examination and not suggested to him by the questions put on *voir dire*. When we reflect upon the fact that judges so often assign faulty reasons for sound rulings and that those reasons are then rejected though the ruling stands, it becomes apparent that the reasoning of jurors should not be the subject of later investigation and that the reasons assigned by one of them in support of the verdict should not open the doors of the jury room. Most people, including judges, harbor numerous latent prejudices which may bear upon their decisions at any time but are not recognized when inquiry is made as to their ability to be impartial in a particular case. All of our opinions are formed in the matrix of our heritage and the background of our experience. If they are to be indiscriminately examined after the event and disqualification imputed retroactively it will be an unfortunate effort to eliminate the human element from the judicial processes. If jurors are to be thus disqualified after the verdict, it will be a sorry day for the integrity of that invaluable aid to administration of real justice.

The fundamental considerations which underlie the privilege surrounding jury deliberations should not be overlooked. They are stated by Mr. Justice Cardozo in Clark v. United States, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993. He says, in part: "The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning." 289 U.S. at page 11, 53 S.Ct. at page 468. "For the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid." 289 U.S. at page 13, 53 S.Ct. at page 469. "The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a prima facie case sufficient to satisfy the judge that the light should be let in." 289 U.S. at page 14, 53 S.Ct. at page 469.

Prior to Shipley v. Permanente Hospital, supra, 127 Cal.App.2d 417, 274 P.2d 53, 48 A.L.R.2d 964, the California cases uniformly applied the rule in terms of wilful concealment.

People v. Galloway, 202 Cal. 81, 86, 91, 259 P. 332, 336, was a case of active concealment and, as shown by the following passage, that was the basis of the ruling: "We think that People v. Fair, supra [43 Cal. 137], omits the recognition of a well-defined distinction which exists between a case where a juror was not interrogated upon the subject, or where he admitted his bias and expressed the belief that he could lay it aside, and a case where a juror concealed his prejudiced state of mind when examined on his *voir dire* and entered upon the discharge of his duty as such juror while in such mental condition. In the second instance, actual bias becomes, where concealed, positive misconduct and continues to be such throughout such juror's service on the case, and if such misconduct is not known to the accused until after the trial and verdict, we see no reason whatsoever why the court should not have power to grant to the accused a new trial, basing it upon said subdivision 3 of section 1181 of the Penal Code."

Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407, is another case of actual concealment. The court, 140 Cal.App. at page 543, 35 P.2d at page 410, quoted portions of the language of Clark v. United States, supra, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993, and People v. Galloway, supra, which are above set forth.

In Re Estate of Mesner, 77 Cal.App.2d 667, 674, at page 676, 176 P.2d 70, at page 76, Mr. Justice Shinn stated the rule as follows: "Affidavits of jurors may be received as to occurrences during the trial and the deliberations of the jury which tend to prove the existence of prejudice in the mind of a juror, which would prevent his acting as an impartial juror, where the state of mind is charged to have been entertained and to have been intentionally concealed during his *voir dire* examination. Williams v. Bridges, supra; Gray v. Robinson, 33 Cal.App.2d 177, 183, 91 P.2d 194. This is a recognized exception to the general rule that affidavits of jurors may not be received to impeach the verdict except upon the ground that it was arrived at by resort to chance." In affirming an order granting a new trial the opinion emphasized the trial court's "implied finding that he [the juror] was guilty of intentional concealment." 77 Cal.App.2d at page 677, 176 P.2d at page 76.

In Pollind v. v. Polich, 78 Cal.App.2d 87, 92, 177 P.2d 63, the rule of intentional concealment was again stated, but it was held that the challenged conduct of the juror did not measure up to that standard.

These cases are discussed in Shipley, supra, and differentiated upon the ground that they were not necessarily decided upon the theory that wilful concealment is of the essence. It appears, however, that such was the ground upon which those cases were decided and they should not be brushed aside upon the basis of what might have been the rationale of the particular rulings. The Shipley case does not mention Mast v. Claxton, 107 Cal.App. 59, 65, 290 P. 48, or George v. City of Los Angeles, 51 Cal.App. 2d 311, 321, 124 P.2d 872.

In the Mast case, supra, a juror had failed to disclose the fact that one of the attorneys had previously represented him. At page 67 of 107 Cal.App., at page 51 of 290 P., the court laid down this rule: "In order to justify the granting of a new trial on this ground, it must be shown that some prejudice resulted to the appellant, or that there was a wilfully false and untruthful answer given by the juror, which would lead to the inference that the juror was animated by a dishonest motive in qualifying." At page 69 of 107 Cal.App., at page 51 of 290 P., it was said: "Furthermore, we do not believe that either the juror Nielson or respondent's counsel were guilty of misconduct. It was undoubtedly a lapse of memory on the part of both, and the record is absolutely devoid of anything that would tend to show any willful misconduct." The judgment was affirmed.

In the George case, supra, it was claimed that the court in denying a new trial had erred in rejecting the claim of irregularity in the conduct of juror Gates. This court, speaking through Mr. Justice McComb, said, 51 Cal.App.2d at page 321, 124 P.2d at page 878: "We are of the opinion that from the foregoing facts appealing defendant was not in any way prejudiced by the juror's failure to understand the question and properly answer it. Therefore, since it is established that a motion for a new trial will not be granted upon the ground that a juror upon *voir dire* examination has incorrectly answered questions, in the absence of a showing that (1) prejudice has resulted to the appealing party, or (2) there were wilfully false and untruthful answers given by the juror which would lead to the inference that the juror was animated by a dishonest motive in qualifying, the trial judge properly denied the appealing defendant's motion for a new trial predicated upon the alleged misconduct of Juror Gates (Mast v. Claxton, 107 Cal.App. 59, 67, 290 P. 48.)" In response to an attack upon Juror Garland the court also said, on the same page: "There is, therefore, no showing that this juror wilfully concealed any fact from the court." The Supreme Court denied a hearing.

The references to prejudice in the Claxton and George opinions, supra, seem to point to cases such as Los Angeles County F. C. Dist. v. Abbot, 24 Cal.App.2d 728, 741, 76 P.2d 188; Scott v. McPheeters, 52 Cal. App.2d 61, 66, 125 P.2d 868; La Gue v. Delgaard, 138 Cal.App.2d 346, 348, 291 P.2d 960; Irvin v. Padelford, 127 Cal.App.2d 135, 139–140, 273 P.2d 539, wherein it was held that the misconduct of the juror was not prejudicial because it did not affect the deliberations of the other jurors and the verdict was supported by sufficient votes without counting the disqualified juror. See also, Buckley v. Chadwick, 45 Cal.2d 183, 203, 288 P.2d 12, 289 P.2d 242.

In Ross v. Lightner, 139 Cal.App.2d 756, 761, 294 P.2d 59, 62, the court disposed of a claim of a juror's misconduct by saying: "There is no evidence that he wilfully concealed that fact about which he was not interrogated."

That the greater number of jurisdictions require wilful concealment in situations such as those now under discussion is attested by 66 C.J.S., New Trial, § 22, p. 116. See also, Annotation in 38 A.L.R.2d at page 645. The following cases from other jurisdictions are likewise pertinent: Harrison v. St. Louis Public Service Co., Mo.App., 251 S.W.2d 348; Lineker v. Missouri-Kansas-Texas R. Co., Mo.App., 142 S.W.2d 356; Barb v. Farmers Insurance Exchange, Mo., 281 S.W.2d 297, 302; Durham v. State, 182 Tenn. 577, 188 S.W.2d 555, 557, 160 A.L.R. 746; Orenberg v. Thecker, 1944, 79 U.S.App.D.C. 149, 143 F.2d 375; Childers v. Texas Employers' Ins. Ass'n, Tex. 1954, 273 S.W.2d 587, 588.

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150 Cal.App.2d 438

Carmela WARD, Plaintiff and Appellant,
v.
Rolland A. WARD, Defendant and Respondent.
Civ. 9014.

District Court of Appeal, Third District, California.
April 24, 1957.

In an action for divorce, the wife was granted an interlocutory decree of divorce. From an order of the Superior Court of Calaveras County, J. A. Smith, J., modifying the decree so as to restrain the wife from removing the parties' minor children from California and refusing an increase in support, the wife appealed. The District Court of Appeal, Schottky, J., held that the evidence did not establish an abuse of discretion by the trial court in the modification.

Order affirmed.

1. Divorce 🔑296, 312.6(5)

Questions as to the custody of minor children of divorced parents are within the sound discretion of the trial judge, who has an opportunity to observe the parties and hear the evidence, and his discretion should not be disturbed unless it clearly appears that there has been an abuse of discretion. West's Ann.Civ.Code, § 213.

2. Divorce 🔑303(2)

Where divorced parents were awarded joint custody of children in interlocutory decree, court had jurisdiction to modify the decree on evidence that wife was intending to remove the children from California so as to restrain their removal from the state and from their domicile in the county and to restrain the parties from taking the children upon a plane or boat, where the court believed it was for the best interest of the children that they be not removed from its jurisdiction. West's Ann.Civ.Code, § 213.

3. Husband and Wife 🔑278(1)

Divorced parents may not by property settlement agreement between themselves relieve themselves from their obligation to provide needed support for their minor children, so far as they are able to do so.

4. Divorce 🔑309

Where property settlement agreement between divorced parents divided the income of the property of the parties so as to provide ample support for the children, record did not establish that the court, in refusing to consider need for additional support from the husband on motion to modify the decree, was acting in the mistaken belief that it had no power to change the interlocutory decree with reference to the custody of the children because of the provisions of the property settlement agreement.

5. Divorce 🔑309

Evidence did not establish an abuse of discretion by the trial court in refusing to modify an interlocutory decree of divorce to increase the amount of support for children in custody of the wife.

6. Appeal and Error ⚷717

The court of review will not examine a memorandum of the court for the purpose of defeating the judgment of the trial court.

◆

Wm. Wear Clark, Stockton, for appellant.

Airola & Airola, San Andreas, for respondent.

SCHOTTKY, Justice.

On January 26, 1955, in an uncontested action for divorce, plaintiff, Carmela Ward, was granted an interlocutory decree of divorce from defendant Rolland A. Ward. The provisions of a property settlement agreement were incorporated in the decree and provided as follows with reference to the custody of the two minor children of the parties:

> "It is hereby agreed that the parties shall have joint custody of the said minor children during the minority of said children. So long as the wife is able and competent to do so, she shall have the care, custody, control and education of said minor children during their minority, without any interference whatsoever on the part of the husband, during the regular school terms. So long as the husband is able and competent to do so, he shall have the care, custody and control of the said minor children during periods of school vacations. 'School vacations' are those periods designated as such by the school authorities and do not include Saturdays and Sundays, except where such Saturday or Sunday shall follow or precede a regularly declared school holiday.
>
> "During any period in which the custody of said children is in one of the parties, the other party shall have the right to visit said children at reasonable times and places. Also, it is further agreed that during the time when one of the parties hereto shall have the custody of said children, said party shall provide said children, at her or his own expense, suitable living quarters and adequate food. Each of the parties hereto hereby covenants and agrees to pay one-half (½) of the cost of providing said minor children with clothes and expenses necessarily incident to the education of said children. And it is further likewise agreed between the parties hereto that neither of the parties shall attempt to influence said minors unfavorably to the other party."

On October 6, 1955, defendant filed an affidavit for an order modifying the interlocutory decree with respect to the custody of the minor children, alleging in substance that plaintiff was becoming increasingly emotional and unstable of late, and that affiant believed that the plaintiff was proposing to have the children enter a passenger airplane to fly them to some place outside the jurisdiction of California, and that in such event affiant would be unable to visit them or have the custody as provided in the decree because of his business and occupation in Calaveras County. Defendant asked that he be given sole custody. Plaintiff filed a counter-motion asking for sole custody of the children and for the sum of $150 per month for their support, and for counsel fees, her supporting affidavit alleging in substance that the defendant was nervous and had a violent temperament and was attempting to influence the children against plaintiff, and that in the best interests of the children plaintiff should be given custody.

Upon stipulation of the parties a psychiatrist was appointed by the court and he reported that in his opinion the plaintiff had no mental symptoms that would interfere with her ability to care for and manage the children.

The hearing of the matter before the court occupied two full days and the court stated in its "Rulings on Motions to Modify Interlocutory Decree" which appears in the clerk's transcript that "The testimony may be characterized as charge and denial on behalf of both parties." The court concluded its "Rulings" as follows:

> "Plaintiff's and Defendant's motions to modify the Interlocutory Decree will be denied, with the following exceptions:
>
> "The children are not to be taken out of the jurisdiction of the court, the State of California.
>
> "The children are not to be taken on a plane or boat.
>
> "The children are to remain domiciled in Calaveras County.
>
> "Counsel for plaintiff will be allowed the sum of $150 as an attorney fee, and It Is So Ordered."

Plaintiff has appealed and her notice of appeal states that:

> "The portions of said order which are hereby appealed from are as follows: (a) The portion thereof denying plaintiff's request for child support, (b) the portions of said order which provide as follows: 'The children are not to be taken out of the jurisdiction of the court, the State of California. The children are not to be taken on a plane or boat. The children are to remain domiciled in Calaveras County.' "

The appeal is not taken upon any authenticated transcript of evidence or upon any bill of exceptions. The record here consists of a number of documents designated and requested by plaintiff's attorney to be copied and included in a clerk's transcript. A reporter's transcript was not requested.

Appellant first contends that "the court had no authority to restrict or restrain the removal of the children from the State of California nor the removal of their domicile from Calaveras County, nor to restrain the parties from taking the children upon a plane or boat."

Appellant argues that because the property settlement agreement and the interlocutory decree stated that appellant was awarded "the care, custody, control and education of the minor children during their minority, without any interference whatsoever on the part of the husband (defendant), during the regular school terms," she has the right to determine and to change their residence and domicile as she sees fit during those regular school terms, unless such change or removal would prejudice the rights or welfare of the children. She relies upon section 213 of the Civil Code which reads:

> "A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child."

Appellant cites Heinz v. Heinz, 68 Cal.App.2d 713, at page 715, 157 P.2d 660, at page 662, in which the court, in reversing an order restraining a husband from removing his minor son from Los Angeles County, quoted said section 213 and said:

> "In Luck v. Luck, 92 Cal. 653, 655, 28 P. 787, our Supreme Court states the rule thus: '* * * if he [the father] is entitled to the custody of the children at all, he has the right to name any reasonable place in which they shall abide with him. * * *'
>
> "Applying the foregoing rule to the facts of the present case, since the trial court found that plaintiff was a fit and proper person to have the custody of his minor child and there was no finding that the child's rights or welfare would be prejudiced by his removal from Los Angeles County, the court's order in restraining plaintiff from removing his son from Los Angeles was erroneous."

Also cited by appellant is Shea v. Shea, 100 Cal.App.2d 60, 223 P.2d 32, in which the trial court, upon motion of plaintiff, made an order after entry of the final decree of divorce, which order modified the previous custody orders of the court so as to restrain the defendant who had custody of the parties' minor children, from removing them from the State of

California. Upon appeal the court, citing the Heinz case, supra, held that in the absence of an affirmative finding that the rights or welfare of the children would be prejudiced by their removal, the trial court had no authority to restrain such removal.

But as pointed out by respondent, in the cases cited by appellant the care and custody of the minor children were awarded to one parent, whereas in the instant case the care and custody were awarded to the parents jointly. Respondent cites the later case of Gudelj v. Gudelj, 41 Cal.2d 202, at page 209, 259 P.2d 656, at page 660, in which the Supreme Court said:

> "Custody of the child was given jointly to Catherine and John with physical custody in Catherine. John was given the right to visit the boy at reasonable times and to have him for at least one day each week. Presumably, such visits are for the best interests of the child. The record includes testimony to the effect that Catherine had threatened to remove the boy from the state and to change his name, thus defeating John's visitation rights. Under such circumstances, it cannot be said that the restrictions imposed upon removal of the child amount to an abuse of discretion. The trial court maintains continuing jurisdiction of the matter and, in the future, if circumstances should arise of the kind suggested by Catherine, appropriate modifications of the cutody provisions may be made."

It is clear from the statement in the ruling of the court that the court believed it was for the best interests of the children that they not be removed from Calaveras, and it is apparent that the court believed that appellant intended to take the children to the Hawaiian Islands where it would be difficult for respondent father to see them frequently. While we have no record of the oral testimony given before the court, the court stated in its ruling that it occupied two full days. We have no doubt that the court found ample support for its conclusion that the children should not be removed from Calaveras County. The court stated in its ruling:

> "The children are fond of both of their parents and are the victims of an unhappy circumstance—a broken home. They expressed a preference to live on the ranch.
>
> "I can see no reason why either parent should be deprived of the society and companionship of their children.
>
> "A consideration of all the evidence impels me to hold that neither parent should have the custody of the children taken from them. The children are the most precious possessions that the parents have in this world."

[1, 2] Questions as to the custody of minor children of divorced parents are matters within the sound discretion of the trial judge who has an opportunity to observe the parties and hear the evidence, and his decision should not be disturbed by an appellate tribunal unless it clearly appears that there has been an abuse of discretion. No such abuse of discretion is shown in the instant case and we believe that under the decision in Gudelj v. Gudelj, supra, the court had the power to impose the restrictions complained of by appellant.

Appellant contends also that "The court erred in considering the property settlement agreement binding upon the question of child support and therefore refusing to consider the need for such support from defendant and defendant's ability to contribute such support."

The court in its ruling on the motions stated:

> "Plaintiff is asking the court to require defendant to pay plaintiff $150 per month for the support of the minors and a counsel fee of $200.
>
> "The testimony shows that plaintiff received from defendant, during the year 1955 in accordance with the terms of the property settlement agreement the sum of $3175.15. Defendant has complied with all the terms of the

> agreement and has made other payments on behalf of plaintiff not required to be made by him alone. I do not think that the court has the power to modify the amount set forth and agreed upon between the parties."

[3] Appellant argues that the court denied any further allowance upon the mistaken belief that the court had no power to change the provisions of the interlocutory decree with reference to the custody of the children because of the provisions of the property settlement agreement. We do not believe that the learned trial judge was under any misapprehension as to his power to make additional allowance for the support of the children, notwithstanding the terms of the property settlement agreement, if the need for such additional allowance was shown. It is of course the law that parents may not by a property settlement agreement between themselves relieve themselves from their obligation to provide needed support for their minor children so far as they are able to do so.

[4–6] In the instant case, however, the property settlement agreement divided the income of the property of the parties in such a manner as to in the judgment of the court, provide ample support for the children, and we are satisfied that what the court meant in stating that it had no power to modify the amount set forth in the agreement was that under the facts and circumstances of the instant case it was neither necessary nor proper to modify the terms of the property settlement agreement as to the support of the children. Furthermore, the well-settled rule is as stated in Wittman v. Wittman, 32 Cal.App.2d 184, at page 186, 89 P.2d 419, at page 420:

> "Conceding that in some instances a court of review will for certain purposes examine such a memorandum [memorandum of decision], it is settled law that the court of review will not examine such a memorandum for the purpose of defeating the judgment of the trial court. Scholle v. Finnell, 173 Cal. 372, 376, 159 P. 1179; 24 Cal. Jur. 924."

In view of the foregoing we are convinced that the making of the order appealed from was a matter within the sound discretion of the trial court and that it does not appear that there was an abuse of discretion.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 398

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Manuel C. HERNANDEZ, Defendant and Appellant.
Cr. 1140.

District Court of Appeal, Fourth District, California.
April 22, 1957.

Defendant was convicted in the Superior Court of San Bernardino County, R. Bruce Findlay, J., for selling a narcotic, and he appealed. The District Court of Appeal, Griffin, J., held that questions passed upon by trial court, District Court of Appeal, and Supreme Court, in denying writ of prohibition, should not be again considered on appeal from conviction of defendant, who had sought prohibition.

Affirmed.

1. Criminal Law ⚷1023(8)

Order denying defendant's motion to dismiss indictment was not appealable. West's Ann.Pen.Code, §§ 1237, 1259.

2. Criminal Law ⚷1128(2)

Setting forth in brief certain portions of proceedings taken before Grand

Jury, indicating that record did not affirmatively show that interpreter was necessary or was sworn, would not present proper or sufficient record or showing in respect to points raised by appellant claiming that indictment had not been found, endorsed and presented as prescribed by law, and that an unauthorized person, to wit, an interpreter, not sworn as such, had been present before Grand Jury during taking of testimony.

3. Criminal Law ⚷1144(2)

Where it appeared that interpreter had been used in proceedings before Grand Jury, court would have to assume, in absence of any other showing, that interpreter had been necessary. West's Ann.Code Civ.Proc. § 1963, subd. 15; West's Ann. Pen.Code, § 925.

4. Judgment ⚷648

Questions passed upon by trial court, District Court of Appeal, and Supreme Court, in denying writ of prohibition, should not be again considered on appeal from conviction of defendant who had sought prohibition.

5. Criminal Law ⚷1128(2)

Matters not presented by record cannot be considered on suggestion of counsel in briefs. West's Ann.Rules on Appeal, rule 33(b).

◆

Julius J. Novack, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

[1] A court trial resulted in a conviction of defendant and appellant on four counts of violation of Section 11500 of the Health and Safety Code (selling a narcotic). The sufficiency of the evidence is not questioned. The claim is that the indictment had not been found, endorsed and presented as prescribed by law, and that an unauthorized person was present before the Grand Jury during the taking of testimony, to wit, an interpreter who was not sworn as such. The point is that the court should have granted defendant's motion to set aside the indictment on the grounds noted, which motion was made just prior to trial. Appellant cites such authority as People v. Lem Deo, 132 Cal. 199, 64 P. 265; Husband v. Superior Court, 128 Cal.App. 444, 17 P.2d 764; Sec. 1884, Code Civ.Proc.; and Sec. 925, Pen.Code. Defendant has attempted to appeal from the judgment, the order denying his motion for new trial, and denying the motion to dismiss the indictment, as well as all other "orders adverse to defendant's rights". The attempted appeal from the order denying the motion to dismiss and all other "orders adverse to defendant's rights" must be dismissed as not being appealable. People v. Simmons, 119 Cal. 1, 50 P. 844; Pen. Code, secs. 1237 and 1259.

[2] Defendant sets forth in his *brief* certain portions of the proceedings taken before the Grand Jury indicating that the record does not affirmatively show that an interpreter was necessary or was sworn. Of course this would not be a proper or sufficient record or showing in respect to the points raised. People v. Scott, 24 Cal. 2d 774, 777, 151 P.2d 517; People v. Black, 89 Cal.App. 219, 222, 264 P. 343; Adams v. Crawford, 116 Cal. 495, 499, 48 P. 488.

In a prior proceeding before this Court under section 995 of the Penal Code, Hernandez v. Superior Court, 142 A.C.A. No. 5, Minutes page 5, Case No. 5524 (Hearing in Supreme Court denied Aug. 31, 1956, 47 A.C. No. 2, Minutes page 3) this defendant sought an order prohibiting the Superior Court from trying the matter set forth in the indictment on the same grounds he now urges and there was lodged before this court a copy of the reporter's transcript of the oral proceedings taken before the Grand Jury relating to this defendant. The petition was denied. This order became final. The reporter's transcript was returned to defendant's counsel.

In connection with this appeal, on January 24, 1957, there was, according to the minutes, "Lodges with this court, but not filed," by direction of the Presiding Judge, what purports to be a carbon copy of the reporter's transcript of the oral proceedings taken before the Grand Jury in respect to this defendant. Whether this is a true, full and complete copy of all of the proceedings and testimony taken before the Grand Jury is problematical. Aso, it is questionable whether the certificate of the official reporter attached was signed by him or was copied by another person. It recites that he took down in shorthand the testimony of the witnesses named therein, who testified before the Grand Jury on Wednesday, May 2, 1956, in connection with the charges made against Manuel Hernandez and John Doe 1; and that the 25 typewritten pages were a full, true and correct transcription from his shorthand notes. It appears therefrom that the foreman of the Grand Jury announced that the "consideration" for that day was "to determine what, if any, public offenses were committed by the following people in connection with the selling, furnishing, or giving away of narcotics", naming 19 persons. Among them appeared defendant's name. Several of the other names were Spanish. It therefore affirmatively appears that charges against other defendants were also under consideration. After testimony of a chemist, as to the nature of a certain number of articles and that they contained narcotics, the district attorney announced: "This concludes the testimony of this witness as to any matters in connection with Manuel Hernandez". Up to this time it does not appear that any interpreter was in the Grand Jury room. Apparently there were other witnesses examined and other testimony taken in reference to the other named persons. Whether the interpreter was sworn and used in reference to these other witnesses is not indicated. Apparently this part of the proceeding was omitted from the transcript before us. It was then announced to the foreman that the district attorney would now present the testimony of a witness in connection with any public offense possibly committed by defendant Hernandez. An Eduardo Nunez was sworn as a witness and testified to four separate and distinct sales of narcotics to him by defendant on different dates and that he turned the narcotics thus purchased by him over to a deputy sheriff. Apparently this witness could speak fairly good English but at times he was assisted in his answers by one designated in the transcript as "the interpreter". Then follows the statement by the district attorney that "this concludes the testimony of this witness as to any matters in connection with Manuel Hernandez * * *." Apparently the Grand Jury continued on with the proceedings in reference to other parties named.

It is upon this showing that defendant now claims that it was affirmatively shown that the interpreter was not first sworn as such interpreter and that there was no showing that an interpreter was necessary or required.

[3] In the first place we do not believe that defendant has properly or fully met the burden resting upon him to establish these claimed facts. It may well have appeared from a full transcript of the entire hearing before the Grand Jury that an interpreter was sworn and that an interpreter was required. In the absence of a contrary showing, there is a presumption that official duty has been regularly performed. Sec. 1963, subd. 15 Code Civ.Proc. From the testimony before us it does affirmatively appear that an interpreter was used in a few instances and we must assume, in the absence of any other showing, that it was necessary. It is also of interest to note that an interpreter for this same witness was sworn and examined in the trial court, and counsel for defendant spoke through this interpreter in cross-examining the witness. Section 925 of the Penal Code provides in part:

> "* * * The grand jury or district attorney may require by subpena the attendance of any person before the grand jury as interpreter, and such

> interpreter may, while his services are necessary, be present at the examination of witnesses before the grand jury * * *"

[4, 5] In addition, these same questions were once before passed upon by the trial court, this court, and the Supreme Court, in denying a writ of prohibition. That judgment has become final and these same questions should not be again considered on an appeal from the judgment. People v. Lancellotti, 147 Cal.App.2d 723, 305 P.2d 926. Furthermore, there is no showing in the present transcript on appeal that the reporter's transcript of the proceedings taken before the Grand Jury was used and made a part of the record in the trial court or on appeal, in support of the second motion to dismiss the indictment. Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs. Adams v. Crawford, 116 Cal. 495, 499, 48 P. 488; People v. Gormley, 64 Cal. App.2d 336, 338, 148 P.2d 687. The procedure to augment the record is set forth in Rule 33(b), Rules on Appeal. We conclude that the objections here raised are not well taken at this time and that no prejudicial error resulted. Stern v. Superior Court, 78 Cal.App.2d 9, 13, 177 P.2d 308.

Judgment and order denying a new trial affirmed. Attempted appeal from other orders dismissed.

BARNARD, P. J., and MUSSELL, J., concur.

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8 Cal.2d 355

SUBSEQUENT INJURIES FUND, State of California, Petitioner,

v.

he INDUSTRIAL ACCIDENT COMMISSION of the State of California and Gust Erickson et al., Respondents.

Supreme Court of California,
In Bank.
April 19, 1957.

The Subsequent Injuries Fund, State f California, brought a proceeding for nnulment of an award made against it by he Industrial Accident Commission of the tate of California in a proceeding by an mployer's insurance carrier to secure nder the Labor Code, apportionment of iability to an employee who had become ermanently and totally disabled from ilicosis suffered as a result of successive mployments. The Supreme Court, Schaur, J., held that section of the Labor Code roviding for reimbursement from Subseuent Injuries Fund by means of award in avor of employer who has paid original ward to employee suffering silicosis reulting from underground metal mining perations, where any of the other emloyers, who have not contributed to such ayment, are without the jurisdiction of he Industrial Accident Commission, or re dead, insolvent, or not subject to enorcement of award against them for such ontributions, either directly or through olvent insurance carriers, should not be etrospectively applied.

Award annulled.

Opinion, 304 P.2d 112, vacated.

1. Statutes 🔑263

Statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.

2. Statutes 🔑267(1)

If substantial statutory changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights is retroactive because legal effects of past events will be changed, and statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.

3. Workmen's Compensation 🔑63

Section of the Labor Code providing for reimbursement from Subsequent Injuries Fund by means of award in favor of employer who has paid original award to employee suffering silicosis resulting from underground metal mining operations, where any of the other employers, who have not contributed to such payment, are without the jurisdiction of the Industrial Accident Commission, or are dead, insolvent, or not subject to enforcement of award against them for such contributions, either directly or through solvent insurance carriers, should not be retrospectively applied. West's Ann.Labor Code, § 5500.5.

◆

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and F. G. Girard, Deputy Atty. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, Donald Gallagher, Loton Wells, Leonard, Hanna & Brophy and Ivan A. Schwab, San Francisco, for respondents.

Mullen & Filippi, San Francisco, amicus curiae on behalf of respondents.

SCHAUER, Justice.

Petitioner, State of California Subsequent Injuries Fund, seeks annulment of an award against it made by respondent commission in a proceeding by an employer's insurance carrier to secure, under the provisions of section 5500.5 of the Labor Code, apportionment of liability to an employe who had become permanently totally disabled from silicosis suffered as the result of successive employments. We have concluded that respondent Industrial Accident Commission erroneously applied the section retrospectively, and that the award should be annulled.

The facts appear to be undisputed. The employe, Erickson, was employed as an underground miner over the period 1924–1949 by various metal mining employers; during such periods of employment he was exposed to free silica dust, the cumulative effect of which contributing exposures was to cause the disease of silicosis. This chronology followed:

September 10, 1949. The disease, which constitutes an injury within the meaning of the workmen's compensation law, culminated in disability (total). In the subsequent proceedings the commission found, in accordance with statutory law, that "said date accordingly constitutes the date of injury herein." See Lab.Code, § 5412;[1] Alford v. Industrial Accident Comm., 1946, 28 Cal.2d 198, 203–204, 169 P.2d 641 [2].

August, 1950. The employe initiated proceedings before the Industrial Accident Commission to obtain an award solely against Central Eureka Mining Company, one of his employers during the period when he was contracting silicosis.[2] A few days later respondent State Compensation Insurance Fund, the insurance carrier for the company, was joined as a defendant.

September 22, 1951. Section 5500.5 of the Labor Code became effective, providing, among other things, for reimbursement from the Subsequent Injuries Fund (sometimes hereinafter called the Fund) by means of "an award in favor of the employer" who has paid the original award to an employe suffering silicosis resulting from underground metal mining operations, where any of the other employers who have not contributed to such payment are "without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers." Prior to enactment of this section no such reimbursement provision existed.

September 28, 1951. The commission entered an award in favor of the employe and against State Compensation Insurance Fund (sometimes hereinafter called the carrier) for the entire disability.

April, 1952. The carrier[3] initiated supplemental proceedings before the commission for an apportionment of liability against several named employers and the Subsequent Injuries Fund under section 5500.5 of the Labor Code.

August 13, 1954. The commission entered its findings, order and award in favor of the carrier apportioning liability against some nineteen employers or their insurance carriers, finding that five of the employers and their carriers were "without the Commission's jurisdiction and * * * [not] subject to the enforcement of any awards for contribution" in this state and charging the Subsequent Injuries Fund with the proportions of liability otherwise chargeable to those five employers.

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[1] Section 5412: "The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment."

[2] Prior to the date of injury in this case (September 10, 1949) this court had determined, in Colonial Ins. Co. v. Industrial Acc. Comm., 1946, 29 Cal.2d 79, 82–86, 172 P.2d 884, that "in progressive occupational diseases * * * the employee may, at his option, obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability," and that in a subsequent independent proceeding among themselves the successive carriers or employers may secure an apportionment by the Industrial Accident Commission of the share of the employe's total award that each should bear.

[3] Because of the conclusion reached (that § 5500.5 is here inapplicable because it is not retrospective) we do not consider the Fund's contention that the language of the statute does not in any event authorize reimbursement to a carrier as distinguished from the employer.

December 5, 1955. Following petitions for reconsideration, further hearing was had and the commission entered its decision confirming in all material respects the award of August 13, 1954.

Petitioner State of California Subsequent Injuries Fund, as ground for annulment of the award against it, first contends that, contrary to the intention of the Legislature, the commission retrospectively applied the reimbursement provisions of section 5500.5, which did not become effective until more than two years *after* the date of the employe's injury. The Fund states in its brief that it "has never contended that section 5500.5 can not be applicable to periods of silicotic exposure occurring prior to the passage of the section. What we do contend is that it cannot be applied to cases where the date of injury [i.e., the date on which the disease culminates in disability] precedes the passage of the section for that is the time that liability under the Workmen's Compensation Act is to be determined." All parties appear in agreement that the ascertainable legislative intent in enacting the subject section should be the controlling factor on this point and that the section is to be construed with reference to its purpose and the objects intended to be accomplished by it. (See 23 Cal.Jur. 725–727, 764–765.)

Section 5500.5 deals chiefly with claims for compensation benefits made "on account of an occupational disease which may have arisen out of more than one employment." The section prescribes the form and content of an application for such benefits; provides for joinder or bringing in of former employers; states that the employe or his dependents may elect to proceed against any one or more of the employers, and that any award shall be joint and several as against any two or more employers held liable; and provides that "At any time within one year after the commission has made an award" any employer held liable may institute supplemental proceedings before the commission for the purpose of determining an apportionment of liability or right of contribution, but that such proceedings shall not diminish, restrict, or alter in any way the recovery previously allowed the employe or his dependents. The section next provides as follows:

"In any proceeding before the commission for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:

"(a) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in such operations shall be jointly and severally liable for the payment of compensation and of medical, surgical, legal and hospital expense which may be awarded to the employee or his estate or dependents as the result of disability or death resulting from or aggravated by such exposure.

"(b) If any of the employers who have not contributed to payment of the original award shall be without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, then upon such showing being made to the satisfaction of the commission, it shall make an award in favor of the employer or employers who have paid the original award, payable out of the fund used for payment of the additional compensation provided for in Section 4751 [4] of this code, in an amount equal to the unreimbursed portions of the original payment or payments to which such employer or employers are found entitled as aforesaid. The use of the fund for such reimbursement in addition to the purposes specified in Section 4751 of this code is hereby authorized. The Legislature finds that as a matter of public policy and public welfare, sufferers from silicosis resulting from employment in underground metal mines should be compensated for such disability; that due to the peculiar nature of this disease it often does not manifest itself until long after periods of exposure have expired; that this frequently results in disability occurring in or after the last of a series of employments where such exposure existed; that underground metal mining is a class of industry having special character, both as to silicotic hazard and investment hazard; that the latter hazard has resulted in the past in closure of mines, disappearance or financial nonresponsibility of former owners or lessees of such mines and consequent inability of the commission to enforce against them compensation awards for proportionate liability in silicosis cases. It is inequitable that total ultimate liability should fall on one or more such employers who happen to be solvent or have solvent insurance carriers within the commission's jurisdiction or in reach of its process. Therefore the Legislature finds that, to the extent that the commission determines that proper contributions to a joint and several award for compensation for silicosis cannot be enforced against an employer who is or was engaged in underground metal mining for any of the above reasons, it shall direct that contribution shall be paid, either directly or by way of reimbursing any employer or employers who have paid said award, by payment from the fund provided for in Section 4751 of this code. Such payments or reimbursement for payments the Legislature finds will protect employees in the metal mining industry and will promote the general public welfare in mining communities. * * *"

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[4] Section 4751 sets forth the circumstances under which payment to an injured employe will be made from the Subsequent Injuries Fund.

[1, 2] The Fund, relying upon Aetna Casualty & Surety Co. v. Industrial Acc. Comm., 1947, 30 Cal.2d 388, 182 P.2d 159, urges that the law in effect at the time of the injury is the law governing all rights and liabilities arising out of the injury. That case dealt with an amendment to section 4661 of the Labor Code, under which amendment an award was made in an amount greater than it would have been had the commission applied the section as it read at the date of injury. This court declared that, at pages 392–393 of 30 Cal.2d, at pages 160, 161 of 182 P.2d. "Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery. The 1945 amendment of section 4661 increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the employee's existing rights and the employer's corresponding obligations. The amendment is therefore clearly substantive in character, and the commission, by applying it in the present proceedings, gave it a retrospective operation.

"The authorities support the conclusion that a statute changing the measure or method of computing compensation for disability or death is given retrospective effect when applied to disability or death resulting from an injury sustained before the effective date of the statute. * * *

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent. [Citations.] * * * 30 Cal.2d at page 394, 182 P.2d at page 161. [T]he distinction [between purely 'procedural' and purely 'substantive' legislation] relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. [Citations.]"

With respect to the contention that the Legislature intended to give retrospective operation to the amendment, the court stated that, 30 Cal.2d at page 395, 182 P.2d at page 162, "That intention does not appear on the face of the amendment since no express provision was made for its application to cases involving prior injuries. * * * [L]egislative intent in favor of the retrospective operation of a statute cannot be implied from the mere fact that the statute is remedial and subject to the rule of liberal construction. [Citation.] * * *

"30 Cal.2d at page 396, 182 P.2d at page 163. Our conclusion is that it does not clearly appear from the language of the amended statute, or by necessary implication, that the Legislature intended it to apply in cases where the injury occurred before the effective date of the enactment. On the contrary, it must be assumed that the Legislature was acquainted with the settled rules of statutory interpretation, and that it would have expressly provided for retrospective operation of the amendment if it had so intended. Accordingly the commission improperly gave a retrospective effect to the amendment by applying it to claims arising out of injuries occurring prior to the date of its enactment."

And in Krause v. Rarity, 1930, 210 Cal. 644, 655 [11], 293 P. 62, 77 A.L.R. 1327, the court observed that "although the legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute. [Citation.]" See also People v. Allied Architects Ass'n, 1927, 201 Cal. 428, 436–437[6], 257 P. 511.

[3] Nowhere in section 5500.5 has the Legislature declared that the reimbursement provisions here involved shall be given retrospective operation. Thus, despite the legislative declarations and findings concerning public policy and public welfare and of the inequity resulting if total ultimate liability in silicotic cases should fall on less than all of the employers or carriers in the contributing employments, and despite the arguments of respondents and of amicus curiae that the statute is remedial and curative in nature, it is clear that under the above quoted rules, as expressed in the Aetna case, the provisions should not be retrospectively applied and that inasmuch as the controlling event of injury occurred to effective date of the section, the award now under attack should be annulled.

Respondents argue, however, that whether the injury precedes or follows the effective date of the section is of no significance because "in enacting section 5500.5, the * * * Legislature has not taken away or impaired any vested right of any person, or created a new obligation or duty to be performed by any person. * * * The Subsequent Injuries Fund is the State government itself. Through section 5500.5, the State has conferred a remedial benefit upon California mining companies and their insurance carriers to achieve a public purpose." This argument is not persuasive. Even though payments from the Subsequent Injuries Fund (which, of course, is a fund provided by legislative appropriation) to injured employes themselves may likewise be considered the conferring of a remedial benefit to achieve a public purpose, pursuant to the Legislature's "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation" art. XX, § 21; Subsequent Injuries Fund v. Industrial Acc. Comm., 1952, 39 Cal.2d 83, 88, 244 P.2d 889; see also Lab.Code, §§ 4750–4755, the principle appears to have been consistently followed that payments from the fund to an employe will not be made where the date of the subsequent injury preceded the effective date of the fund legislation or an otherwise applicable amendment thereto which would enlarge the employe's rights. See Whittingslow v. Industrial Acc. Comm., 1949, 14 Cal.Comp. Cases 6, writ denied; Cravens v. Industrial Acc. Comm., 1951, 16 Cal.Comp.Cases 227, writ denied, hearing by Supreme Court denied; Morrell v. Industrial Acc. Comm., 1952, 17 Cal.Comp.Cases 324, writ denied; see also Associated Indemnity Corporation v. Industrial Acc. Comm., 1948, 13 Cal. Comp.Cases 240, writ denied. In the

Cravens case, in which this court denied a hearing, a previously partially disabled employe met with an industrial injury in 1946. The commission found that she had suffered permanent total disability, of which 60 per cent could be attributed to the industrial injury, but refused to make an award against the Subsequent Injuries Fund. It took the position that the 1949 amendment to section 4751 of the Labor Code (enlarging the employe's rights so as to cover *all* pre-existing disabilities) could not be applied where the subsequent injury had occurred in 1946, and that the pre-existing disability of the employe did not come within the terms of the section as it read before the 1949 amendment.

Although any inequity to either an injured employe or an unreimbursed employer may be considered just as great whether the date of injury occurs before or after the effective date of the statute under which they claim rights to payments from the Subsequent Injuries Fund, it would appear that any arguments seeking relief upon such a basis should more appropriately be addressed to the Legislature, than to the courts. As urged by the Subsequent Injuries Fund, no reason is shown why an employer should be placed in a better position than an employe with respect to the date as to which rights to payment from the fund may attach, and that just as an employer's liability to his employe is determined as of the date of injury, so should that date determine his rights to contribution from the fund.

Moreover, in the Whittingslow case (Whittingslow v. Industrial Acc. Comm., 1949, supra, 14 Cal.Comp.Cases 6), the commission declared the rule that an employe who suffered a subsequent injury in 1942 could not recover under the Subsequent Injuries Fund legislation (effective in 1945), unless it clearly appeared from the language of the statute that retrospective effect was intended, and that no such legislative intent was shown. Writ of review was denied in January, 1949, more than two and one-half years prior to the effective date of section 5500.5, with which we are here concerned. It must therefore be presumed that the Legislature was aware of that decision, as well as of the canon of interpretation applied in the Aetna case, supra, 30 Cal.2d at page 393, 182 P.2d at page 161 [5], and intentionally failed to provide for retrospective operation of the section. See Buckley v. Chadwick, 1955, 45 Cal.2d 183, 200, 288 P.2d 12, 289 P.2d 242 [14]; Cole v. Rush, 1955, 45 Cal.2d 345, 355, 289 P.2d 450 [8], [9]; see also 23 Cal.Jur. 783, § 159, and cases there cited.

Respondents also suggest that the provision in section 5500.5 for a one-year period after the award of compensation benefits, within which any employer held liable may institute supplemental apportionment proceedings, indicates that the date of the award of such benefits should be the controlling date with respect to the employer's right to contribution from the Fund. Such one-year period appears, however, to be only the customary time limitation provision, and similar provisions in statutes governing the employe's rights to benefits have never been viewed as authorizing a retrospective application of a statute enlarging those rights. Respondents' position on this point is without merit.

To summarize: As pointed out by the Fund, the question here is not what the Legislature might have done with respect to providing for retrospective application of the portions of section 5500.5, which are here involved, but what it did do. It used no language showing that it intended retrospective effect and, therefore, under the rules carefully stated and followed in the Aetna case, no such effect will be given by the courts under the guise of construction. The award against Subsequent Injuries Fund should therefore be annulled.

This conclusion makes unnecessary a discussion of other contentions advanced on behalf of the Subsequent Injuries Fund.[5]

Certain of the insurance carriers held liable for a portion of the total award ask in their brief that, in case of annulment of

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5. The issue of constitutionality is discussed in the companion case of Subsequent Injuries Fund v. Ind. Acc. Comm. (Walters), Cal., 310 P.2d 7.

the award against the Fund, the court then determine on this review the question of "What happens to the 34.6 per cent of the workmen's compensation benefits paid, or to be paid, to the * * * [employe] which had been charged to the Subsequent Injuries Fund?" Various alternatives are suggested as to how such 34.6 per cent might be charged. However, that question is not before us on this petition for review, filed by Subsequent Injuries Fund, in which only the award against itself is attacked, and it therefore follows that the matter should be left for original determination by the Industrial Accident Commission. (See Lab.Code, § 5952.)

For the reasons above stated the award is annulled.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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48 Cal.2d 365

SUBSEQUENT INJURIES FUND, State of California, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION and Raymond C. Walters et al., Respondents.

L. A. 24468.

Supreme Court of California,
In Bank.
April 19, 1957.

The State of California, Subsequent Injuries Fund, brought a proceeding for annulment of a purported apportionment or contribution award against it by the Industrial Accident Commission directly in favor of mining employee who suffered permanent partial disability from silicosis resulting from successive employments in underground metal mining. The Supreme Court, Schauer, J., held that section of the Labor Code providing for reimbursement from Subsequent Injuries Fund by means of an award in favor of employer who has paid original award to an employee suffering silicosis resulting from underground metal mining operations, where any of the other employers, who have not contributed to such payment, are without the jurisdiction of the Industrial Accident Commission, or are dead, insolvent, or are not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, is not unconstitutional, on ground that an unreasonable discrimination is made in favor of employers engaged in underground metal mining as distinguished from other employers.

Contribution award annulled and matter remanded for further proceedings.

1. Constitutional Law 🔑48, 208(1)

Wide discretion is vested in the Legislature in making statutory classification, and every presumption is in favor of the validity of the statute, and decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and, beyond rational doubt, erroneous.

2. Constitutional Law 🔑208(1)

A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it.

3. Constitutional Law 🔑70(1)

The authority and the duty to ascertain the facts, which will justify classified legislation, must rest with the Legislature in the first instance, and not with the courts, and the decision of the Legislature in that respect is ordinarily conclusive on the courts.

4. Constitutional Law 🔑48

All presumptions and intendments favor the validity of a statute, and mere doubt does not afford sufficient reason for a judicial declaration of invalidity, and statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears.

5. Constitutional Law 🔑48

When statutory classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, existence of that state of facts is presumed, and one who assails the classification must carry the burden of showing that it is arbitrary.

6. Constitutional Law 🔑70(3)

In passing on constitutionality of statute, Supreme Court is not concerned with question whether the Legislature has adopted what Supreme Court might think to be the wisest and most suitable means of accomplishing objects of statute.

7. Constitutional Law 🔑208(7)
Workmen's Compensation 🔑30

Section of the Labor Code providing for reimbursement from Subsequent Injuries Fund by means of an award in favor of employer who has paid original award to an employee suffering silicosis resulting from underground metal mining operations, where any of the other employers, who have not contributed to such payment, are without the jurisdiction of the Industrial Accident Commission, or are dead, insolvent, or are not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, is not unconstitutional, on ground that an unreasonable discrimination is made in favor of employers engaged in underground metal mining as distinguished from other employers. West's Ann.Labor Code, § 5500.5.

8. States 🔑119

Section of the Labor Code providing for reimbursement from Subsequent Injuries Fund by means of an award in favor of employer who has paid original award to an employee suffering silicosis resulting from underground metal mining operations, where any of the other employers, who have not contributed to such payment, are without the jurisdiction of the Industrial Accident Commission, or are dead, insolvent, or are not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, is not unconstitutional, on ground that it violates constitutional provisions forbidding a gift of public money. West's Ann.Labor Code, § 5500.5; West's Ann Const. art. 4, § 31.

9. Workmen's Compensation 🔑30

Section of the Labor Code providing for reimbursement from Subsequent Injuries Fund by means of an award in favor of employer who has paid original award to an employee suffering silicosis resulting from underground metal mining operations, where any of the other employers, who have not contributed to such payment, are without the jurisdiction of the Industrial Accident Commission, or are dead, insolvent, or are not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, is not unconstitutional, on ground that it purports to invest jurisdiction in commission in violation of limited jurisdiction conferred on commission by constitution. West's Ann. Labor Code, § 5500.5; West's Ann.Const. art. 20, § 21.

10. Workmen's Compensation 🔑1030

Award of workmen's compensation against Subsequent Injuries Fund directly in favor of mining employee, who was suffering from silicosis, rather than an apportionment or reimbursement award in favor of one or more of his employers against whom award in his favor could be made, was improper. West's Ann.Labor Code, § 5500.5.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., Patrick T. McCormick and F. G. Girard, Deputy Attys. Gen., for petitioner.

Everett A. Corten, Daniel C. Murphy, San Francisco, Edward A. Sarkisian, Los Angeles, Donald Gallagher and Loton Wells, San Francisco, for respondents.

SCHAUER, Justice.

Petitioner State of California Subsequent Injuries Fund seeks annulment of a purported apportionment or contribution award against it made by respondent commission directly in favor of an employe who suffered permanent partial disability from silicosis resulting from successive employments in underground metal mining. We have concluded that petitioner's attacks upon the constitutionality of the provisions of section 5500.5 of the Labor Code, under which the award was made, are (upon any proper interpretation and application of the legislation) without merit, but that contrary to the provisions of that section and beyond the scope of its intendments the commission erroneously issued an award of workmen's compensation against petitioner directly in favor of the employe (rather than an apportionment or reimbursement award in favor of one or more of his employers against whom award in his favor could be made) and that therefore the award should be annulled and the matter remanded for further proceedings in accordance with the terms of the statute.

Reference is made to the companion case of Subsequent Injuries Fund v. Industrial Acc. Comm., Cal., 310 P.2d 1, for a more complete statement of the provisions of section 5500.5, here involved.

In the present case the commission found that the employee had suffered permanent disability equivalent to 6½ per cent, resulting from silicosis contracted after 158.5 months of exposure in underground metal mining, and that "Liability for compensation should be apportioned among the various *insurance carriers* [italics added] in accordance with the periods of their coverage during said period of employment and exposure, which apportionment is as follows:" Four "Defendants" are then listed, including petitioner Subsequent Injuries Fund, and a percentage of liability as well as the monetary liability of each is set forth. The award was made "in favor of Raymond C. Walters against [the four "Defendants," including petitioner] * * * in the percentages as provided herein in" the findings.

The parties agree that the award against petitioner is based upon section 5500.5 of the Labor Code, although neither the findings nor the award so state. There is, however, no suggestion that the Fund was an employer, or insurance carrier of an employer, engaged in underground metal mining. As ground for annulment of the award, petitioner first attacks the constitutionality of certain provisions of that section, urging that an unreasonable discrimination is made in favor of employers engaged in underground metal mining as distinguished from other employers.

The section (Lab.Code, § 5500.5) provides, among other things, that "In any case involving a claim of occupational disease contracted as a result of more than one employment, the employee making the claim or his dependents, may elect to proceed against any one or more *of the employers* * * * and any award which the commission shall issue awarding compensation benefits shall be a joint and several award as against *any two or more employers* who may be held liable. * * * At any time within one year after the commission has made an award for compensation benefits in connection with an occupational disease, *any employer held liable under such award may institute proceedings before the commission* for the purpose of determining an apportionment of liability or right of contribution [*which proceedings*] * * * *shall be limited to a determination of the respective contribution rights, interests or liabilities of all the employers* joined in the proceeding, either initially or supplementally." (Italics added.) If, however, the disability of the employe resulted "from silicosis in underground metal mining operations," then "If any of the employers who have not contributed to payment of the original award shall be without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, then upon such showing being made to the satisfaction of the commission, it shall make an award *in favor of the employer or employers who have paid the original award*, payable out of the [Subsequent Injuries Fund] * * * in an amount equal to the unreimbursed portions of the original payment or payments to which such employer or employers are found entitled as aforesaid." (Italics added.) Then follow the declarations of public policy and public welfare made by the Legislature, based upon its expressly stated findings of the special character of the underground metal mining industry with respect to silicotic hazard and investment hazard.[1]

Petitioner asserts that "Concerning a special silicotic hazard in the underground metal mining industry, it is submitted that such does not exist." As a basis for such assertion it relies upon statements found in bulletins published by certain state and federal agencies and upon a report of an interim committee of the California state Senate which indicate that "silicosis can be acquired" in many other industries as well as in underground metal mining.

Petitioner also argues that "Even if it be assumed that a special silicotic hazard does exist in the underground metal mining industry in California, that alone would not result in this discriminatory legislation being constitutional, for the *crucial* distinction between the underground metal mining industry and other industries by the legislature is the finding of an investment hazard which results in the closure of mines and disappearance of employers, with the consequent inability to enforce awards against them, which in turn results in the inequity of solvent employers or their insurance carriers bearing the entire award. As Section 5500.5 authorizes the use of public funds to the *employer* who has paid an award not in proportion to the employee's employment with such employer, it is obvious that this is the evil the statute was concerned with correcting. Therefore, if there is *no* basis for the legislative conclusion that awards cannot be enforced against insolvent mines, there can be no valid distinction between the underground metal mining industry and other industries on this ground. It is submitted that such is the case." In support of this latter argument petitioner states that records of the Department of Industrial Relations show that in 1951, the year section 5500.5 was adopted, there were 236 permissibly self-insured employers (Lab.Code, § 3700), only one of which was in the metal mining industry, although during the same year there were 266 "operating producers of *metallic* minerals in California." Thus, argues petitioner, "it appears * * * that all metal mines except one carried insurance against liability to pay compensation * * * [and so] it is obvious that an award made against an insolvent mine is not unenforceable, because even if the employer cannot respond, the insurance company can. Therefore, no inequity to solvent employers or their insurance carriers can occur from the insolvency of a domestic mine, for at the time the section was enacted only one operating mine failed to carry insurance, and this [self-insured] mine had a substantial surety bond on deposit with a state official. Thus, the underground metal mining industry was as fully able to respond to Industrial Accident Commission awards as employers in any other industry where a silicotic risk is present, and there is no justification for the discrimination based on investment risk resulting in noncompliance with commission awards and the consequent inequity to other solvent employers or insurance carriers."

[1–6] As pointed out by respondents however, the issue is not whether facts existed which might have supported a contrary determination by the Legislature, but, rather, whether the classification between underground metal mining and other industries involving a silicotic hazard, and the legislative findings upon which such classification is based, are so palpably arbitrary that no set of facts can reasonably be conceived that would sustain them. (See 11 Cal.Jur.2d 726–728, and cases there cited.) Thus, in Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co., 1942, 20 Cal.2d 684, 693 [5], 128 P.2d 529, it is declared that "Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations.] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." Further, in In re Herrera, 1943, 23 Cal.2d 206, 212 [2], 143 P.2d 345, the rule is again quoted that "The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the legislature, in the first instance, to whom has been given the power to legislate and not to the courts and the decision of the legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act * * *" See also Jersey Maid Milk Products Co. v. Brock, 1939, 13 Cal.2d 620, 636 [1], 91 P.2d 577. In Lockheed Aircraft Corp. v. Superior Court, 1946, 28 Cal.2d 481, 484, 171 P.2d 21, 166 A.L.R. 701, involving the constitutionality of section 1101 of the Labor Code, it was once more pointed out that "All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]" And in Lelande v. Lowery, 1945, 26 Cal.2d 224, 232 [6], 234 [7], 157 P.2d 639, 175 A.L.R. 1109, the court declared that "When the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts is presumed, and one who assails the classification must carry the burden of showing that it is arbitrary. [Citations.] * * * [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. [Citations.]" See also City of Walnut Creek v. Silveira, 1957, 47 Cal.2d 804, 306 P.2d 453.

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[1] Such findings are set forth in full in the quotation from section 5500.5, found in the companion case of Subsequent Injuries Fund v. Industrial Acc. Comm., Cal., 310 P.2d 1, 3.

[7] Applying these rules to the reimbursement provisions of section 5500.5, here attacked by the Subsequent Injuries Fund, it is at once apparent that no proper basis has been shown for interference by the courts with the findings and classification made by the Legislature. The statistics submitted by the Fund cannot be accepted by this court as conclusive on the subject, and as pointed out by respondents there are special factors affecting underground metal mines which the Legislature could have considered. One such factor is that such miners are frequently nomadic, traveling from one section of the country to the other in search of work as mines become exhausted or are closed because of the seasonal nature of mining in mountain terrain, whereas employes exposed to silicosis in other industries are usually more stable and thus do not present the hazard to less than all of their employers of becoming liable for an employe's entire disability due to silicosis. Moreover the argument presented by the Fund overlooks the fact that section 5500.5 provides for reimbursement not only where certain of the employers are insolvent but also where any of the employers are "without the commission's jurisdiction."

Further, as pointed out by respondents, with respect to the investment hazard the liability of the mining companies for silicosis, which results in the inequity found by the Legislature to exist, arises largely because of the exposure of miners to silicosis while employed in mines during years prior to the effective date of section 5500.5. Because of such liability the cost of operating the mines is greater because of higher premiums that California mining companies must pay for compensation insurance. Another factor is that the United States Government has pegged the price of Gold at $35 an ounce since 1934, thus limiting the price gold mining companies can obtain for their product although their costs of operation, including higher premiums for the silicosis hazard, have increased greatly since 1934. The expensive equipment required in underground metal mines to safeguard against silicosis, as well as the fact that a mining venture is much more of a gamble than many business undertakings, are other matters which may have been considered by the Legislature in providing for the reimbursement rights here involved.

[8] Subsequent Injuries Fund also urges that a reimbursement award against it violates the provisions against a gift of public money, found in section 31 of article IV of the state Constitution. Payments from the Fund to an injured employe have been upheld as against a similar contention, on the ground that provision for the Fund is "encompassed within the Legislature's 'plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation' (art. XX, § 21)." Subsequent Injuries Fund v. Industrial Acc. Comm., 1952, 39 Cal.2d 83, 88 [2], 244 P.2d 889. The same may be said of provision for payment from the Fund to correct inequities resulting when less than all of the employments contributing to the employe's silicosis are forced to provide payment of his award.

[9] Finally, the Fund urges that section 5500.5 is unconstitutional in that it "purports to invest jurisdiction in the Industrial Accident Commission to apportion the liability and rights of contribution between employers for the payment of a workmen's compensation award subsequent to the rendition of the latter in favor of an employee," in violation of the limited jurisdiction conferred upon the commission by section 21 of article XX of the state Constitution. However, supplemental apportionment proceedings likewise constitute a reasonable step in the creation and enforcement of a complete system of workmen's compensation. In Colonial Ins. Co. v. Industrial Acc. Comm., 1946, 29 Cal.2d 79, 82–86, 172 P.2d 884, an award in favor of an employe disabled by silicosis, and against only one of the employers, was affirmed with the further holding and order that "petitioner [the insurance carrier] shall have the right to have determined the issue of apportionment among the carriers and the employer while uninsured, and the case is remanded to the * * * Commission for the purpose of making such apportionment, and ordering the other carriers and the employer to reimburse petitioner accordingly." See also Fireman's Fund Indemnity Co. v. Industrial Acc. Comm., 1952, 39 Cal.2d 831, 835–836, 250 P.2d 148. The Fund's contention on this point is without merit.

[10] Petitioner also contends that the award against it cannot stand in its present form, because made directly in favor of the employe, rather than as an order of reimbursement of an employer who had previously paid the award to the employe under the provisions of section 5500.5. We are persuaded that this contention is meritorious.

The first paragraph of the section provides that "Where a claim for compensation benefits is made on account of an occupational disease which may have arisen out of more than one employment, the application [for compensation benefits] shall state the names * * * of all employers * * * [Provisions follow for joinder of omitted employers at or prior to the first hearing.] Subsequent to the first hearing the commission shall join as a party defendant any additional employer when it appears that such employer is a proper party, but the liability of such employer shall not be determined until supplemental proceedings are instituted."

The second paragraph states that "the employee * * * or his dependents, may elect to proceed against any one or more of the employers named in the application.

Where such an election is made * * * any award * * * shall be a joint and several award as against any two or more employers who may be held liable * * [and although during the proceeding additional proper parties may be joined] the liability of such [joined] employer shall not be determined until supplemental proceedings are instituted. Any employer joined as a defendant subsequent to the first hearing or subsequent to the [employe's] election * * * shall not be entitled to participate in any of the proceedings prior to the commission's final decision * * * but may be permitted to ascertain from the employee or his dependents [certain limited information] * * * On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted." The third paragraph of the section provides that within one year after the award, any employer held liable to the employe "may institute proceedings before the commission for the purpose of determining an apportionment of liability or right of contribution * * *."

The next three paragraphs set forth the special provisions concerning silicosis resulting from underground metal mining, such as here involved. It is first stated that "In any [apportionment or contribution] proceeding * * * [involving] silicosis in underground metal mining operations, the determination of the respective rights and interests of all of the employers joined in the proceedings either initially or supplementally shall be as follows:" Next is a provision that all employers whose mining employments contributed to the silicotic exposure "shall be jointly and severally liable." Then follows the provision that "If any of the employers who have not contributed to payment of the original award shall be without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, then upon such showing being made to the satisfaction of the commission, it shall make an award in favor of the employer or employers who have paid the original award, payable out of the" Subsequent Injuries Fund. Next come the legislative declarations of public policy and public welfare, of the special character of underground metal mining with respect to silicotic hazard and investment hazard, and of the inequity arising if less than all of the employers involved are charged with total ultimate liability. This sentence then follows: "Therefore the Legislature finds that, *to the extent that the commission determines that proper contributions to a joint and several award* for compensation for silicosis *cannot be enforced against an employer* who is or was engaged in underground metal mining for any of the above reasons, it shall direct that contribution shall be paid, either *directly or by way of reimbursing any employer or employers who have paid said award,* by payment from the" Subsequent Injuries Fund. (Italics added.)

In the present case, as already noted, the award was directly in favor of the employe and against four "defendants," including Subsequent Injuries Fund, all of which were denominated as "insurance carriers." This procedure does not find support in the statute. Although section 5500.5 is anything but a model of clarity and precision, its general tenor with respect to payments from the Fund contemplates that it is failure of some of the employers to "contribute to payment of the original award" which in turn will give rise to a right of contribution from the Fund in favor of employers who have paid, and that such right of contribution is to be determined separately from the award made in favor of the injured employe. The section in specific and positive terms directs the commission to "make an award [for reimbursement] in favor of the employer or employers who have paid the original award," and it is only four rather long sentences later that the statement appears that the Legislature "finds" that the commission "shall direct that contribution shall be paid [from the Fund], either directly or by way of reimbursing any employer or employers." This legislative "finding," viewed in the light of its context, does not appear to have been intended to authorize in initial proceedings *an original award to the employe* to be paid directly from the Fund.

The Fund suggests that, since under the statute its liability is secondary and arises only *after* an original award in favor of the employe, the language of the "finding" concerning payment of contribution "directly" from the Fund appears to mean that *the employer entitled to contribution* may benefit in either one of two ways to be designated by the commission in its award of contribution from the Fund. The alternatives are: 1. The employer (or carrier) may be required to pay the total award and receive in reimbursement from the Fund that portion of the total which the commission then or subsequently determines upon the facts of the case and in accord with the law to be apportionable against the Fund. 2. The commission upon determining the apportioned share for which each employer (or carrier) is liable may so frame the award that payments from each employer shall constitute only his apportioned liability and the payment due from the Fund shall be paid directly to the claimant.

At first glance the second of the alternatives above stated may appear to be essentially the same as the procedure in this case, but upon reflection there is seen to be a substantial difference. In the case before us the apportionment as against certain employers and the Fund was made in the primary proceeding begun by the employe. In the second of the alternatives suggested by the Fund the apportionment, while requiring a payment directly from the Fund to the employe, would be made not in the original proceeding inaugurated by the employe but in a subsequent proceeding incepted by an employer (or carrier). From the standpoint of the employe it is desirable that the initial proceeding be kept as simple as possible, and that the employe should not be concerned with whether all of his employers or their insurance carriers have been sought out, or of even participating as an active party in proceedings necessary to determine the ultimate apportionments of liability as among the employers and the Fund. In fact, previous to the adoption of section 5500.5, we had already held in Colonial Ins. Co. v. Industrial Acc. Comm., 1946, supra, 29 Cal.2d 79, 82–86, 172 P.2d 884, that the employe could look to any one or all of his prior employers and that their liability was joint and several.

Furthermore, section 5500.5 itself distinguishes materially between the initial proceeding by the employe looking directly toward his compensation benefits as against any one or more available employers and subsequent proceedings (in which the employe is not interested) to the end of apportionment among multiple employers or carriers. As hereinabove shown the section provides that "the employee * * * or his dependents, may elect to proceed against any one or more of the employers named in the application," and although during the proceeding additional parties may be joined "the liability of such [joined] employer shall not be determined until supplemental proceedings are instituted." Also it is provided that "On supplemental proceedings * * * the right of the employer to full and complete examination or cross-examination shall not be restricted." It would thus appear to be a more orderly procedure and more in keeping with the general intendments of section 5500.5 for the commission to make its initial determination solely as between the employe or his dependents and the one or more of his employers (or their carriers) then available, leaving to supplemental proceedings the ultimate apportionment as among the several employers and the Fund.

The following considerations lend further support to the conclusion above announced. Bearing in mind that in the original proceeding by the employe each employer named and against whom an award can be made is jointly and severally liable for the entire award it becomes obvious that the provision permitting an employer (who has been held liable) to institute supplemental proceedings to compel apportionment as among all potentially liable employers and, in a proper case, the Fund, is at least primarily for the benefit of the employers, rather than for the benefit of the employe.[2] The attempt to include the Fund in the primary proceeding as, in effect, an employer or insurance carrier against whom a portion of the original award might be allocated would seem to tend to confuse and delay rather than to simplify or expedite recovery by the employe from the employer or employers against whom he has elected to proceed. Emphasizing this consideration is the provision of the section that "At any time within one year *after the commission has made an award* for compensation benefits * * * any employer held liable under such award may institute proceedings * * * for the purpose of determining an apportionment of liability or right of contribution." (Italics added.) In addition, as noted, it is only upon a showing that those employers who have not contributed to payment of the original award are "without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions," that the right of reimbursement from the Fund arises. As pointed out by the Fund, this showing would necessitate proof which might not be available until it had been first determined whether a particular employer or insurance company was or was not actually able to satisfy the award; i. e., attempted enforcement of an award might well be a reasonable element of such a showing.

Respondent commission urges, however, that petitioner has not shown that the results would have been any more favorable to it if the contribution award against it had been issued in proceedings separate from those in which the employe's award was made. However, where the statutory provisions giving rise to a right of contribution also provide the procedure to be followed, it is fundamental that the commission should conform to the legislative directive.

For the reasons stated the contribution award against petitioner is annulled and the matter is remanded for further proceedings not inconsistent with the views herein expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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48 Cal.2d 408

Application of C. L. ATCHLEY for a Writ of Habeas Corpus.

Cr. 5749.

Supreme Court of California,
In Bank.
April 23, 1957.

Rehearing Denied May 22, 1957.

Original habeas corpus proceeding. The Supreme Court, Schauer, J., held that the evidence was insufficient to show that any bargain had been made for pleas of guilty or that defendant had not been adequately represented by the public defender.

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[2] We do not now have before us, and hence express no opinion concerning, whether any right to payment from the Subsequent Injuries Fund would or constitutionally could arise in favor of the employe in a case where none of his employers is within the commission's jurisdiction or subject to enforcement of an award in favor of the employe, either directly or through solvent insurance carriers. Since conceivably the factual hypothesis suggesting this question might some time arise, it would appear to be a proper subject for timely legislative attention to the end of making it clear whether there is or is not a legislative intent to impose, or to attempt to impose, on the Subsequent Injuries Fund (which means the taxpayers of the state, not the mining industry) the total ultimate liability for the defined silicotic hazard in cases where there is no solvent and available employer or carrier.

Petition denied and order to show cause discharged.

1. Habeas Corpus ⚷90

In original habeas corpus proceeding in Supreme Court, findings and report of referee were not binding upon Supreme Court, although due regard would be given to referee's opportunity to observe demeanor of witnesses and to weigh their statements with their manner on the stand.

2. Criminal Law ⚷268

Mere advice or assurance by private attorney to a defendant accused of crime will not vitiate a plea entered in reliance thereon.

3. Criminal Law ⚷641

Generally speaking, when a public defender is appointed to represent a defendant accused of a crime, he becomes attorney for such defendant for all purposes of case and to same extent as if regularly retained and employed by defendant.

4. Habeas Corpus ⚷85.5(1)

In habeas corpus proceeding, evidence was insufficient to establish that any bargain had been made as to punishment or that prisoner had not been adequately represented by public defender. Canons of Professional Ethics, American Bar Association, Canon 5; West's Ann.Bus. & Prof. Code, § 6068(c, e).

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Michael di Leonardo, San Jose, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., and Joseph L. Heenan, Dist. Atty., Marysville, for respondent.

SCHAUER, Justice.

By his petition for habeas corpus C. L. Atchley, an inmate of Folsom State Prison, attacks the validity of a judgment of conviction of first degree murder and of assault with a deadly weapon with intent to commit murder. His basic contention is that his pleas of guilty to the charges of murder and the described assault, and his stipulation that the murder was of the first degree, are vitiated by violations of fundamental constitutional rights, particularly by asserted inadequacy and misrepresentation of defense counsel, as hereinafter described. We have concluded that, on the contrary, petitioner was ably and faithfully represented by his trial counsel and benefited by such representation, and that the relief sought should be denied.

The petition for habeas corpus alleges that petitioner is "an uneducated person, who can only, with great difficulty, read, or understand very simple words," and that "a 'friend' whose qualification cannot be revealed in this action, prepared this petition for your petitioner in the interests of justice." This court issued an order to show cause and appointed counsel for petitioner. By affidavits and argument it developed that petitioner's contentions of law rested upon assertions of fact which were controverted by the attorney general, who represents respondent warden. This court appointed a referee to take evidence and make findings and a report upon the following questions:

Was there unqualified, untrue factual representation of the public defender, petitioner's counsel, that a responsible officer of the state had entered into a bargain purporting to commit the state to give petitioner a lesser punishment than he might otherwise receive, in exchange for pleas of guilty; was such representation apparently substantially corroborated by acts or statements of a responsible state officer; and did petitioner change his pleas from not guilty to guilty in reliance in good faith upon such representation and not in the exercise of his own free will and judgment? (See People v. Gilbert (1944), 25 Cal.2d 422, 443, 154 P.2d 657.)

Did the public defender fail to have reasonable consultation with petitioner, unreasonably refuse to present witnesses suggested by petitioner, or otherwise fail to represent petitioner properly and effectively?

At the hearing concerning the foregoing questions, the referee diligently performed his duty and petitioner's present court-appointed counsel diligently represented petitioner. The referee determined that the answer to the question first stated above, in its entirety and in each part, is "no." As to the second question stated above, the referee determined that the public defender did not fail to have reasonable consultation with petitioner, but that the public defender did "fail to represent defendant [petitioner] properly and effectively." The referee expressed his high regard for the integrity and ability of the public defender, but explained that he (the referee) reached his last quoted determination because "for some unexplained reason, from the very first, it is apparent * * * [that the public defender] did not want to represent defendant," and because the public defender refused to call one Onis Belt as a witness for defendant-petitioner.

It is petitioner's theory that the shootings which resulted in his convictions were in self-defense, and that Belt witnessed and could have testified to circumstances of the shootings which would have supported petitioner's claim of self-defense. The public defender told petitioner at the time of trial, and testified before the referee, that he would not use Belt as a witness because he feared that Belt's testimony would be discredited and that petitioner, if he relied on Belt's discreditable testimony, would receive the death penalty. It was the opinion of the referee that the public defender might properly have refused to present Belt's testimony if counsel had been "sure" that such testimony would be false, but that because counsel was only "suspicious" that the testimony would be false and because petitioner, informed by counsel that he might receive the death penalty if Belt's testimony were used, still insisted that he wished Belt to testify.

[1] The referee's findings and report are not binding upon this court (In re Egan (1944), 24 Cal.2d 323, 332, 149 P.2d 693; In re Mooney (1937), 10 Cal.2d 1, 17, 73 P.2d 554) but in considering his determinations we give due regard to his opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand (In re Mitchell (1950), 35 Cal.2d 849, 855, 221 P.2d 689; In re Marvich (1946), 27 Cal.2d 503, 516, 165 P.2d 241; In re De La Roi (1945), 27 Cal.2d 354, 364, 164 P.2d 10). Our determinations in this matter, both those which agree with the report of the referee and those which differ from his report, are based upon consideration of the following matters revealed by the affidavits filed by both parties, the transcript of proceedings on petitioner's arraignment, the transcript on petitioner's appeal from the judgment of conviction, and the transcript of the proceeding before the referee.

According to prosecution evidence, the following facts led to the charges and convictions of murder and assault: In August, 1953, petitioner met Helen, the victim of the subsequent assault. Beginning shortly thereafter, petitioner and Helen lived together as man and wife until the end of June, 1954. Immediately after petitioner and Helen separated, Helen met Mr. Hilliard. On July 10, 1954, Helen and Hilliard intermarried. Helen and Hilliard resided in a cabin near the ranch house of Richard Moore. Petitioner unsuccessfully tried to persuade Helen to return to him. On July 27, 1954, petitioner, armed with a revolver, went to the Moore ranch, entered the ranch house, and shot Moore. In the ranch house was a shot gun. Moore ran from the house and fell, dying. Helen ran from the porch of the house to Moore. Petitioner came from the house carrying both the shot gun and the revolver. With the revolver petitioner shot Moore again and also shot Helen twice. As a result of the shots Moore died and Helen was seriously wounded. Petitioner stated several times, shortly after the shootings, that he had killed both Moore and Helen. On the day of the shootings, petitioner told the district attorney and the sheriff that he had shot both Helen and Moore. He suggested that he shot Moore after the latter threatened to shoot him, but he did not then intimate that Helen had a weapon or that she threatened him. That fact becomes significant because of the claims that he now makes, as hereinafter developed.

When petitioner was arraigned in the justice court, the public defender was appointed as his counsel. In the justice court and again when petitioner was arraigned in the superior court the public defender asked to be relieved of his appointment. The record and the referee's report disclose that on both occasions this request was on the stated ground that the public defender believed that petitioner had sufficient assets to employ private counsel. The committing magistrate and the superior court judge reached the contrary conclusion, and thereafter the public defender faithfully and efficiently represented petitioner. Although petitioner testified before the referee that the public defender had not desired to represent petitioner, it does not appear that the public defender's personal feelings in this respect (if he had any such feelings other than those hereinafter related which arose during the trial in respect to the proposed use of Belt and one Morse as witnesses) interfered with his performance of his duty.

Petitioner pleaded not guilty to the charges of murder and assault, and trial before a jury began. The People presented evidence on Wednesday and Thursday, November 17 and 18, 1954. After the second day of the taking of prosecution evidence, petitioner and the public defender disagreed as to how the defense of petitioner should be handled.

On Friday, November 19, 1954 (before the taking of additional prosecution evidence began and out of the presence of the jury), the public defender, petitioner, and the district attorney appeared before the trial judge and the colloquy quoted in the margin occurred.[1] From this col-

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[1] "Mr. Schoenig [public defender]: * * A matter has come up which I have discussed with Mr. Atchley and we are now at opposite viewpoints on putting on the case of Mr. Atchley. Mr. Atchley desires it put on in one way and I will absolutely not put it on that way * * * [T]he way we both feel, there is no possible way we can work together anymore on the case * * * I ask at this time that the Court allow me to withdraw from the case. Mr. Atchley is in Court, if your Honor desires to ask him any questions. * * *

"The Court: I don't desire to ask him any questions. * * * I don't know what your differences of opinion on strategy are or whatever it may be, but I do know this case has gone for a week now and I am not going to relieve any attorney from his obligation in connection with prosecuting or defending it through to a finish. It will probably take a couple or three more days and therefore it will be between you and your client, the Defendant in the case, to work out your program, and if he insists on certain matters that you feel are not to his interests, and you can't convince him to the contrary, I would say that you should probably, as his attorney, go along with him.

"Mr. Schoenig: I can't, Your Honor, I would swear on the Bible I cannot do it, Judge.

"The Court: You don't have to take the stand, you don't have to be sworn, you don't have to do anything, all you have to do is conduct the case.

"Mr. Schoenig: * * * I can't do it the way it would be run [by petitioner-defendant] * * * I passionately state I can't do it, Judge.

"The Court: Then don't do it, do it your way, you are still on the case. * *

"The Defendant: I ain't allowed to have all my witnesses?

"The Court: You certainly are.

"The Defendant: That is what I mean.

"Mr. Schoenig: If that is the case, Judge, I believe it will be an injustice to Mr. Atchley to allow me to go ahead with it, for his interests.

"The Court: You will conduct it as he wants to conduct it.

"Mr. Schoenig: I just don't think I can do a good job for him. * * *

"The Defendant: It wouldn't be a fair trial if he doesn't think he can give me justice.

"Mr. Heenan [district attorney]: If the Court please, would it be proper for the Court to ask the Defendant if loquy, standing alone, it might seem that the trial judge forced petitioner to continue to be represented by the public defender against the wishes and judgments of both the public defender and his client, in order that the county might be spared loss of time and expense. However, as will hereinafter be related, it appears from the record viewed as a whole that petitioner and the public defender decided, without any misrepresentation to, or coercion of, petitioner by the public defender or by the trial judge or by the prosecuting attorney, that petitioner should change his plea and should not present a defense which the public defender honestly and for reasonable cause believed would be false, would be discredited by the jury, and might well result in the death penalty.

After the colloquy quoted in footnote 1, the People presented more evidence to the jury. Then, at noon on Friday, November 19, 1954, the case was adjourned until Monday morning, November 22, 1954. On that Monday morning the trial judge, at the request of the public defender, permitted petitioner to change his pleas. Petitioner personally pleaded guilty and it was stipulated that the murder was of the first degree.

On Friday, November 26, 1954, the trial judge sentenced petitioner to life imprisonment on the first degree murder conviction and ordered that the sentence on the assault conviction and the sentence on the murder conviction run concurrently.

Petitioner in propria persona appealed from the judgment of conviction and the judgment was affirmed. (People v. Atchley (1955), 132 Cal.App.2d 444, 282 P.2d 160.) On his appeal petitioner ineptly presented the following contentions (at page 446 of 132 Cal.App.2d, at page 162 of 282 P.2d): "that he was not allowed to seek his own attorney; that he was not allowed to produce witnesses and not permitted a jury trial; * * * that the judge and district attorney were guilty of misconduct; that his attorney sold him out to the prosecution." The District Court of Appeal concluded that "The record is utterly devoid of any support for any of the foregoing contentions."

In his petition for habeas corpus petitioner suggests that he might be able to establish variations of the above contentions by supplementing the colloquy quoted from the record on appeal, ante, footnote 1, 310 P.2d 18, with evidence outside that record.

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he agrees with Mr. Schoenig's request to withdraw?

"The Court: What difference does that make? You would have to try it all over again.

"Mr. Heenan: No, but so far the Defendant hasn't either agreed or disagreed with the motion to withdraw.

"Mr. Schoenig: It is all right with me.

"The Court: I don't know what the difference is between them, but there is some difference between them. * * * That happens frequently in many cases but it doesn't necessarily mean that after a case has gone on at considerable expense and time * * *, that the mere whim of one or the other or both should upset the whole thing and try it over again with some other counsel.

"Mr. Schoenig: I might state to the Court that it isn't something that came up prior to the trial. * * * It is something which has arisen in the last couple of days, and I can't do it, Judge.

"Mr. Heenan: Would it be proper for the Court to possibly appoint another attorney to confer with the Defendant and Mr. Schoenig over the week-end and prior to the presentation of the defense in this case?

"The Court: Yes, we haven't reached the defense case yet * * * I would be willing to do that and see, maybe by Monday or when the case reaches the defense, there would be some clear understanding of what it is all about.

"The Defendant: I would like to make one motion, Judge—

"The Court: * * * [Y]ou still have an attorney and any motion that is made will be made by the attorney.

"The Defendant: If he is going to put me through the trial, I would like to have one from here or—

"The Court: I know, but you had plenty of time to get an attorney before this case—

"The Defendant: I didn't have the money to hire one with.

"The Court: You have been adequately represented thus far in this case. Let's adjourn to the courtroom."

There is ample, credible evidence before the referee which supports his conclusion that "There were no untrue factual representations made by the Public Defender, the District Attorney, the Judge of the Superior Court or anyone else. The Defendant knew exactly what punishment he would receive if he plead[ed] guilty and this punishment he did receive." The trial judge testified before the referee that "I believe Mr. Heenan [district attorney] and the public defender Mr. Schoenig—I don't know whether the defendant was with them, or not—came into the Chambers and advised me for the first time that there might be a change of plea; and wanted to know what my position would be in the event it was a plea of guilty of first degree murder. And, I think, I assured them that it would not—that I would not inflict the extreme penalty of the law. I want it understood that is not a practice of mine in the general felony cases; I have never bargained with a defendant, in exchange for a plea, any sentence, but I do feel in a murder case that it is only fair before a defendant enter[s] a plea of guilty that he knows the extreme penalty is not going to be imposed." The district attorney testified to the same effect. The public defender testified that "The summation [of his discussions with the district attorney concerning change of pleas] was * * * first degree murder, no death penalty, plead [guilty] to count 2, and that he [the district attorney] would not oppose having count 2 run concurrent with the first degree"; the public defender communicated this "summation" to petitioner and petitioner told the public defender that "he would accept if it meant he would not get the death penalty." Petitioner's contrary evidence (that the public defender assured him that petitioner "would only receive a sentence of '5 to life' ") does not appear probable.

As already indicated, a crucial question appears to be whether the public defender, after the trial judge refused his request to withdraw from the case, and before petitioner changed his pleas, could properly decide, and advise petitioner, that he (the public defender) did not believe defendant's proposed witnesses and that in the public defender's opinion the production of such witnesses before the jury would result in the jury's disbelieving the witnesses and imposing the death penalty, and in perjury charges against such witnesses. There can be no doubt of the honesty of the public defender's actions in this regard, but there is a question of law as to their propriety. In this connection the referee concluded that petitioner was, in effect, induced to change his pleas because the public defender refused to present the defense, the trial judge refused to let petitioner present the defense personally or obtain a counsel who would present such defense, "and faced with this situation the change of plea probably appeared to defendant as the only possible manner in which he could save his life."

The public defender in his opening statement to the jury said that petitioner proposed to prove self-defense.

The public defender testified as follows before the referee: Petitioner in interviews with the public defender concerning his defense consistently claimed that he entered the ranch house without intent to kill Moore and that he shot Moore because Moore reached for Moore's shot gun and threatened to kill petitioner. With reference to petitioner's firing of shots outside the ranch house petitioner on various occasions changed materially the substance of his stories to the public defender; "initially he had never said anything about any weapon with Mrs. Hilliard; but as the trial kept coming up, then he had a gun in Mrs. Hilliard's hand. And this is where I started getting leery." Then before commencement of the trial petitioner told the public defender that Onis Belt and James A. Morse had observed and would testify to circumstances which would tend to show that petitioner shot both victims in self-defense. The public defender after commencement of the trial interviewed Belt once and Morse twice. In the public defender's first interview, their accounts of the shooting by petitioner substantially agreed with petitioner's latter account in that both Belt and

Morse said that they saw a weapon in Helen's hand. Thereafter, Morse returned and told the public defender that "he was afraid he wouldn't be too good a witness; possibly he didn't see all that; and maybe Belt was the only one that saw it"; during his second conversation with the public defender, Morse indicated that he had not seen the shootings.

The public defender privately told petitioner that "in my opinion if they [Belt and Morse] went on under cross-examination they would be torn to shreds; * * * it might be the death penalty; and I couldn't afford to take that chance for him." Petitioner replied that nevertheless he wanted Belt and Morse to testify. The public defender said that in that event he would ask to withdraw. Petitioner replied that he would personally present the testimony of Belt and Morse.

Then occurred the colloquy with the trial judge quoted ante, footnote 1, 310 P.2d 18.

After that colloquy and the adjournment of trial for the weekend, according to the public defender's testimony before the referee, "it was still Mr. Atchley's intent he wanted them to testify over my objections, and I said to him, I have no way of checking out their story to prove I am wrong; I have no investigator in my office. I said, if you feel they will exonerate you, and if you wish to concur, we will allow the Sheriff to investigate the statements, and let him report back to us." Petitioner agreed. As the result of the sheriff's investigation, the public defender testified, "I felt that they [Belt and Morse] weren't at the scene when the shooting took place. * * * I felt at best they may have been there, but [at the time of the shooting] they were gone." Furthermore, because Morse had signed a job application at a place distant from the shooting on the date of the shooting, the public defender believed that it was "improbable" although not "impossible" that Morse had been at the scene when the shooting occurred. Neither Belt[2] nor Morse appeared before the referee.

On the Monday morning before the trial resumed and petitioner changed his pleas, the public defender told petitioner and petitioner's family that "if Belt and Morse testified I felt it would be the imposition of the death penalty and they would be open to perjury charges, in my opinion." Petitioner agreed that Belt and Morse should not be produced and asked the public defender "to find out, or to ask the District Attorney if he could have a second degree plea and get the count 2 dismissed; I said, I would try"; however, the public defender correctly told petitioner that prior to trial the district attorney had refused to make such an arrangement and that he would probably still refuse. Thereafter, the "bargain" described ante, 310 P.2d 20, was negotiated and petitioner changed his pleas and received the sentence for which he "bargained."

Petitioner's testimony before the referee is contrary to that of the public defender in many respects. The referee believed the testimony of the public defender but concluded that the public defender should have presented a defense which the public defender believed was false and let petitioner gamble on the chances that the jury might impose a death sentence or a life sentence for murder, or might convict petitioner of a lesser offense than murder, or might acquit petitioner. Instead, the public defender chose to assure petitioner a life sentence.

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[2] Petitioner has presented an affidavit of Belt. This affidavit avers that Belt saw Mrs. Hilliard shoot at petitioner before petitioner shot her; petitioner knocked at Moore's door; Moore opened the door and said, "I'll just kill you"; petitioner said, "Don't go for that gun"; and Belt then heard two shots. The affidavit of Belt does not mention Morse.

The People have filed an affidavit of Morse. This affidavit avers that before the shooting Morse and Belt visited Mrs. Hilliard in a cabin outside Moore's house; a visitor unknown to Morse arrived and Mrs. Hilliard left the cabin; Morse heard a shot and he and Belt at once went toward their car; other shots were fired; Morse did not see either petitioner or the deceased Moore; Morse and Belt immediately drove away.

[2, 3] Mere advice or assurance by a private attorney to a defendant accused of crime will not vitiate a plea entered in reliance thereon. (People v. Gilbert (1944), supra, 25 Cal.2d 422, 443, 154 P.2d 657.) Generally speaking, "when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant." (In re Hough (1944), 24 Cal.2d 522, 528–529, 150 P.2d 448.) Nothing appears in the present record which would require or justify considering the public defender here in a different light from that in which a private attorney would be considered.

[4] We recognize the following ethical principles which govern the conduct of an attorney who undertakes to represent a defendant in a criminal case: Canon 5 of the Canons of Professional Ethics of the American Bar Association provides, "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." Subdivision (c) of section 6068 of the Business and Professions Code provides that it is the duty of an attorney "To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense." Subdivision (e) of the same section provides that it is the duty of an attorney "To maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

It does not appear that the public defender here violated the foregoing duties. He had the right and duty to control the trial which was under way when petitioner and his counsel disagreed as to the advisability of presenting petitioner's claimed defense. Counsel then ably and diligently and correctly explained to petitioner counsel's view of the probable effect of the presentation of petitioner's claimed defense. Petitioner's counsel did not give up or destroy petitioner's claimed defense; rather, he fully explained to petitioner what, in counsel's honest opinion, would be the result of presenting such claimed defense and petitioner, fully advised in the premises, accepted counsel's opinion and determined to plead guilty.

In the circumstances, counsel's representation of petitioner was not "pro forma" rather than zealous and active, and such representation did not deprive petitioner of the right to the effective aid of counsel in any sense cognizable on habeas corpus; rather, it is our opinion that even if the record now before us (which, of course, includes matters which were not before the District Court of Appeal in People v. Atchley (1955), supra, 132 Cal.App.2d 444, 282 P.2d 160) were here on appeal, it would not impel the conclusion that there was any reversible error. (Cf. People v. Avilez (1948), 86 Cal.App.2d 289, 296–297, 194 P.2d 829; People v. Manchetti (1946), 29 Cal.2d 452, 458–459, 175 P.2d 533.)

For the reasons above stated, the order to show cause is discharged and the petition is denied.

SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

GIBSON, C. J., concurs in the judgment.

150 Cal.App.2d 551

Klazina GLANTZ, Plaintiff, Cross-Defendant and Respondent,

v.

Robert GLANTZ, Defendant, Cross-Complainant and Appellant.

Civ. 9002.

District Court of Appeal, Third District, California.

April 29, 1957.

Action by wife for separate maintenance on ground of extreme cruelty. From adverse judgment of the Superior Court, Stanislaus County, H. L. Chamberlain, J., the husband appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was insufficient to support a separate maintenance decree when only acts of cruelty consisted of a slap on the arm during mutual quarrel and refusal by husband to sleep in same bedroom with wife for two nights.

Decree reversed in part and affirmed in part.

1. Husband and Wife ⚿297

In action by wife for separate maintenance on ground of extreme cruelty, evidence was insufficient to support separate maintenance decree based on acts consisting only of slap on arm during mutual quarrel and refusal by husband for two nights to sleep in same bedroom with wife. West's Ann.Civ.Code, § 94.

2. Husband and Wife ⚿299½

In action by wife for separate maintenance on ground of extreme cruelty, it was within discretion of court to enter order requiring husband to pay wife $50 per month for support of child, which was born after separation, from date action was filed pending outcome of litigation and to award custody of child to mother.

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Philip O. Solon, Oakland, for appellant.

Rodin, Nelson & Coffin, Turlock, for respondent.

VAN DYKE, Presiding Justice.

[1] This is an appeal from a judgment for separate maintenance. The parties hereto were married January 19, 1950, in the Netherlands, to which country appellant had gone anticipatory to the marriage and after the parties had corresponded for some time. Respondent was a war widow with a child. After the marriage, appellant returned to his home near Turlock, California, and on July 2, 1950 respondent arrived, having left her child in the Netherlands. Appellant was and for long had been residing in the home of his parents. His father ran a dairy. Appellant worked about the place and apparently had never done anything else. On September 5th, after two months' cohabitation, respondent left appellant and has not lived with him since. On October 10th she brought suit for separate maintenance, alleging extreme cruelty as her cause of action for divorce. She specifically pleaded that on September 1st appellant had struck her with his fist, and that on September 3d he had refused to cohabit with her and to treat her as his wife. Intermediate the separation and the filing of suit by respondent, efforts were made to induce her to return. Appellant offered, through the aid of his father, to provide the couple with a separate home. Respondent viewed various residences with appellant and his father and selected one, upon which the father made the down payment, and arranged the transaction so that the accruing payments would amount to $35 per month. However, respondent insisted before she moved in with her husband that the house be completely paid for, stating as her only reason that she feared that the appellant would be unable to make the monthly payments. Her demands not being met, she refused to return to her husband.

At the trial of this case, which took place almost five years after it was commenced, respondent testified that on one occasion and while they were having a quarrel, her husband slapped her on the arm sufficiently hard to leave a red mark, and that for two nights before she left appellant had slept in a separate bedroom. She said these were the only specific acts of cruelty which she could charge against her husband, and on cross-examination she said that her grievances were really against her in-laws and not against appellant. She complained that appellant failed to take her side against his mother. There was no other evidence of cruelty.

Appellant contends that the evidence is insufficient to support the trial court's order for separate maintenance, which ordered that he pay to respondent $50 per month from October 21, 1950 and that he pay to her for the support of the minor child that was born after the separation the further sum of $50 per month, beginning at the same time. Custody of the child was awarded to the mother.

[2] Appellant's contention that the evidence is insufficient to support the separate maintenance decree must be sustained. A slap on the arm during a mutual quarrel and a refusal for two nights to sleep in the same bedroom is wholly insufficient to support a finding that appellant inflicted upon respondent grievous bodily injury or grievous mental suffering. Civil Code, Sec. 94; Truax v. Truax, 62 Cal.App.2d 441, 443–444, 145 P.2d 88; Julson v. Julson, 110 Cal.App.2d 797, 799–801, 243 P.2d 558. It appears that, when the action was filed, an order was made, effective October 21, 1950, for payment by appellant to his wife for the support of their child of the sum of $50 per month pending the outcome of the litigation. It appears also that little has been paid, but the exact amount does not appear. Under the circumstances, it was within the discretion of the court to make the order concerning child custody and child support, and we see no reason for disturbing that part of the decree.

The decree appealed from is reversed, except in so far as it grants child custody and support and directs appellant to pay the amounts awarded to respondent therefor.

PEEK and SCHOTTKY, JJ., concur.

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150 Cal.App.2d 576

R. A. HODGES, Plaintiff and Respondent,
v.
Richard Thacker BAURMANN and Donna Baurmann, Defendants and Appellants.
Civ. 21818.

District Court of Appeal, Second District, Division 1, California.
April 30, 1957.

Action was brought for damages sustained as result of collision of automobiles at intersection. The Superior Court, Ventura County, Wm. A. Reppy, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Drapeau, J. pro tem., held that question whether plaintiff was contributorily negligent was for jury.

Judgment affirmed.

1. Automobiles ⟾171(13)

A reasonably careful driver, approaching an intersection with a go-ahead signal, should be vigilant and alert, and should not blindly propel his motor vehicle into path of approaching vehicle that he knows will be unable to obey red signal and stop.

2. Automobiles ⟾245(80)

If reasonable minds may draw different conclusions on question of contributory negligence in action involving intersectional collision of automobiles, question is one of fact for jury.

3. Automobiles ⟾245(80)

In action for injuries sustained in collision of automobiles at intersection, question whether plaintiff was contributorily negligent in entering intersection on green light when plaintiff saw defendant's automobile approaching intersection at high speed, was for jury.

4. Appeal and Error ⟾1050(1)

In action for injuries sustained in collision of automobiles at intersection, wherein defendants' witnesses testified that plaintiff's dog was in the front seat of automobile and that plaintiff was looking down at the dog prior to collision, and wherein plaintiff testified that dog was in back seat and that the collision propelled the dog into front seat, admission of testimony of witnesses for plaintiff that habits of the dog were such that he would never ride in front seat was not prejudicial error.

5. Damages ⚷208(1)
New Trial ⚷74

In action for injuries, it was duty of jury to fix amount of damages and then duty of trial judge to determine whether, in all circumstances in the case, damages were fair and just and reasonable.

6. Appeal and Error ⚷932(1), 933(1)

District Court of Appeal was required to presume on appeal from judgment for plaintiff in personal injury action that jury in fixing amount of damages and that trial judge in determining whether damages were fair and just and reasonable performed their duty with impartiality.

7. Appeal and Error ⚷1004(1)

Only when passion or prejudice or corruption of a jury is clearly indicated as a matter of law should a reviewing court set aside a verdict for damages as excessive.

8. Damages ⚷132(8)

Award of $27,721.20 for damages sustained in automobile collision was not excessive, where plaintiff testified that he suffered constant pain and had headaches every day after the accident, and medical testimony was that he was subject to a 20 per cent limitation of motion referable to shoulder injury and would have pain and limitation for the remainder of his life.

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Lynch & Reilly, by Chas. H. Lynch, Santa Barbara, for appellants.

Neil D. Heily, Oxnard, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff's and defendants' automobiles collided at the intersection of highways 101 and 101-a in Ventura County. This point is midway between Oxnard and Ventura on the coast highway.

Traffic there was controlled by red and green lights.

Plaintiff testified that he "had the green light" and that defendants' automobile struck his automobile while it was in the intersection. A witness who was driving a car following plaintiff testified that the light was green when plaintiff entered the intersection.

Defendant driver of the other car in the accident, and two other witnesses for him, all testified that they too saw a green light at the intersection, but in their lane of traffic.

This hopeless conflict in the evidence was resolved by a jury in favor of plaintiff, together with the related issues of contributory negligence and damages. The verdict for plaintiff was for $35,721.20.

The trial judge stated that he would deny a motion for a new trial that followed if plaintiff would remit $8,000 of the verdict and consent to a judgment for $27,721.20. Plaintiff so consented, and judgment followed.

Defendants contend on appeal:

(a) That there was no substantial evidence to support the verdict;

(b) That it was error to admit evidence as to certain habits of plaintiff's dog while riding in the car; and

(c) That the damages were excessive.

The record contains substantial evidence to support the verdict. Defendants' principal contention in this respect is that plaintiff was guilty of contributory negligence because he testified that as he was approaching the intersection at 15 miles an hour, he estimated the speed of defendants' approaching car at 60 or 70 miles an hour. "Therefore," say defendants, "it was contributory negligence for plaintiff to drive his car into the intersection and into the path of their car."

[1] It is true, of course, that a reasonably careful driver, approaching an intersection with a go-ahead signal, should be

vigilant and alert, and should not blindly propel his motor vehicle into the path of an approaching vehicle that he knows will be unable to obey the red signal and stop.

[2] But if reasonable minds might draw different conclusions upon the question of contributory negligence, the question is one of fact for the jury. Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Shiya v. Reviea, 122 Cal.App.2d 155, 264 P.2d 190.

[3] Plaintiff's estimate of the speed of defendants' automobile does not compel a determination that he was guilty of negligence as a matter of law. Moreover, as to this he later testified: "I assumed, me having the green light on him and two cars going ahead of me, I presumed that the man would stop."

Defendants' claim of error in respect of the admission of evidence as to the habit of plaintiff's dog in refusing to ride in the front seat is predicated upon the following: Plaintiff testified that his dog was in the back seat of his car and that the collision propelled the dog into the front seat. Defendants' witnesses testified that the dog was in the front seat and that plaintiff was looking down at the dog. One of the plaintiff's witnesses testified that the dog was in the back seat.

Other witnesses for plaintiff testified, over objection by defendants, that the habits of the dog were such that he would not ever get into the front seat. Defendants contend that it was error to admit in evidence this testimony of habit of the dog.

Authorities involving evidence as to customs and habits of animals are to be found generally in dog-bite cases and are not particularly in point here.

[4] There was no prejudicial error in the admission of this evidence. It shed some light upon a disputed inference: Did plaintiff have his eyes or his mind on the dog, and not on the road? Or was he alert and vigilant, with his eyes and his mind upon the hazards ahead of him?

[5] Finally, with respect to defendants' contention that the damages were excessive. It was the duty of the jury to fix the amount of damages. Then it was the duty of the trial judge to determine whether, in all the circumstances in the case, the damages were fair and just and reasonable.

Plaintiff testified that he suffered constant pain, and that he had headaches every day, conditions that did not afflict him prior to the accident. Medical testimony is that he is subject to a 20% limitation of motion referable to his shoulder injury, and that he will have pain and limitation for the remainder of his life.

[6, 7] This Court must presume that both jury and judge performed their duty with impartiality. It is only when passion or prejudice or corruption of a jury is clearly indicated as a matter of law that a court of appeal should set aside a verdict for damages as excessive. Christy v. Ulrich, 113 Cal.App. 338, 298 P. 135. In Ericksen v. Southern Pacific Co., 39 Cal.2d 374, at page 382, 246 P.2d 642, 647, our Supreme Court states the rule: "The amount of damages fixed by the jury and thereafter approved by the trial court will not be disturbed on appeal unless the evidence shows that the award is so disproportionate to any reasonable limit of compensation as to indicate that it was the result of passion, prejudice, or corruption on the part of the triers of the facts."

[8] Nothing in the record brings this case within the rule stated.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Ethel L. POWELL, Plaintiff and Respondent,

v.

Daniel J. VRACIN and Mary L. Vracin, Defendants and Appellants.

Civ. 21986.

District Court of Appeal, Second District, Division 3, California.

April 25, 1957.

Rehearing Denied May 16, 1957.

Hearing Denied June 19, 1957.

Action for injuries sustained by defendants' baby sitter when, while attempting to retrieve dangerous object with which child had been playing, she used wall opening designed for eventual use as door, but which had not yet been provided with outside steps, and fell and fractured her left ankle. The Superior Court of Los Angeles County, Frank C. Charvat, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence would sustain finding of negligence and did not require finding as a matter of law that the baby sitter had been contributorily negligent.

Affirmed.

1. Negligence 🔑28

Generally, owner of property is under duty to keep in safe condition all parts of premises over which he has control.

2. Negligence 🔑32(2.3)

An invitee is one who goes on premises of another at other's invitation, express or implied, and whose presence there is to their mutual interests.

3. Negligence 🔑32(1)

An owner is required to exercise ordinary care to render his premises reasonably safe for use by invitees thereon.

4. Negligence 🔑66(2)

Forgetfulness of a known danger will not operate to prevent recovery, for to forget is not negligence unless it shows a want of ordinary care; and generally question is for trier of fact.

5. Master and Servant 🔑278(8), 289(15)

In action for injuries sustained by defendants' baby sitter when, while attempting to retrieve dangerous object with which child had been playing, she used wall opening designed for eventual use as door, but which had not yet been provided with outside steps, and fell and fractured her left ankle, evidence would sustain finding of negligence and did not require finding as a matter of law that baby sitter had been contributorily negligent.

6. Negligence 🔑32(3)

A person may be an invitee in a portion of a building and not have that status as to another portion thereof.

7. Trial 🔑243, 296(3)

In action for injuries sustained by defendants' baby sitter when, while attempting to retrieve dangerous object with which child had been playing, she used wall opening designed for eventual use as door, but which had not yet been provided with outside steps, and fell and fractured her left ankle, there was a conflict between instruction, given at defendants' request, with regard to scope of invitation, and court's own instruction that plaintiff was an invitee; but error could not be deemed prejudicial in view of other instructions given and fact that court did not tell jury that plaintiff was an invitee in use of exit she used.

8. Master and Servant 🔑296(8)
Trial 🔑243

In action for injuries sustained by defendants' baby sitter when, while attempting to retrieve dangerous object with which child had been playing, she used wall opening designed for eventual use as door, but which had not yet been provided with outside steps, and fell and fractured her left ankle, giving of instruction on momentary forgetfulness was not error, and it was not error to decline to give requested instruction in conflict therewith.

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James V. Brewer, Los Angeles, for appellants.

Houser & Beam and Elsworth M. Beam, Long Beach, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff entered on a jury verdict in an action for damages for personal injuries.

On October 29, 1953 in the daytime plaintiff fell as she was going out of defendants' house where she was working as a baby sitter.

We shall, in accordance with the rule, state the evidence most favorable to the prevailing party—plaintiff. In defendants' house there was an opening in an outer wall of the dining room leading outside the house. The opening was to be a door eventually. It was filled temporarily with two sliding glass panels and outside those, two sliding screens. The floor level at the opening was about 20 inches higher than the ground level outside. There were no steps from the house to the ground. The ground immediately outside the opening was "real slick," hard, and sloped away from the house. Defendants knew the conditions.

Defendants had several children. Four of them, ranging in age from 2½ to 6 years, were at home the day of the accident. Defendants were not at home and plaintiff was in charge of the children. Plaintiff was in the kitchen. "Hucky," 3½ years old, came into the kitchen with a sharp piece of metal. Plaintiff reached for the metal; Hucky jerked, dodged, and ran out of the house into the yard. Plaintiff called to him and in about two minutes he came back through the glass sliding doors without the metal. Andrew, 2½ years old, was playing in the yard at the time. Fearful that Hucky would get the metal again or that Andrew would get it, plaintiff hurried to the glass sliding door to go to the yard to find the metal before the children got it. She went "out through the glass door, because that was the way he came in and that was the shortest way to the metal." She walked to the door, took hold of the handle, and stepped down. As she stepped down she fell and fractured her left ankle.

[1-5] Defendants first claim plaintiff failed to prove negligence and that she was guilty of negligence as a matter of law. It is argued that the conditions were open and obvious; any danger was open and known to plaintiff; and there was no duty on defendants to warn of danger she already knew.

Generally the owner of property is under a duty to keep in safe condition all parts of premises over which he has control. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 233, 282 P.2d 69. An invitee is one who goes on the premises of another at the other's invitation, express or implied, and whose presence there is to their mutual interests. Boucher v. American Bridge Co., 95 Cal.App.2d 659, 667, 213 P.2d 537. The evidence is uncontradicted that plaintiff was on defendants' premises at their express invitation and to their mutual interests—she was on the premises as an invitee. An owner is required to exercise ordinary care to render his premises reasonably safe for use by invitees thereon. Woodard v. Bank of America, 130 Cal.App.2d 849, 853, 279 P.2d 1018; Hale v. Safeway Stores, Inc., 129 Cal. App.2d 124, 128, 276 P.2d 118.

In Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, the plaintiff fell in stepping from the sidewalk to the gutter, a distance of 15 inches, and was injured. A judgment for the plaintiff was upheld, the court saying, 207 Cal. at page 660, 280 P. at page 120:

> "Negligence is relative to the time, place, and circumstances which bear upon the particular acts under investigation. Each case must depend upon its own state of facts, and so varying are the factors which contribute to produce a result that no hard and fast rule may find practical application in the great majority of cases. * * *
>
> "[207 Cal. at page 663, 280 P. at page 121.] No case has been cited where the distance of the tread from sidewalk to street or from tread to tread in any kind of traffic lane was as great at fifteen inches. * * * We think we may well take notice of the fact that

> steps or treads, whether in public places, or stairways in private residences, or upon public sidewalks or other places built for pedestrian purposes, seldom, if ever, exceed seven or eight inches, and the public has become accustomed to approximately such a distance. A misjudgment by the fraction of an inch is sufficient to disturb the physical equilibrium."

Also see Shellman v. Hershey, 31 Cal.App. 641, 161 P. 132. The evidence as to the nature of the exit, the 20 inches from the floor level to the ground, the slant and slick condition of the ground, was such as to make the question whether defendants were negligent in thus maintaining the exit or whether, if so maintained, it was unsafe or dangerous, one peculiarly for the jury's resolution. Whether the step from the floor level to the ground and the ground immediately outside the opening were so negligently maintained as to render defendants liable in damages was a question of fact for the jury. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

There is no merit in defendants' argument that there is no evidence as to how the accident happened or what caused plaintiff to fall except that she turned her ankle. Plaintiff testified: "[J]ust as I stepped out there, it [her foot] just—well, I just went down"—that her ankle turned "[o]n the ground it was so slanting and hard," and "Q. [By Mr. Beam, attorney for plaintiff]: And then what happened, if anything? A. Well, I don't know. The next thing I knew I was on the ground. Q. Where were you in relation to the house? A. Well, just down at the side, right straight down from the doors."

It is asserted plaintiff was guilty of contributory negligence because she had used the exit once or twice before without falling, knew there was "bare ground" outside, knew the distance from the floor to the ground and that there were other means of exit from the house. Plaintiff had used the exit a time or two before the accident. When Hucky went out with the piece of sharp metal he went close to the sliding door. Andrew was about two feet from that door, sitting on the ground. This was the nearest exit to where Andrew was sitting. Plaintiff testified: "I didn't take time to go over the long ways"—this was 15 to 20 feet shorter—at this time she was more in a hurry to get out. Plaintiff testified further: "But when I went out that door that day, all I was thinking of was getting that piece of metal before either Hucky got it again or Andrews picked it up"—"[w]ell, like I say, I just had that metal on my mind"—that at the moment she took hold of the door handle all she "was thinking of was getting out to get that piece of metal."

Forgetfulness of a known danger will not operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. And generally the question is for the trier of fact. Neel v. Mannings, Inc., 19 Cal.2d 647, 656, 122 P.2d 576; Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 237, 282 P.2d 69. The court in Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, at page 838, 161 P.2d 673, at page 675, 164 A.L.R. 1, stated:

> "In considering those contentions, the rule, as recently stated by this court in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829, is applicable:
>
> " 'But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.'
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> * * *
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> "[26 Cal.2d at page 841, 161 P.2d at page 677.] 'Accordingly, where a situ-

> ation requires an immediate choice between alternative courses of conduct, negligence may not be inferred from an unwise choice, if a reasonable man, under similar circumstances, would choose similarly. And under such circumstances one may be excused if he loses his presence of mind, momentarily forgets, errs in judgment, or omits cautionary measures which should otherwise have been taken, even though the effect of his conduct is to cause him to encounter the danger sought to be avoided. Whether a person in a position of imminent danger acted reasonably is a question of fact for the jury, but in determining the question, conduct must be viewed in the light of the confusion and excitement of the moment and not in view of the circumstances and surroundings of one not in danger.' 19 Cal.Jur. 598. And the rule has been extended to cover rescue of property. Henshaw v. Belyea, 220 Cal. 458, 31 P.2d 348."

It is evident it cannot be said as a matter of law that plaintiff was guilty of contributory negligence.

We have examined the some thirty cases cited by defendants and find none of them factually analogous.

The court on its own motion gave this instruction:

> "I instruct you that the plaintiff was an invitee on the premises in question and that she was an invitee at the time when she sustained the alleged injury for which she has brought this action."

At defendants' request the court charged the jury:

> "In considering whether or not the plaintiff was an invitee of defendants at the time and place of the accident in question, even if you should find that she entered the premises of said defendant as an invitee, you should consider further the scope of the invitation. All the circumstances of a case may sometimes show that an invitee is such for limited purposes only or that her privileges as such have certain limitations. When such is the case, if she goes beyond those limits, if she enters part of the premises, or makes some use thereof, not embraced within the scope of her invitation, she thus and then loses her status as an invitee.
>
> "Often the invitation that makes a person an invitee on the premises of another is not an express invitation but is only implied. When considering the scope of an implied invitation, the jury, if its judgment so directs, may infer that the invitation extended to all those parts of the premises on or in which the invitee naturally would be likely to go."

Defendants say that in view of their testimony the instruction given at their request was a proper instruction and the one given on the court's own motion conflicts with it. They say further it was error to take the issue of whether plaintiff was an invitee from the jury in the latter instruction. Defendant Daniel J. Vracin testified that prior to the accident he had told plaintiff the exit "was not a passageway, not to be used by the children at all," and it was to be kept closed and not used as a doorway. Defendant Mary Louise Vracin testified she told plaintiff prior to the accident they did not use the exit as a door. Plaintiff testified neither Dr. nor Mrs. Vracin ever said anything to her about the use or nonuse of the sliding door exit. There was evidence that the day before the accident Dr. Vracin used the exit several times and that the children used it.

[6] The instruction given at defendants' request is a correct statement of the law. A person may be an invitee in a portion of a building and not have that status as to another portion thereof. Medcraft v. Merchants' Exchange, 211 Cal. 404, 407, 295 P. 822. Johnston v. De La Guerra Properties, Inc., 28 Cal.2d 394, at page 399, 170 P. 2d 5, at page 8, states:

> "The duty of the invitor to exercise reasonable care toward an invitee applies, however, only to that portion

of the premises to which the invitee under the circumstances of the invitation would be likely to go. But where the invitee has been intentionally or negligently misled into the reasonable belief that a particular passageway or door is an appropriate means of reaching the business area, he is entitled to the protection of a visitor while using such passageway or door. Tschumy v. Brook's Market, 60 Cal.App.2d 158, 164–166, 140 P.2d 431; Rest., Torts, § 343, Comment b. In other words, the invitation, and consequently the duty, of the invitor are sufficiently extensive to protect the business visitor in his use of such means of ingress and egress as by allurement or inducement, express or implied, he has been led to employ.

* * *

"[28 Cal.2d at page 400, 170 P.2d at page 8.] The rule is that an invitor owes a duty to business invitees to use reasonable care as to all portions of the premises over which he has control, whether they be within the precincts of the building or on the outside and used by the general public in common with invitees."

[7] While on critical analysis there is a conflict in these instructions, we do not believe the error was prejudicial. The court did not tell the jury plaintiff was an invitee in the use of the sliding door exit. At defendants' request an instruction which is set out in the margin was given which in effect told the jury they were entitled to assume plaintiff would perceive that which would be obvious to her on the ordinary use of her own senses; that there was no duty to give plaintiff notice of an obvious danger; and that if no circumstance existed to cause them to think differently, defendants had a right to assume plaintiff was possessed of normal faculties of sight and would exercise ordinary care.[1] The court also told the jury: "Whether or not it is negligence for one to proceed into a dangerous situation of which he had previous notice is a question of fact not always and necessarily to be answered in the affirmative. If at the time he was aware of the danger and also appreciated its extent, and if he voluntarily and unnecessarily exposed himself to it, then he was negligent as a matter of law." At defendants' request the court also gave an instruction on unavoidable accident.

[8] In view of what we have said, the giving of an instruction on momentary forgetfulness was not error, as claimed by defendants.

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[1] "Toward an invitee, those who joined in the invitation are obliged to refrain from active negligence and to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee in the reasonable pursuit of a purpose embraced within the invitation.

"But the responsibility of one having control of the premises is not absolute; it is not that of an insurer. If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the owners have actual knowledge of them, or if they are discoverable by them in the exercise of ordinary care, it is their duty to give reasonable warning of such danger to the invitee. The owners are not bound to discover defects which reasonable inspection would not disclose, and they are entitled to assume that the invitee will perceive that which would be obvious to him or her upon the ordinary use of her own senses. In brief, there is no duty to give the invitee notice of an obvious danger.

"In the absence of appearances that caution him or her, or would caution a reasonably prudent person in like position, to the contrary, the invitee has a right to assume that the premises he or she was invited to enter are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption.

"Each, the invitee and the invitor, so long as he or she is exercising ordinary care and no circumstance exists that either causes him or would cause a reasonably prudent person in his position to think differently, has a right to assume that the other is or will be possessed of normal faculties of sight and hearing and will exercise ordinary care, and has the right to rely on that assumption."

The court declined to give three instructions requested by defendants which are set out in the margin.[2] Defendants assert error. There was no error. To have given the first of these instructions would have been error. It would have conflicted with the instruction on momentary forgetfulness. The subject matter of the other two was fully covered by instructions given.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

150 Cal.App.2d 345

Satenig GUNNER and Mimi Gunner, Plaintiffs and Appellants,

v.

VAN NESS GARAGE; Clyde W. Mason, Warren Dickens, etc.; Mohawk Oil Corp.; Lumbermens Mutual Casualty Company, a corporation; and National Retailers Mutual Insurance Company, a corporation, Defendants and Respondents.

Civ. 17116.

District Court of Appeal, First District, Division 2, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Civil action in which the Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment of dismissal for failure to prosecute action with reasonable diligence and plaintiff appealed. The District Court of Appeal, Dooling, J., held that record disclosed no abuse of discretion on part of trial judge in dismissing action.

Affirmed.

1. Dismissal and Nonsuit 🔑60(6)

It is a principle in the field of the law concerning dismissal of action for want of prosecution that burden is at all times upon plaintiff to use diligence at every step of the proceeding to expedite his case to final determination, and no affirmative duty to do more than meet plaintiff step by step is cast upon defendant. West's Ann.Code Civ.Proc., § 583.

2. Appeal and Error 🔑962

Dismissal and Nonsuit 🔑60(1)

In action on a motion to dismiss for failure of plaintiff to prosecute with reasonable diligence, trial court has a wide discretion which will only be disturbed by an appellate court in case of manifest abuse. West's Ann.Code Civ.Proc., § 583.

3. Dismissal and Nonsuit 🔑60(2)

In civil action where plaintiff waited almost three years to serve summons upon defendant and then failed to serve amended complaint for almost another year, record failed to disclose that trial court abused its discretion in dismissing case for failure of plaintiff to prosecute with diligence. West's Ann.Code Civ.Proc., § 583.

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[2] "You are instructed that if you find the plaintiff knew of the situation or condition at the place where she fell, then there was no negligence on the part of the defendants and your verdict should be for defendants."

"You are instructed that the defendants were not obliged to warn plaintiff of an obvious danger or one which should have been perceived by plaintiff through the ordinary use of her own senses."

"The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence a proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then must find on a third question:

"Was the plaintiff negligent?

"If you find that she was not, after having found in plaintiff's favor on the other two issues, you then must fix the amount of plaintiff's damages and return a verdict in her favor.

"If you find that plaintiff was negligent,

4. Dismissal and Nonsuit ⚿68

Tardiness in making motion to dismiss for plaintiff's failure to prosecute with diligence will not excuse plaintiff's prior inexcusable delay. West's Ann.Code Civ.Proc., § 583.

Noal R. Gray, San Francisco, Hutchinson & Quattrin, San Francisco, for appellant.

Daniel J. O'Brien, Jr., Daniel J. O'Brien, III, San Francisco, for respondents Van Ness Garage, Mohawk Petroleum, Dickens.

Alexander, Bacon & Mundhenk, San Francisco, Herbert Chamberlin, San Francisco, for respondents Lumberman's & National.

DOOLING, Justice.

Plaintiff, Satenig Gunner, appeals from a judgment of dismissal entered on the defendants' motions based upon her failure to prosecute her action with reasonable diligence. The original complaint was filed on December 20, 1950. No service was made on any of the defendants until September 17, 1953, and the last defendant served was the defendant Mohawk Petroleum Corporation on December 16, 1953.

Certain of the defendants filed a demurrer on August 4, 1954. An amended complaint was filed on September 10, 1954, to which the same defendants filed a demurrer on September 28, 1954. This demurrer was overruled on November 17, 1954. On November 29, 1954, these defendants secured an extension of time to file a pleading and on December 8, 1954, an answer was filed to the amended complaint. Counsel for plaintiff filed a memorandum to set the case for trial on December 16, 1954, and a notice of motion to advance the case on the trial calendar on December 22, 1954. As a result the case was placed on the jury calendar with the trial date set for February 28, 1955.

The other defendants had a stipulation in writing that they need not file a pleading until they received 10 days' notice from plaintiff's counsel. The record does not show whether or not they received such notice but on January 19, 1955, these defendants by order of the court were given until January 30, 1955, to file a pleading. On January 31, 1955, these defendants filed their answer. The defendants filed their notice of motion to dismiss on February 16, 1955, and a similar motion was filed by the other set of defendants on February 28, 1955.

The motions were heard on extensive affidavits and counter affidavits and the court granted the motions to dismiss by minute order entered March 17, 1955.

The motions were based on the discretionary power of the trial court to dismiss where the case is not brought to trial within two years after the filing of the action. Code Civ.Proc. § 583.

[1, 2] Certain principles in this field of the law are well settled: 1. That the burden is at all times on the plaintiff to use diligence at every step of the proceeding to expedite his case to final determination, and no affirmative duty to do more than meet the plaintiff step by step is cast on the defendant. Oberkotter v. Spreckels, 64 Cal.App. 470, 473, 221 P. 698; Steinbauer v. Bondesen, 125 Cal.App. 419, 426–427, 14 P.2d 106; Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 753, 299 P.2d 417. 2. In acting on such a motion the trial court has a wide

you then must determine a fourth issue, namely:

"Did that negligence contribute in any degree as a proximate cause of the injury of which plaintiff here complains?

"If you find that it did, your verdict must be for the defendant, but if you find that it did not, and you previously have found that there was negligence on defendant's part which proximately caused plaintiff injury, you then must fix the amount of plaintiff's damages and return a verdict in her favor.

"As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage, if any, found to have been suffered."

discretion which will only be disturbed by an appellate court in case of manifest abuse. Hayashi v. Lorenz, 42 Cal.2d 848, 851, 271 P.2d 18; Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343; Steinbauer v. Bondesen, supra, 125 Cal.App. 419, 427, 14 P.2d 106.

[3] Plaintiff waited almost three years to serve the summons upon the defendants. If the summons had not been served within the three year period the dismissal of the action would have been mandatory under Code of Civil Procedure, section 581a. There was very little excuse offered by plaintiff for this long delay. The fact that plaintiff changed her counsel twice during this period was no concern of the defendants who were only required to meet her step by step. Some effort was made to show that the delay was due to negotiations for settlement but according to the defendants' affidavits, which we must assume the trial court believed, any such negotiations were sporadic and not continuous nor of such a character as to excuse or explain the long delay in the service of summons.

When the defendants had been finally served with summons plaintiff's then counsel informed the attorneys for defendants that he planned to file an amended complaint and assured them that they need not plead until he did so. This was followed by the written stipulation in the case of one set of defendants giving them until 10 days after notice to file a pleading. In spite of the expressed intention to file an amended complaint such amended complaint was not filed until September 10, 1954, almost a year after service of summons on the defendants. We may concede that plaintiff's counsel proceeded with diligence from the time of the filing of the amended complaint, but a belated manifestation of diligence could not operate to excuse the earlier lack of diligence which extended over a period of nearly four years, from December 1950 to September 1954. The only excuse suggested for the delay from the serving of summons to the filing of the amended complaint was one exchange of letters suggesting the possibility of a settlement which was closed by a flat refusal to consider the proposal of plaintiff on April 2, 1954. This whole negotiation covered a period of only a few weeks.

On the whole evidence we can find no abuse of discretion in the determination of the trial court that plaintiff did not prosecute her action with reasonable diligence. The court could reasonably find that from the filing of the complaint on December 20, 1950, to the filing of the amended complaint on September 10, 1954, plaintiff was guilty of inexcusable delay in expediting her action against defendants.

[4] Plaintiff seeks to excuse herself by the facts that the case was actually set for trial, and that certain defendants obtained time to plead to the amended complaint by order of court. As we view the situation disclosed by the record these facts are immaterial since the inexcusable delay to support the trial court's order may be found in the period before the filing of the amended complaint. Counsel have cited no case holding that tardiness in making the motion to dismiss will excuse the plaintiff's previous inexcusable delay. The cases are to the contrary. Netzley v. Hillstrom, 122 Cal.App.2d 417, 421, 265 P.2d 57; Barry v. Learner, 113 Cal.App. 651, 655, 299 P. 82.

In fairness to appellant's counsel on this appeal it should be noted that they did not represent plaintiff at any stage in the trial court.

Judgment of dismissal affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

Hearing denied; CARTER, J., dissenting.

150 Cal.App.2d 424

GOLDEN STATE BOTTLING CO.,
Plaintiff and Respondent,
v.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant and Appellant.
Civ. 9078.

District Court of Appeal, Third District, California.
April 23, 1957.

Action for damages on an undertaking for wrongful attachment. The defendant moved for a change of venue and from a judgment of the Superior Court, Sacramento County, James H. Oakley, J., denying the motion, the defendant appeals. The District Court of Appeal, Warne, J. pro tem., held that the action was maintainable in Sacramento County.

Order affirmed.

Corporations ⚷503(2)

An action against a corporate surety on attachment bond for wrongful attachment was maintainable in the Superior Court of Sacramento County and not in the city and county of San Francisco, where the undertaking was executed, where execution of the writ upon plaintiff's bank account was in Sacramento, and where plaintiff suffered its damages, and fact that writ was issued by clerk of Superior Court in San Francisco created no liability against the surety. West's Ann.Const. art. 12, § 16.

Barnett & Robertson, San Francisco, for appellant.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal by the defendant from an order denying its motion for a change of venue.

A summary of the facts as alleged in the complaint are as follows: On July 30, 1954, one E. T. Burns commenced an action in the Superior Court of the City and County of San Francisco against E. J. Crofoot and respondent herein, a California corporation, with its principal place of business in Sacramento County, to recover a money judgment on an alleged claim. On the same date appellant, as a corporate surety, executed an undertaking for attachment. This undertaking was executed in San Francisco and filed in the Superior Court in San Francisco. A writ of attachment was then issued and directed to the Sheriff of Sacramento County for levy upon property of the respondent. On August 1, 1954, bank accounts of respondent in Sacramento totaling $42,319.28 were levied upon and held under attachment until April 25, 1955, and during all of said time respondent was deprived of the use of said funds, and interest thereon at the rate of seven per cent, amounting to $2,180.47.

The action terminated in favor of the Golden State Bottling Company, respondent herein.

Thereafter, respondent commenced this action against the Fidelity and Deposit Company of Maryland, appellant herein, on its undertaking, for wrongful attachment. The action was filed in the Superior Court of Sacramento County.

Appellant moved for a change of venue to the City and County of San Francisco. The grounds of motion as set forth in the notice of motion are: "That the Court designated in the complaint is not the proper court and for the alternative ground that the convenience of witnesses * * * would be promoted * * *." In support of its motion, respondent filed an affidavit stating that it is a corporation, organized and existing under the laws of the state of Maryland, and that its principal place of business was located in the City and County of San Francisco. It also alleges that the undertaking on attachment sued upon "was executed in San Francisco, California by defendant corporation, and the place of performance, if any is required, is in the City and County of San Francisco, State of California, and not elsewhere." Respondent herein filed an affidavit opposing said motion for change of venue. The motion was denied, and this appeal followed.

The place for filing and trial of an action against a corporation is provided in Section 16 of Article XII of the California Constitution. The section reads as follows:

> "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

We do not agree with appellant's contention that its obligation or liability arose in the City and County of San Francisco, where the undertaking was executed. We believe that respondent clearly has the right to maintain its action in the Superior Court of Sacramento County. The case of Etcheverry v. Hartford Acc. & Indem. Co., 90 Cal.App. 722, 266 P. 549, so holds. In that case, as in the instant case, the action was for recovery upon a bond given upon the issuing of a writ of attachment in another action which was filed in the Superior Court in and for the County of Los Angeles, but subsequently was transferred to the County of San Diego. The writ of attachment was issued by the clerk of the Superior Court of Los Angeles and was executed by levying upon farm lands situate in San Diego County. Judgment was in favor of Etcheverry. He then filed his action to recover on the bond in the Superior Court in and for the County of San Diego. The defendant in that case gave notice of a motion to transfer the case for trial to the Superior Court in and for the City and County of San Francisco. The grounds for the motion were "that the place where the principal business of the corporation is transacted, is the City of San Francisco, County of San Francisco, State of California, and not the County of San Diego, and furthermore, upon the ground that the residence of the said corporation is the County of San Francisco"; also, "that it is an action against a corporation, and was instituted in a county in which the contract was not made, nor was to be performed, nor where the obligations or liabilities arose, nor where the breach occurred." The court denied the motion to transfer the case, and the defendant appealed from the order. In affirming the order, the court said:

> "The obligation or liability which forms the basis of plaintiff's action arose when the levy of the writ of attachment was made upon plaintiff's real estate situated in the county of San Diego. The mere issuing of the writ of attachment by the clerk of the superior court in Los Angeles County, created no liability against the defendant bonding company. It was the execution of the writ upon plaintiff's property situate in San Diego County, which, according to his complaint, prevented him from securing any rental or returns therefrom, because renters would not plant the land to crops as long as the attachment lay upon the land. Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541; Maskell v. Barker, 99 Cal. 642, 34 P. 340."

In the instant case it was the execution of the writ upon plaintiff's bank accounts in the County of Sacramento which, according to the complaint, caused it to suffer the loss of the use of the garnished funds, with loss of interest at the rate of seven per cent from August 1, 1954, to April 25, 1955. The issuing of the writ of attachment by the clerk of the Superior Court in and for the City and County of San Francisco created no liability against appellant. Further, the mere fact that the undertaking was executed in San Francisco and filed in the superior court there created no liability. The liability arose at and in the county wherein the property was levied upon.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

* * *

150 Cal.App.2d 618

BOARD OF SUPERVISORS OF the COUNTY OF NEVADA, Curtis Clark, John L. Frank, Guy Robinson, Henry G. Loehr and J. L. Coughlin, as Supervisors of the County of Nevada, State of California, Petitioners,

v.

SUPERIOR COURT OF The State of CALIFORNIA, IN AND FOR The COUNTY OF NEVADA, and James Snell, Judge of the Superior Court of the State of California, in and for the County of Nevada, Respondents.

Civ. 9243.

District Court of Appeal, Third District, California.

May 1, 1957.

Proceeding for a writ of prohibition involving action taken by the board of supervisors in calling an election for members of the board of education, on the ground that mandamus, review, and prohibition were not proper proceedings to contest the election or try title to the right to hold public office. The District Court of Appeal, Peek, J., held that neither mandamus, certiorari, or prohibition, were proper to try title to the officers involved.

Writ of prohibition issued.

1. Mandamus 🔑77(1)

Title to public office cannot be tried in a mandamus proceeding, and it is only when the title is incidentally involved, that mandamus will lie. West's Ann.Education Code, §§ 301–305.

2. Quo Warranto 🔑5

Validity of the organization of a board of education cannot be questioned by private individuals but only in the proceeding in quo warranto at the suit of the state. West's Ann.Education Code, §§ 301–305.

3. Mandamus 🔑74(1)

Where board of supervisors called for an election of members of the county board of education and an election was held at which certain persons were elected and were presently acting in that capacity, mandamus seeking to have the election invalidated and the offices declared vacant would not lie, since even assuming that the board failed to follow the statutory requirements, there was no showing that a de facto existence of the board was not present. West's Ann.Education Code, §§ 301–305.

4. Elections 🔑45

Certiorari would not lie to review proceedings calling for the election of members of the county board of education, since the board of supervisors in calling the election were acting in a legislative and not a judicial capacity, and hence certiorari was an improper remedy. West's Ann.Code Civ.Proc. § 1068.

5. Prohibition 🔑19

Prohibition would not lie to prevent the board of education from performing any official act on ground that their election by the board of supervisors was invalid for failure to comply with the statutory requirements where the persons sought to be restrained were never made parties to the proceeding.

◆

Vernon Stoll, Nevada County Dist. Atty., William J. Cassettari, Chief Deputy Dist. Atty., Grass Valley, for petitioners.

Albert L. Johnson, Nevada City, for real party in interest.

PEEK, Justice.

The present controversy stems from action taken by the board of supervisors of Nevada County by which an election was held and candidates elected and certified to the county board of education of said county pursuant to the recommendations of the county committee on school district organization. Education Code, §§ 301–305. Thereafter one Robert Wallace, Jr., filed in the superior court of said county his petition for a writ of mandate, number 11331, wherein he sought (1) an order commanding the board of supervisors to "rectify" the election by which members of the board of education were selected; (2) review of the proceedings calling for the election; and (3) an order prohibiting the persons elected from acting in the official capacity of board members. Neither the board of education as such nor its individual members were named as parties in said proceeding. The demurrer of the board of supervisors upon the ground that the petition failed to state sufficient facts to constitute a cause of action was overruled. The board of supervisors thereupon answered, denying generally all of the allegations of the petition, and shortly thereafter filed in this court the present petition for prohibition. It is alleged therein that mandamus, review and prohibition are not proper proceedings to contest an election or try title to the right to hold public office, and that Wallace has a plain, speedy and adequate remedy at law in quo warranto.

[1–3] We assume that when Wallace prayed for a writ of mandamus against the board of supervisors commanding them to "rectify the invalid election" whereby the members of the county board of education were elected, he meant that the office to which the persons were so elected should be declared to be vacant and a new election held. Our courts, in accordance with the general rule, have consistently held that title to public office cannot be tried in a mandamus proceeding. It is only when title is incidentally involved that mandamus will lie. Klose v. Superior Court, 96 Cal.App.2d 913, 217 P.2d 97. The uncontradicted facts show that the board of supervisors took action calling for an election of members of the county board of education pursuant to the recommendations of the county committee on school district organization; that an election was held at which certain persons were elected and are presently acting in that capacity. Even assuming, but not deciding, that the board of supervisors failed to follow statutory requirements as alleged by Wallace, and hence that the board of education was not properly organized, that is not to say that no de facto existence of the board was shown. Under such circumstances, "the law is well settled that the validity of the organization of [the board of education] cannot be questioned by private individuals, but only in a proceeding in *quo warranto* at the suit of the state." Keech v. Jeplin, 157 Cal. 1, 14, 106 P. 222, 228.

[4] The request of Wallace for a "review of the proceedings calling for the said election" is equally without merit. By the provisions of section 1068 of the Code of Civil Procedure, certiorari is available only to review the proceedings of an inferior judicial tribunal or board exercising judicial functions upon the grounds that it has exceeded its jurisdiction and there is no appeal or any plain, speedy and adequate remedy. It has long been the rule that a board of supervisors in creating a reclamation district was acting in a legislative, not a judicial, capacity and hence certiorari would not lie to review such proceedings. Williams v. Board of Supervisors, 65 Cal. 160, 3 P. 667. We find no basis for a different conclusion as regards the formation by a board of supervisors of a county board of education.

[5] What has heretofore been said is equally applicable to the final request by Wallace for an order prohibiting the board of education from performing any official act. Furthermore, it again should be noted that the persons sought to be restrained were never parties to that proceeding.

Let the writ issue.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

150 Cal.App.2d 462

Estate of Eino John PESULA, Deceased.

Alma Pesula CLYNE, Contestant and Appellant,

v.

P. A. PESULA, Administrator with the Will Annexed, Petitioner and Respondent.

Civ. 9031.

District Court of Appeal, Third District, California.

April 25, 1957.

Hearing Denied June 19, 1957.

Proceeding in the matter of the estate of deceased testator. A legatee appealed from an order of the Superior Court, Mendocino County, Lilburn Gibson, J., settling the first amended account of the administrator with will annexed for the estate of the deceased testator, and from an order allowing the administrator fees for extraordinary services. The District Court of Appeal, Warne, J. pro tem., held that where administrator himself repaired damaged tractor of deceased testator, administrator was entitled to an allowance for extraordinary services, which consisted of his own labor, but was not entitled to allowance for rental of administrator's truck or for materials and supplies.

Order allowing extraordinary fees modified and, as modified, affirmed.

1. Motions 🔑58

A court has power to correct its orders so that they express the intent of the court.

2. Executors and Administrators 🔑510(6)

Where Superior Court on September 27 made an order settling amended account and report and allowing administrator with will annexed $1,918.95 for extraordinary services, and on October 6 the order of September 27 was amended to disallow claim of $3,307.52 representing cost of repairs to tractor, and on October 7 the order of October 6 was amended so as to disallow repairs to tractor only to extent of $1,918.95, and legatee appealed from order of September 27, as amended by order of October 6, and legatee claimed that she had no knowledge of amendment of October 7 until time for appealing therefrom had expired, District Court of Appeal could consider the appeal from the order as finally amended by the Superior Court on October 7. West's Ann.Rules on Appeal, rule 1.

3. Executors and Administrators 🔑507(2)

Where legatee filed objections to account of administrator with will annexed, and hearing was set for July 19, at which time it came on for hearing, and matter was continued to August for further hearing, and administrator then filed amended account, legatee was not entitled to ten days' notice of the hearing on the amended account in accordance with Probate Code. West's Ann.Probate Code, § 1200.

4. Appearance 🔑24(1)

Where legatee voluntarily appeared and contested amended account of administrator with will annexed, legatee was foreclosed from urging want of statutory notice. West's Ann.Probate Code, § 1200.

5. Executors and Administrators 🔑510(4)

Where legatee filed objections to first and final account of administrator with will annexed, and hearing was set for July 19, at which time it came on for hearing, and probate court ordered administrator to file an amended account, and matter was then continued to August 19, for further hearing, and legatee made no objections when probate court considered testimony taken on July 19 hearing as part of record at subsequent hearing on amended account, legatee's objection on appeal came too late.

6. Executors and Administrators 🔑508(1)

Findings of fact could be included by probate court in order settling amended account of administrator with will annexed.

7. Executors and Administrators 🔑508(1)

Where orders of probate court settling amended account of administrator with will annexed were rather informal, but they found on the ultimate facts in issue, they were sufficient, and objection of legatee to asserted failure of probate court to make findings of fact was not well taken.

8. Executors and Administrators 🔑153

Where, at time of appointment of administrator with will annexed, deceased testator's tractor was in a damaged condition and was located in the woods some fourteen miles from testator's headquarters, and tractor, in its damaged condition, had been appraised at $3,750, and tractor could not be moved by transport, administrator had authority to make reasonable and necessary repairs to the tractor. West's Ann.Probate Code, § 581.

9. Executors and Administrators 🔑497

Where administrator with will annexed repaired damaged tractor of deceased testator, administrator was entitled to an allowance for extraordinary services, which consisted of his own labor, but was not entitled to allowance for rental of administrator's truck or for materials and supplies. West's Ann.Civ.Code, § 2230.

10. Executors and Administrators 🔑115

An executor or administrator will not be permitted to deal with himself as an individual in any transaction concerning trust property. West's Ann.Civ.Code, § 2230.

Joseph T. Curley, San Francisco, for appellant.

Mannon, Brazier & Bell, Ukiah, for respondent.

WARNE, Justice pro tem.

This is an appeal by Alma Pesula Clyne from an order settling the first amended account of the administrator with the will annexed for the estate of Eino John Pesula, deceased, and from an order allowing said administrator fees for extraordinary services.

P. A. Pesula, as administrator of the estate of the deceased, and respondent herein, filed in June of 1955 his first and final account. Thereafter, Alma Pesula Clyne, a legatee, and appellant herein, discovered that the administrator had collected $3,000 as insurance on account of damage to a tractor owned by the deceased, which he had not accounted for. She then filed objections to the account, and the hearing was set for July 19, 1955, at which time it came on for hearing. At the hearing respondent testified that he had received the $3,000 but had not reported it to the court, because he did not think it was part of the estate money. He said it was just for the repair of the tractor and had no bearing on the case. He further testified that he had spent $3,307.52 in making said repairs. At the conclusion of this hearing, the court ordered respondent to file an amended account which would include the $3,000 insurance which he received and show the items of expense for the repairs of the tractor. The matter was then continued to August 19, 1955, for further hearing. Respondent filed his amended account and included in his disbursements "Costs of repairs to tractor from Feb. 4, 1955 to June 4, 1955 as follows: $3,307.52." The repairs were itemized as shown below.

P. A. Pesula, rental and use of 1½ ton truck to haul equipment and tools, 61 trips at 28 miles at 20¢ per mile	$ 341.61
P. A. Pesula, rental and use of pickup truck, 24 trips at 28 miles as 10¢ per mile	67.20
P. A. Pesula, welding equipment rental	136.00
P. A. Pesula, move tractor to Boonville	61.80
P. A. Pesula, repair labor, 485 hours at $2.50	1,192.50
K. J. Kelly, labor 3/15/55 to 6/20/55	800.00
Various materials and supplies ..	119.84
Don Kollger, labor	91.57
Edward Warren, labor	196.00
John Wagner, labor	93.00
Sidney Johnson, labor	32.00
Payroll taxes	34.88
Social Security tax	23.25
Unemployment insurance	11.62
Workmen's compensation insurance	106.25
Total repairs	$3,307.52

As part of said account and report the respondent alleged "If the court decides that the aforesaid items of truck rental and administrator's labor aggregating $1,918.95 are not allowable under the authority of In re Estate of Howard, 133 Cal.App.2d 535, 284 P.2d 966, then this administrator claims said sum of $1,918.95 as an allowance of extraordinary commission under the authority of [In re] Estate of Scherer, 58 Cal.App.2d 133, 142 [136 P.2d 103]. Oral testimony adduced at hearing of July 19, 1955, is hereby made a part hereof."

At the hearing held on July 19, 1955, respondent testified that he used his own trucks and equipment for making the repairs, and that he had made 61 trips of 28 miles each to the site of the tractor with a 1½ ton truck and 24 round trips with a pickup truck for the purpose of carrying heavy equipment and tools for the repair job; that $341.61 was a reasonable rental charge for the use of the 1½ ton truck, and that $67.20 was a reasonable rental value for the use of the pickup truck. He also said that he used and made no charge for some $300 worth of parts that were six or seven years old and had been taken from a tractor which he formerly owned. He further testified that he used his own welding equipment for which he charged the estate $136. This charge was at the rate of $2 per hour for 68 hours. He further testified that the charges for the rental of the two trucks and the welding equipment were reasonable and that cheaper service was not available. He also testified that he put in 485 hours in making these repairs which were reasonably worth $2.50 per hour or a total of $1,192.50. He also purchased various materials and supplies for the repair of the tractor which amounted to the sum of $119.84. In addition thereto, he paid the sum of $1,388.57 for labor, payroll taxes, social security tax, unemployment insurance and and compensation insurance; and that those charges were reasonable and necessary.

Appellant filed written objection to the amended account. The matter was submitted to the court on September 16, 1955, and on September 27, the court made an order settling the amended account and report and allowing the administrator $1,918.95 for extraordinary services rendered. All objections to the account were overruled. The September 27 order was amended on October 6, 1955, wherein the $3,307.52 representing the cost of repairs to the tractor was disallowed. However, on the next day the latter order was amended so as to disallow the repairs to the tractor only to the extent of $1,918.95; or, in other words, an allowance of $1,388.57 for said repairs.

[1, 2] Appellant appeals from the order of September 27 as amended by the order of October 6, 1955. She claims that she had no knowledge of the amendment of October 7 until after the time for appealing therefrom had expired. However, we see no reason why this court cannot consider the appeal to be taken from the order as finally amended. The court has power to correct its orders so that they express the intent of the court. Rule 1 of Rules on Appeal states that a notice of appeal shall be liberally construed in favor of its sufficiency. Applying both of these rules, we are of the opinion that this court can consider the appeal from the order as finally amended by the probate court.

[3–5] Appellant first contends that at least ten days' notice should have been given of the hearing of the amended account pursuant to section 1200 of the Probate Code. We do not believe that such notice was required to be given in this particular matter since at the July 16 hearing the matter was continued to August, 1955, for further hearing. However this may be, appellant having voluntarily appeared and contested the account, she is foreclosed from urging the want of statutory notice. In re Estate of Palm, 68 Cal.App.2d 204, 156 P.2d 62, and cases cited therein. Nor is she in a position to object to the request made by the respondent that the court consider the testimony taken at the July 19 hearing as part of the record at the subsequent hearing of the amended account. It does not appear that she made such objection prior to the time the matter was submitted to the court. Her objection now comes too late.

[6, 7] Appellant objects to the asserted failure of the court to make findings of fact. Findings of fact may be included in the judgment or order. In re Estate of Janes, 18 Cal.2d 512, 514, 116 P.2d 438. While the several orders which the court made are rather informal, we feel that they find upon the ultimate facts in issue, and are therefore sufficient. (24 Cal.Jur. Trial, sec. 207.)

Appellant next contends that the only powers of an administrator to make repairs to estate property are found in section 581 of the Probate Code, which provides in part: "He [the administrator or executor] must keep in good tenantable repair all houses, buildings and fixtures thereon which are under his control." And since this section does not confer upon him the express power to repair any other property of the estate, respondent lacked the power to repair the tractor. We do not entirely agree with appellant. At the time respondent was appointed administrator of the estate, the tractor was in a damaged condition and located in the woods some 14 miles from the deceased's headquarters. It was damaged to the extent that it could not be operated. Respondent testified that before making the repairs, he considered moving the tractor by a truck, but the road leading to the site where it was located was in such condition that a "transport" could not travel over it. It was then that respondent decided to repair the tractor so that it could be moved by its own power. The court found that the respondent in making the repairs acted with the utmost good faith and for what he believed to be the best interests of the estate.

[8] We feel that respondent had the authority to make reasonable and necessary repairs to the tractor. Under the law it was his duty to take charge of it and also to preserve it. The tractor was a valuable piece of machinery. In its damaged condition it had been appraised at $3,750. The trial court impliedly found that the repairs were necessary in view of the testimony that it could not be moved by a "transport" and that the cost of making such repairs was reasonable. Concededly, the repair job added value to the tractor. Under the circumstances we find no reason to disturb the court's order on this ground.

[9] Lastly, it is contended that there is no evidence to support a finding that respondent performed extraordinary services of the value of $1,918.95. The claim for extraordinary services is presumably made up of the following items: Rent of the administrator's 1½ ton truck, $341.61; the rent of his pickup truck, $67.20; rent of his welding equipment, $136; his own labor, 485 hours, $1,192.50; materials and supplies, $119.84; and labor and equipment for moving the tractor, $61.80. Obviously, the rental of materials and supplies does not constitute services, nor does the charge of $61.80 for a pilot car. The only allowable claim for services would be the item of $1,192.50. That is the maximum that should have been allowed for extraordinary services since the respondent made no claim for any other service that might be termed extraordinary. All of the other items are of a contractual nature. In renting the truck and welding equipment to the estate, respondent was dealing with himself as an individual. Such items of expense should not have been allowed under the guise of extraordinary fees.

[10] It is well settled that an executor or administrator will not be permitted to deal with himself as an individual in any transaction concerning trust property. Civil Code, section 2230; In re Estate of Boggs, 19 Cal.2d 324, 333, 121 P.2d 678. The trial court is ordered to correct and reduce the allowance for extraordinary fees to the sum of $1,192.50, and as modified, the order appealed from is affirmed, each side to bear its own costs on appeal.

PEEK, J., concurs.

VAN DYKE, Presiding Justice.

I concur except in so far as the decision disallows a part of the award of extra compensation.

The majority opinion presumes that the claim for extraordinary services was made up of specific items for rent of 1½ ton truck, pickup truck and welding equipment, for the administrator's own labor, and for material and supplies furnished by him. I think that presumption should not be indulged. The claim for extra compensation is a claim in gross. The court was not required to break its allowance down into the mentioned items. It is apparent from the record that the court rejected the contract basis for the claim which the administrator advanced as an alternative to an allowance for extraordinary services. It is apparent, too, that the court did so in view of the rule stated in Estate of Howard and in Estate of Boggs forbidding an administrator from dealing with himself as an individual in any transaction concerning trust property. It is equally apparent that the court made its order under the alternative claim for extra compensation. The court could do this. The fact that the administrator's claim, based on contract and resting on dealings between himself as an individual and himself as a trustee, could not be allowed even in part did not prevent him from recovering on a claim for extraordinary services, if any such claim he had. In re Estate of Boggs, 19 Cal.2d 324, 334, 121 P.2d 678. In determining whether he had such a claim, the court could, as it did, consider his good faith, and its finding that in all things he acted in good faith was material in the determination of whether or not he was entitled to any compensation for extraordinary services. When he presented his contract claim, the court simply shut the door to any claim so based and proceeded to examine into the claim for extra compensation.

> "The allowance of extraordinary fees is a matter of discretion with the trial court and is not to be interfered with on appeal except for abuse. Such discretion not only invests the trial court with the power to determine whether the character of the services is such as to warrant extra compensation, but to determine the amount." In re Estate of Scherer, 58 Cal.App.2d 133, 142, 136 P.2d 103, 109.

In my view, the use of the administrator's 1½ ton truck, pickup truck and welding equipment are matters just as properly considered in fixing extra compensation as are the hours of the administrator's own labor. His efforts to accomplish the repair of the tractor included his own labor, in the rendition of which service the use of the machinery was an indistinguishable and inseparable part, without which his labor would have been of little account. I think the trial court impliedly so concluded. When the court turned to the allowance to be made, it could properly consider the going rate for labor and rental of equipment as affording acceptable proof of the amount that should be allowed. The fact that in its order it allowed the total of the various items referred to in the majority opinion does not mean that thereby the court departed from the basis of allowance for extraordinary services and went back to the contract basis.

I would affirm the order appealed from without modification.

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150 Cal.App.2d 514

Jack DOKE, Plaintiff and Respondent,

v.

Benjamin A. BROCKHURST and Ruby A. Brockhurst, his wife, Bert E. Dawe and Charlotte J. Dawe, his wife, First Doe, Second Doe and Third Doe, Defendants, Bert E. Dawe and Charlotte J. Dawe, his wife, Defendants and Appellants.

Civ. 17033.

District Court of Appeal, First District,
Division 2, California.

April 29, 1957.

Rehearing Denied May 29, 1957.
Hearing Denied June 26, 1957.

Action by a real estate broker to recover damages for defendant's breach of oral contract to give plaintiff exclusive agency for sale of homes built by defendant in certain subdivision or to recover amount of commission, which plaintiff relinquished in consideration of such contract, on a sale of land in subdivision. From a judgment of the Superior Court, Contra Costa County, Wakefield Taylor, J., for plaintiff in the amount of such commission, defendant appealed. The District Court of Appeal, Dooling, J., held that defendant having received equivalent of agreed amount of commission through reduction of purchase price paid by him for such land, plaintiff was entitled to recover such amount, though defendant received no direct payment from plaintiff and agreement for exclusive agency contract preceded execution of commission agreement.

Judgment affirmed.

1. Frauds, Statute of ⚷138(2)

Failure to execute written agreement, as orally promised, in transaction governed by statute of frauds, thereby rendering contract unenforceable, entitles party paying money in reliance on such agreement to recover it back. West's Ann.Civ.Code, § 1624, subd. 5.

2. Brokers ⚷11

A real estate broker, relinquishing commission on sale of land by oral agreement with purchaser thereof in consideration of exclusive agency contract for sale of homes in purchaser's real estate subdivision including such land, was entitled to recover agreed amount of commission from purchaser after his breach of contract, though he received no direct payment from broker and agreement between them preceded execution of commission agreement by owners of such land, where purchaser received equivalent of such amount through corresponding reduction in purchase price paid.

3. Frauds, Statute of ⚷138(1)

A real estate broker's recovery of amount of commission agreed to be paid him on sale of certain land from purchaser thereof after his breach of oral agreement to give broker exclusive agency contract for sale of homes in purchaser's real estate subdivision including such land in consideration of broker's relinquishment of commission, thereby reducing purchase price, was not barred by statute of frauds, which prevented enforcement of oral contract, thus entitling broker to recover consideration given therefor. West's Ann.Civ. Code, § 1624, subd. 5.

4. Brokers ⚷11

One breaking his oral contract to give real estate broker exclusive agency for sale of homes in certain real estate subdivision in consideration of such broker's relinquishment of commission agreed to be paid him on sale of certain land in subdivision, thereby reducing purchase price paid therefor by promisor, was not entitled to restitution of or credit for commissions received by broker for selling homes in subdivision before breach, as restitution of benefits received by innocent party to broken contract is not required where he is entitled to such benefits in any event.

5. Brokers ⚷11

One defending broker's action for amount of commission, relinquished by plaintiff in consideration of defendant's oral agreement to give plaintiff exclusive agency contract for sale of homes in subdivision including land sold by him to defendant, on ground that contract was not enforceable because of statute of frauds, could not complain of court's failure to find whether plaintiff breached his obligation in performance of contract, where defendant refused to execute enforceable written agreement promised to plaintiff and paid for by him with such commission.

◆

Hoey, Hoey, Hall & Conti, Martinez, Stark & Champlin, Stanley E. Sparrowe, John F. Wells, Oakland, for appellants.

Edmund S. Barnett, Walnut Creek, for respondent.

DOOLING, Justice.

Plaintiff and respondent Doke is a licensed real estate broker. Mr. and Mrs. Brockhurst placed a tract of land in respondent's hands for sale. Defendant and appellant Dawe desired to purchase this land for the purpose of subdividing it and building 46 homes thereon for sale. The price fixed by the Brockhursts was $58,400 which included a 10 percent commission to respondent Doke amounting to $5,840.

Appellant Dawe approached respondent Doke and proposed to him that if he would forego this $5,840 commission on the sale for the Brockhursts Dawe would give Doke an exclusive written contract to sell all of the homes to be built in the proposed subdivision to which Doke orally agreed. Thereafter a written contract for the sale of the tract to Dawe for $58,400 was signed by the Brockhursts. Attached to this writing was an agreement signed by the Brockhursts to pay Doke a commission of $5,840. This writing was placed in escrow with a title company.

Dawe then went to Doke and told him that he was anxious to close the deal and persuaded Doke to cancel the portion of the contract providing for the $5,840 commission before he received the proposed exclusive agency from Dawe in writing. As a result Dawe was able to purchase the property from the Brockhursts for a net payment of $52,560, thus saving the amount of Doke's commission of $5,840.

Doke acted as exclusive agent for the sale of homes built by Dawe on this tract from the middle of 1953 until April of 1954 and received commissions for the sale of homes therein totaling $8,250 and additional commissions amounting to $1,200 were held for him by the title company at the time of the trial.

Although frequently requested to do so by Doke, Dawe failed to execute the promised exclusive agency contract in writing and in April of 1954 Dawe gave a written contract of agency for the sale of the remaining houses in the tract to another broker.

Doke filed his complaint herein in which he sought damages for the breach of the exclusive agency contract or in the alternative for the recovery of the sum of $5,840, the amount of the commission on the original sale which he had given up.

The trial court found that because the exclusive sales agreement had not been reduced to writing action on it was barred by the statute of frauds. Civ.Code, § 1624(5). Judgment for $5,840 was entered on the ground of failure of consideration in that Dawe had refused to give the agreed exclusive agency contract in writing to Doke and that Dawe was thereby unjustly enriched in the sum of $5,840 which he had been relieved of paying to the Brockhursts by reason of Doke releasing his commission from the Brockhursts in that amount.

[1] The failure to give a written agreement as promised in a transaction governed by the statute of frauds thereby rendering the contract unenforceable will entitle the party who has paid money in reliance upon such agreement to its recovery back. Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 565–566, 71 P.2d 817; Woerner v. Woerner, 171 Cal. 298, 301, 152 P. 919; Fuller v. Reed, 38 Cal. 99, 110; Reynolds v. Harris, 9 Cal. 338; Stowe v. Fay Fruit Co., 90 Cal.App. 421, 427, 265 P. 1042; Vasik v. Speese, 26 Cal.App. 129, 146 P. 61; Restatement Restitution § 108(d).

[2] It is true that appellant Dawe received no direct payment from respondent Doke, but he did receive its equivalent in a reduction in the purchase price paid to the Brockhursts equal to the amount of the commission which Doke relinquished and would otherwise have received. To permit Dawe to retain this financial benefit which he received at Doke's expense would be just as inequitable as if Doke had paid him in cash. It is immaterial that the oral agreement between Doke and Dawe preceded the execution of the commission agreement by the Brockhursts since Doke in fact gave up a commission which the Brockhursts were willing to pay to him in reliance upon his agreement with Dawe and Dawe received an equal benefit in the reduction of the price paid to the Brockhursts for their land.

[3] Appellants' claim that the recovery is barred by the statute of frauds is patently unsound. The court expressly refused to enforce the oral contract on the ground that it was barred by the statute of frauds, thus entitling Doke to recover the consideration which he had given under the authorities above cited. It is because the statute of frauds prevented his enforcement of the promised agreement that he is entitled to recover the consideration given for it.

[4] The claim that appellants are entitled to restitution of, or credit for, the commissions received by Doke is answered by the rule that restoration of the benefits is not required where the plaintiff would be entitled to such benefits in any event. Oliver v. Campbell, 43 Cal.2d 298, 306, 273 P.2d 15; Kales v. Houghton, 190 Cal. 294, 307, 212 P. 21. The evidence shows that the commissions actually paid were less than those customarily paid for similar services and Doke earned them by actual services rendered in the sale of houses. Any real estate broker for the same services would have received the same amount if not more. The court found that if the promised agreement in writing had been carried to a conclusion Doke would have received commissions in excess of $30,000. The court said in Oliver v. Campbell, supra, 43 Cal.2d at page 306, 273 P.2d at page 20: "It is clear that plaintiff was entitled to receive the $450 paid to him either under the contract or for the reasonable value of his services." It is clear that plaintiff was equally entitled to the amount received in commissions in this case on the same basis.

[5] Finally appellants complain that the court failed to make a finding on whether or not Doke breached his obligation in the performance of the contract. The trial court said of this issue: "Defendant Dawe is hardly in a position to complain that plaintiff Doke * * * was not selling the homes fast enough, when Dawe before any sales began and at all times since, has refused to execute to Doke the enforceable exclusive which had been promised to Doke and paid for by him with the Brockhurst commission." We agree. Dawe cannot defend on the ground that the contract is unenforceable because of the statute of frauds and at the same time seek to enforce one of the terms of the contract against Doke for Dawe's benefit. If the contract is unenforceable against Dawe it must be equally unenforceable against Doke.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

150 Cal.App.2d 590

ESTATE of Evelyn T. SCOTT, a Missing Person.

L. Ewing SCOTT, Objector and Appellant,

v.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, as Trustee, and E. Raymond Throsby, Petitioner, Respondents.

Civ. 22004.

District Court of Appeal, Second District, Division 3, California.

April 30, 1957.

Proceeding for appointment of trustee for missing woman's estate. From order of Superior Court, Los Angeles County, Mildred L. Lillie, J., appointing court designated bank as trustee, husband appealed. The District Court of Appeal, Vallée, J., held that where husband was fugitive from justice and in contempt of Superior Court for failure to appear on criminal charges in connection with missing wife's property after being released on bail which had been forfeited, husband's contempt barred him from receiving consideration of District Court of Appeal.

Appeal dismissed.

1. Extradition ⟹30

One who, with knowledge that he is being sought pursuant to court process in a criminal action, absents himself or flees, is a fugitive from justice and the fact that he may be innocent does not change his fugitive status.

2. Contempt ⟹80

Where husband, who appealed from Superior Court order appointing bank as trustee of missing wife's property, was fugitive from justice and in contempt of Superior Court for failure to appear on criminal charges in connection with missing wife's property after being released on bail which had been forfeited, husband's contempt barred him from receiving consideration of District Court of Appeal and appeal would be dismissed.

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Beardsley, Hufstedler & Kemble and Seth M. Hufstedler, Los Angeles, for appellant.

Daniels, Elson & Mathews and Ernest W. Pitney, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from an order appointing a trustee of the estate of Evelyn T. Scott, a missing person.

E. Raymond Throsby, a brother of Mrs. Scott, instituted this proceeding by filing a petition for his appointment as trustee of her estate. The petition alleges that Mrs. Scott is missing; she has property which requires care and attention; she has no living parents or brothers or sisters with the exception of petitioner; and she is reputed to be married to L. Ewing Scott but, on information and belief, he had not taken any steps to preserve her property, and his interests are antagonistic to her estate. L. Ewing Scott filed objections to the petition, alleging he and Evelyn T. Scott are husband and wife; she is a missing person; Throsby was not entitled to appointment and is not a fit or proper person to act. L. Ewing Scott did not ask that he be appointed trustee. He filed a document nominating The Farmers and Merchants National Bank of Los Angeles as trustee and an acceptance by that bank should it be appointed.

After hearing the court found: 1. Evelyn T. Scott is a missing person and owns property in the county of Los Angeles which requires immediate care and attention. 2. A trustee should be appointed. 3. L. Ewing Scott is the husband; Throsby, the brother of Evelyn. 4. Evelyn has no children, no living parents, and no other brothers or sisters. 5. Throsby is not a suitable person to act as trustee. 6. L. Ewing Scott is not a suitable person to act as trustee. 7. "L. Ewing Scott, after the disappearance of his wife, Evelyn T. Scott, failed to take steps to conserve her estate; and that there is a substantial conflict of claim and interest between L. Ewing Scott, husband of Evelyn T. Scott, and the Estate of Evelyn T. Scott; and for that reason the nominee of said L. Ewing Scott, The Farmers and Merchants Bank of Los Angeles, is not suitable to take charge and possession of such estate and manage and control it and is not entitled to appointment." 8. There is no person entitled to participate in the distribution of the estate, were Evelyn dead, who is suitable to act as trustee. 9. Citizens National Trust & Savings Bank of Los Angeles is a suitable person to be appointed trustee and has consented to act. On April 20, 1956 an order was made appointing that bank trustee. L. Ewing Scott appeals from the order.

Respondents have moved to dismiss the appeal on various grounds, among them that appellant is a fugitive from justice. On April 26, 1956 appellant was indicted by the grand jury of the county of Los Angeles on nine counts of forgery and four counts of grand theft, alleged to have arisen out of his activities in connection with his missing wife's property. On May 1, 1956 he was arraigned in the superior court and ordered released from custody on his furnishing bail in the amount of $25,000. He was ordered to return to department 41 on May 15, 1956 for plea.

He furnished the bail and was released from custody. On May 15, 1956 he failed to appear before the superior court for plea, his bail was ordered forfeited, and since that time he has been a fugitive from justice. These facts are not disputed.

[1] One who, with knowledge that he is being sought pursuant to court process in a criminal action, absents himself or flees is a fugitive from justice. Tobin v. Casaus, 128 Cal.App.2d 588, 592, 275 P.2d 792. The fact that he may be innocent does not change his fugitive status. In re Thurber, 37 Cal.App. 571, 572, 174 P. 112.

Appellant is in contempt of the superior court in a criminal action brought against him. He is not in contempt of that court in this proceeding. The question is: Should his appeal in this proceeding be dismissed because he is in contempt of the superior court in the criminal action?

In MacPherson v. MacPherson, 13 Cal.2d 271, 89 P.2d 382, the appellant was in contempt of the superior court in the proceeding in which he was appealing and he was also a fugitive from justice in a separate criminal action. Dismissing the appeal, the court stated, 13 Cal.2d at page 277, 89 P.2d at page 385:

> "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state."

Travis v. Travis, 89 Cal.App.2d 292, 200 P.2d 843, was an appeal from an order made in a suit to set aside an interlocutory decree of divorce and for an injunction to restrain enforcement of some of its provisions. The appeal was not from an order made in the divorce action. The appellant was in contempt of the superior court in the divorce action for failure to comply with the interlocutory decree. Dismissing the appeal, this court observed, 89 Cal.App.2d at page 295, 200 P.2d at page 845:

> "The fact that the present appeal is from an order made in a suit to set aside the interlocutory decree and for an injunction to restrain enforcement of the support provisions of the decree and not from an order made in the divorce action itself does not alter the result. The rationale upon which relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes. By the present action and by this appeal appellant is seeking the court's aid to vacate and set aside provisions of the interlocutory decree providing for the support of respondent and three minor children and to enjoin their enforcement when he has treated the decree of the court with contempt and removed himself from the jurisdiction so that it cannot be enforced."

In Weeks v. Superior Court, 187 Cal. 620, 203 P. 93, in which the petitioner sought a writ of mandate, refusal to issue the writ was predicated on the fact the petitioner was in contempt of the superior court. Monterey Coal Co. v. Superior Court, 11 Cal.App. 207, 104 P. 585, and Knackstedt v. Superior Court, 79 Cal.App.2d 727, 180 P.2d 375, are to the same effect. In Paddon v. Superior Court, 65 Cal.App. 479, 224 P. 474, prohibition was denied on the same ground.

In National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46, a money judgment was obtained against the union in the superior court of the state of Washington. The union appealed but did not obtain a stay of proceedings. In supplemental proceedings the evidence showed the union had no assets in the state of Washington but had United States bonds in California. The court ordered the union to deliver the bonds to the court's receiver. On the union's failure to deliver the bonds, the superior court in the supplemental proceedings adjudged the union to be in contempt. The Supreme Court of Washington dismissed the union's appeal from the money judgment on the ground it was in contempt in the supplemental proceeding. On certiorari the Supreme Court of the United States stated, 348 U.S. 43, 75 S.Ct. 95, 99 L.Ed. 51:

> "While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal. For example, where a prisoner has escaped from custody while his appeal is pending, this Court has upheld a dismissal of his appeal. Cf. Eisler v. United States, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897, and 338 U.S. 883, 70 S.Ct. 181, 94 L.Ed. 542. Similarly, after a state prisoner's recapture, this Court has sustained a state court's refusal to revive his appeal. Allen v. State of Georgia, 166 U.S. 138, 17 S.Ct. 525, 41 L.Ed. 949. See also, Smith v. United States, 94 U.S. 97, 24 L.Ed. 32; State v. Handy, 27 Wash. 469, 67 P. 1094; People v. Genet, 59 N.Y. 80 [17 Am.Rep. 315]; Commonwealth v. Andrews, 97 Mass. 543. * * *
>
> "The dismissal here is not regarded by us as a penalty imposed as a punishment for criminal contempt. It is an exercise of a state court's inherent power to use its processes to induce compliance with a supplemental order reasonably issued in aid of execution."

It was held that neither the due process nor the equal protection clause of the Fourteenth Amendment was violated by the dismissal of the appeal.

[2] On the facts, appellant has wilfully and purposely evaded the processes of the superior court and contumaciously defied its orders. Such contempt bars him from receiving the consideration of this court. It is contrary to the principles of justice to permit one who has flaunted the orders of the courts to seek judicial assistance. The merits of the claims he urges in support of his appeal will not be determined.

The appeal is dismissed.

SHINN, P. J., and PARKER WOOD, J., concur.

150 Cal.App.2d 483

Lillian Vonthea KOTTEMANN, Plaintiff-Respondent,
v.
William C. KOTTEMANN et al., Defendants, William C. Kottemann, Appellant.
Civ. 22000.

District Court of Appeal, Second District, Division 2, California.
April 26, 1957.

Action by wife for divorce. From an interlocutory judgment of divorce in the Superior Court of Los Angeles County, Jesse J. Frampton, J., the defendant appealed. The District Court of Appeal, Ashburn, J., held that the appeal of the defendant must be dismissed, based upon his contumacious failure to pay alimony ordered by the court or to pay an attorney's fees on the appeal of the wife.

Appeal dismissed.

1. Divorce 🔑269(8)

Where defendant husband was ordered to pay alimony to his wife and defaulted, and wife procured an order to show cause for contempt for failure to pay alimony and efforts to serve defendant were unsuccessful, service of the order to show cause upon the attorneys of defendant rather than the defendant was proper in the circumstances.

2. Divorce ⚷269(8)

Where husband was in default in payment of alimony and wife procured an order to show cause for contempt for failure to pay and the order was served upon the husband's attorneys, later attempt of the attorneys, who had appeared generally, to limit their authority in an informal manner selected by them, was unauthorized and ineffective.

3. Divorce ⚷282

Where husband was in default for nonpayment of alimony to wife who procured an order to show cause for contempt, and challenge of service of the order related only to the order to show cause and no such point was raised with respect to the motion for an award of an attorney's fees upon appeal, the question could not be raised on appeal.

4. Appeal and Error ⚷780(1)

Dismissal of an appeal by one who defies the orders of the court is an appropriate remedy.

5. Divorce ⚷278

Where husband was in default of payment of alimony to the wife and was in contempt of the Superior Court and refused to perform a support obligation of the decree from which he appealed and he had obtained no stay and withheld from wife the funds determined by the court to be necessary for the defense of the husband's appeal, dismissal of the husband's appeal was proper.

6. Divorce ⚷286

On defendant's appeal from an interlocutory judgment of divorce based upon failure to pay alimony or attorney's fees, defendant's attack upon judgment consisting of an attempt to have the appellate court review the weight of evidence was ineffective.

◆

Guy Richards Crump, Stanley M. Arndt, Los Angeles, for appellant.

A. James Ayers and Benjamin D. Brown, Los Angeles, for respondent.

ASHBURN, Justice.

Motion to dismiss defendant's appeal from interlocutory judgment of divorce, based upon contumacious failure to pay alimony thereby ordered or to pay attorney fee on appeal which was later awarded to plaintiff.

That judgment, entered on February 7, 1956, ordered defendant, who is a certified public accountant by occupation, to pay to the plaintiff for her support the sum of $160 per month payable on the 15th day of each month commencing January 15, 1956, until further order of the court. Payments were made through the month of May, 1956. Defendant's appeal from the judgment having been taken in March, 1956, plaintiff gave notice of motion for allowance of an attorney fee on appeal, which was returnable on April 10, 1956. The hearing having been continued to May 9, defendant then requested and obtained a further postponement to July 9th; he thereupon defaulted in payment of the installment of alimony due on June 15th, and has failed to pay any later installment.

The motion for award of attorney fee on appeal was again continued at defendant's request to September 11, 1956, on which day he and his attorneys defaulted, the matter was heard and defendant was ordered to pay to plaintiff's attorneys a fee of $2,500 for services on appeal.[1] No part thereof has been paid at any time.

Meantime, on July 3rd, plaintiff had procured an order to show cause in re contempt for failure to pay installments of alimony then in default, same being returnable on August 1st. Efforts to serve defendant were unsuccessful; his residence was vacant and he has not lived in it since June, 1956. On July 17th plaintiff's attorneys procured an order authorizing service of the order to show cause upon Messrs. Crump and Arndt, the attorneys of record for defendant. This was done on July 20th by leaving a copy with the person in charge of the office during the absence of both attorneys. Upon learning of same they disclaimed authority to accept service and declared they did not know the whereabouts of their client. Upon the return date, August 1st, no appearance was made and a bench warrant for the arrest of defendant was issued. The sheriff was never able to serve it and defendant has not been heard of since that time.

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[1] An allowance of attorney fees for services after judgment was also sought and made, but further reference thereto is not essential to the ruling.

On September 6, 1956, plaintiff's attorneys advised Mr. Arndt that continued efforts of his client to hide and continued failure to pay alimony would result in a motion to dismiss the appeal; the clerk's transcript was then on file. Mr. Arndt responded on September 7th to the effect that the service of the order to show cause was not valid and enclosed in his letter to plaintiff's attorneys a document entitled "Withdrawal of Attorneys and Limitation of Authority" which gives notice as follows: "Take Notice that (except for the appeals heretofore taken herein) Guy Richards Crump and Stanley M. Arndt withdraw as attorneys for William C. Kottemann, and that they have no further authority to represent him or act as his attorney, except as to the matters pending in the District Court of Appeals on the appeals heretofore taken. William C. Kottemann will hereafter appear herein as attorney pro per, except as above set forth." The letter also reiterated a lack of knowledge of defendant's whereabouts.

On October 3 plaintiff undertook to enforce the order for an attorney fee on appeal. Execution was issued and levied in San Francisco upon defendant's shares of stock in American Telephone & Telegraph Company, for he had testified at the trial that he owned 64 shares of that stock worth approximately $10,800. The return to the execution was that defendant owned no stock in that company.

At the trial he had also testified to ownership of stocks totaling about $160,000 in value, the holding of about $10,500 in cashier's checks, ownership of a half interest in real property valued at about $40,000, and a postage stamp collection valued at about $25,000. Concerning the cashier's checks he had also said that "he closed his bank accounts and put his cash assets, some $10,000.00, into cashier's checks, so that Plaintiff would not be able to execute thereon after his refusal to pay alimony pendente lite ordered by the Court." Before the trial he had deeded to Bertha Greene, a former wife, the residence in Arcadia; this was done in violation of a restraining order, was adjudged a contempt, and defendant at that time obtained a reconveyance of the property to him. Before the trial defendant had also secreted himself and thus prevented completion of his deposition.

After his appeal was taken defendant again deeded his interest in the said residential property to the former wife, Bertha Greene, although it had been adjudged in this case to be joint tenancy property of plaintiff and himself and had been ordered sold and the proceeds distributed between them.

The execution of October 3 having proved fruitless, plaintiff's attorneys notified Messrs. Crump and Arndt that a motion to dismiss this appeal would be made unless defendant paid the said $2,500 attorney fee and all back alimony. The attorneys replied that they were "attorneys for Defendant in connection with the preparation and filing of his brief on appeal and *in no other matter;*" also said they were sending the letter to Mr. Kottemann at his last known address.

On November 20th plaintiff's counsel addressed a letter to defendant at 2334 South Second Avenue, Arcadia, and requested a return receipt. This document advised defendant that a bench warrant was outstanding for his arrest and demanded that he pay all back alimony at once. A return receipt, showing delivery on November 21st to one E. L. Erickson, as Kottemann's agent, was received in due course but defendant never replied to the letter.

Again on February 22, 1957, notice was given to appellant's attorneys that a motion to dismiss the appeal would be made because the attorney fee order of September 11, 1956, had not been complied with and defendant was delinquent in paying alimony. The reply was that they, the attorneys, "only represented defendant on appeal." Nothing further was heard from defendant himself at any time.

The motion to dismiss was served and filed on April 5, 1957. Upon the hearing an affidavit of Mr. Arndt was presented which stated that he and his associate do not know Kottemann's whereabouts and have not known it since June, 1956; that the only address they ever had was 2334 Second Avenue, Arcadia, California; that they have sent letters to him so addressed but have received no answer thereto. The affidavit also says that the attorneys do not know whether Kottemann has paid any alimony since August 1, 1956, but says nothing about the period from June 15th to August 1st. No mention is made of the attorney fee on appeal. This leaves defendant admittedly in default on alimony and on attorney fee,—in default and in hiding. It also leaves him without any showing of inability to perform. His testimony at the trial constitutes a prima facie showing of such ability. If he were unable he would doubtless be before the court so asserting. Recalcitrant and unrepentent he stands before this court.

[1-3] Before discussisg the remedy, certain preliminary matters should be mentioned. The service of the order to show cause upon the attorneys, rather than the defendant, was proper in the circumstances. Reynolds v. Reynolds, 21 Cal.2d 580, 583, 585, 134 P.2d 251; Miller v. Miller, 57 Cal. App.2d 354, 359, 134 P.2d 292. The later attempt of the attorneys, who had appeared generally, to limit their authority in the informal manner selected by them was unauthorized and ineffective. 6 Cal.Jur.2d § 171, p. 359. Moreover, this question of service relates only to the contempt proceeding and a conviction is not a prerequisite to cognizance of the fact of contempt upon a motion to dismiss. Tobin v. Casaus, 128 Cal.App.2d 588, 590, 275 P.2d 792. Again, the challenge to the service relates only to the order to show cause; no such point is raised with respect to the motion for an award of an attorney fee upon appeal.

[4] That dismissal of the appeal of one who thus defies the orders of the court is an appropriate remedy appears from the following cases: Knoob v. Knoob, 192 Cal. 95, 97, 218 P. 568; MacPherson v. MacPherson, 13 Cal.2d 271, 277, 89 P.2d 382; Travis v. Travis, 89 Cal.App.2d 292, 295, 200 P.2d 843. In the MacPherson case it is said: "[H]e has also wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state." 13 Cal.2d at page 277, 89 P.2d at page 385. In Travis: "The rationale upon which relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes." 89 Cal.App.2d at page 295, 200 P.2d at page 845.

In less aggravated situations the courts have found a stay of proceedings, pending compliance by appellant with the disobeyed order, to be a sufficient remedy. Instanced by Borenstein v. Borenstein, 11 Cal.2d 301, 79 P.2d 388; Tobin v. Casaus, supra, 128 Cal.App.2d 588, 590, 275 P.2d 792. Such leniency failed of its purpose in Tobin, see 128 Cal.App.2d at page 593, 275 P.2d 792, and we are convinced that such would be the result here if we were to temporize in that manner.

[5] Appellant is plainly and persistently in contempt of the superior court in the very matter of this appeal. He, having the apparent ability to do so, refuses to perform

the support obligation of the decree from which he appeals (having obtained no stay) and at the same time withholds from plaintiff the funds determined by the court to be necessary for the defense of his appeal. That he is in hiding or in a foreign jurisdiction cannot be doubted. That he intends to frustrate plaintiff's efforts to obtain the fruits of her judgment and the attorney fee awarded is equally clear. That he entertains an intention to defraud her cannot be gainsaid.

[6] Although his briefs are on file in this court, it appears therefrom that his attack upon the judgment consists of an attempt to have us review the weight of the evidence, which we are not authorized to do.

Appeal dismissed.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 580

Susanne HOUSE, by and through her Guardian ad litem, Ida House, and Ida House, Plaintiffs and Appellants,

v.

William Harold TUCKER, Inez G. Tucker, William Joseph Hardie, George B. Hardie, Margaret R. Hardie, Austin Ward Hall, Ward A. Hall and Dorothy W. Hall et al., Defendants and Respondents.

Civ. 21823.

District Court of Appeal, Second District, Division 1, California.

April 30, 1957.

Action was brought for injuries sustained in automobile collision. The Superior Court of Santa Barbara County, Ernest D. Wagner, J., entered an order granting motion to quash service of summons on one of the defendants, and the plaintiffs appealed. The District Court of Appeal, Drapeau, J. pro tem., held that sections of the Vehicle Code providing that acceptance of ownership or registration certificate or operator's or chauffeur's license shall operate as consent to service do not apply to former residents of the state who changed their domicile to another state before the sections went into effect.

Order affirmed.

Automobiles 🔑235

Sections of the Vehicle Code providing that acceptance of ownership or registration certificate or operator's or chauffeur's license shall operate as consent to service do not apply to former residents of the state who changed their domicile to another state before the sections went into effect. West's Ann.Vehicle Code, §§ 404.1–404.4.

Clarence A. Rogers, Santa Barbara, for appellants.

J. F. Goux, Santa Barbara, for respondents.

DRAPEAU, Justice pro tem.

June 1, 1954, the minor plaintiff, while riding in an automobile driven by one of the defendants, was injured by negligence of the driver of that vehicle and the drivers of two other vehicles, as alleged in her complaint for damages.

Austin Ward Hall, driver of one of the other cars, was also a minor. His father, Ward A. Hall, was the owner of that car. Mr. Hall and his wife had signed Austin's application for a driver's license.

At the time of the accident the Hall family were residents of Santa Barbara, California. About August 1, 1954 (3 months after the accident) they moved to Texas. Since then they have been residents of that state.

The complaint was filed, and summons issued, May 23, 1955, in Santa Barbara County, California.

There was no publication of summons. The only thing done was to serve the summons and a copy of the complaint upon defendant, Ward A. Hall, in San Antonio, Texas, October 3, 1955.

Apparently this was done in reliance upon, and in conformity with sections 404.1 and 404.3 of the Vehicle Code of California.

Vehicle Code sections 404.1, 404.2, 404.3, and 404.4 were enacted by the Legislature of California in 1955, and became law in September of that year. This was after the filing of the complaint, issuance of summons, and service thereof upon Ward A. Hall.

Upon motion, service of the summons was quashed as to defendant, Ward A. Hall, by order of the Superior Court of Santa Barbara County. Plaintiff appeals from this order.

Therefore, as stated in plaintiff's opening brief, the undisputed facts in this case present but one question: Did sections 404.1 and 404.3 of the Vehicle Code apply to actions for damages arising out of accidents of motor vehicles, *pending when the law went into effect?* Or, stated in another way, did the Superior Court acquire jurisdiction of the person of Ward A. Hall by the service upon him in Texas of the summons and a copy of the complaint in this action?

The legal fraternity in the United States has struggled with the validity of service of judicial summons outside the forum of actions in personam ever since state lines were first drawn. It would be hard to find a lawyer or a judge who has not pondered over the land-mark case of Pennoyer v. Neff, 1877, 95 U.S. 714, 24 L.Ed. 565.

The broad language in Pennoyer v. Neff, that jurisdiction may never be acquired by service of process only outside the state in which the forum exists, was modified in 1940 by the Supreme Court of the United States in Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278.

And in Allen v. Superior Court, 41 Cal. 2d 306, 259 P.2d 905, our own Supreme Court of California, applying the law in the Milliken case, states the basic social reasoning for the modification of the old rule:

> "The decision in the Milliken case is entirely in keeping with present-day needs affecting the power of a state to acquire jurisdiction over persons who have departed from its borders. The increasingly artificial nature of state boundaries, the expanding of metropolitan areas into two or more states, and the multiplying transportation facilities, especially through the widespread use of automobiles and trucks affecting the mobility of population, all bear significantly on the problem of process. The necessities of the situation are recognized in the nonresident motorist statutes (e. g., Veh.Code, § 404) permitting an injured person to obtain effective redress against transient motorists. Jurisdiction in such cases is predicated upon the theory of consent of the nonresident to substituted or constructive service and the appointment of the secretary of state or like officer as agent for receipt of service of process. [Citing cases.] This consent is largely fictional but it meets the problem of process in regard to highway automobile accidents involving nonresident motorists. [Citing authorities.] However, these statutes, in order to be valid, must provide some method of service reasonably designed to give notice of the action to the defendant. [Citing cases and authorities.]" 41 Cal.2d at pages 311–312, 259 P.2d at page 908.

In the case now before this Court, notwithstanding that defendant Ward A. Hall had notice of the action against him, there was no statutory law upon which to predicate jurisdiction over him by consent. Our Vehicle Code sections 404.1 et seq. do not apply to former residents of this state who changed their domicile to another state before the law went into effect. Chesin v. Superior Court, 142 Cal.App.2d 360, 298 P.2d 593.

In the Chesin case this Court states the reasons for this rule, as follows:

> "While in Milliken v. Meyer, Meyer was a domiciliary of Wyoming at the time of the commencement of the action, the language used by the Supreme Court of the United States was so broad that it might be interpreted as applying to a case where the defendant was domiciled in the state where the action was commenced at the time the cause of action arose, although he was not so domiciled at the time of the commencement of the action.
>
> "In order to clarify and make definite the rule in California, and to make it clear that residence in the state at the time the cause of action arose did not make a resident of the state subject to service of process outside the state in an action commenced after he left the state even though California was the state of his domicile, the State Bar of California sponsored, and in 1951 the Legislature enacted, section 417, Code of Civil Procedure. This section in substance provides that a court of this state shall only have power to render a personal judgment against a person served by publication in accordance with sections 412 and 413, Code of Civil Procedure, if he is personally served with a copy of the summons and complaint, and *'was a resident of this State at the time of the commencement of the action or at the time of service.'* (Emphasis added.) This was the state of the law at the time petitioner ceased to be a resident or domiciliary of this state, and this was the law at the time of the commencement of the subject action.
>
> "In 1935 the Legislature enacted section 404 of the Vehicle Code of this state, which provides for substituted service upon a nonresident of the state against whom a cause of action has arisen by reason of his operation of a motor vehicle upon the highways of this state.
>
> "After the enactment of section 417, Code of Civil Procedure, it became apparent that a resident of this state who left the state after a cause of action had arisen against him because of his negligent operation of an automobile upon the highways of the state, but before any action was commenced against him, was in a more advantageous position than a nonresident, inasmuch as he was not, but a nonresident driver was, subject to service of process outside the state. To remedy this situation, the State Bar sponsored, and the Legislature in 1955 enacted, sections 404.1 through 404.4, both inclusive, of the Vehicle Code.
>
> "It is upon the basis of the provisions of sections 404.1 and 404.2, Vehicle Code, that respondent and the real parties in interest respondent here, contend that the service upon petitioner in Arizona of the summons and complaint in the subject action gave the respondent court jurisdiction of petitioner's person.
>
> "Keeping in mind that at the time the accident in question occurred, and that at the time petitioner left the state of California and ceased to be domiciled therein or a resident thereof, he did not, by registering his automobile in this state or by obtaining or retaining a license to drive an automobile in this state, give any consent that process might be served upon him outside the boundaries of the state, a reading of the sections of the Vehicle Code in question makes it evident that they do not furnish any basis upon which jurisdiction of the person of the defendant may be acquired by service of process upon him outside of California." 142 Cal.App.2d at pages 363, 364, 365, 298 P.2d at pages 595, 596.

For the foregoing reasons it appears that the Superior Court was correct in granting defendant's motion to quash service of the summons.

The order is affirmed.

WHITE, P. J., and FOURT, J., concur.

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150 Cal.App.2d 523

Eldon G. BURKETT, Plaintiff and Respondent,

v.

J. A. THOMPSON AND SON, a corporation, et al., Defendants,

Edward W. Wicker, Appellant.

Civ. 22188.

District Court of Appeal, Second District, Division 2, California.

April 29, 1957.

Hearing Denied June 26, 1957.

Action by purchaser's assignee for fraud arising out of purchase of realty. From judgment for $5,450 for purchaser's assignee entered in Superior Court, Los Angeles County, Eugene P. Fay, J., vendor appealed. The District Court of Appeal, Moore, P. J., held that where vendor and his agent who sold the realty knew that house which was located in hilly neighborhood was built on lot which had been filled, question whether purchaser acted with reasonable reliance upon agent's representation that house was built on original land was for the court, in nonjury trial.

Judgment affirmed.

1. Fraud 🔑58(4)

In action for fraud arising out of sale of realty, where vendor and his agent who sold realty knew that the house was built on filled land but purchaser had inspected the property which was located in a hilly neighborhood, evidence was sufficient to sustain trial court's findings that purchaser was not informed and had no knowledge that the house was not built on original soil as represented by the agent.

2. Fraud 🔑16

Fraud is complete where a vendor knowingly suppresses a serious vice of his property which the vendee had no reason to suspect.

3. Vendor and Purchaser 🔑33

Where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee, and where he fails to do so, a prompt rescission by the vendee will be adjudged.

4. Fraud 🔑21

Reliance by a vendee upon a positive, false, material representation entitles the vendee to recover, and this is especially true where the vendee is not competent to judge the facts without expert advice.

5. Fraud 🔑64(5)

In action for fraud arising out of sale of realty, where vendor and his agent who sold realty knew that house which was located in hilly neighborhood was built on lot which had been filled, question whether purchaser acted with reasonable reliance upon the agent's representation that the house was built on the original land was for the court in nonjury trial.

6. Evidence 🔑474(18)

Purchaser of property was competent to testify as to value at time of her ownership in action against vendor for fraud arising out of purchase.

7. Fraud 🔑62

Where property worth $7,800 was sold for $17,500, award of $5,450 to purchaser's assignee as damages for fraud was not speculative nor excessive. West's Ann. Civ.Code, § 3343.

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Gray, Glass, Allen & Ransom, by Dudley Gray, Gardena, for appellant.

Dwain Tarbet, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from a judgment for $5,450 damages resulting from an allegedly fraudulent sale of real property. A reversal is demanded on the ground that the evidence does not sustain a finding that defendant Wicker, through his agent, represented to his successor in interest that the house was built on original soil.

Lot 14 was on the side of a hill and was owned by Marlow Burns Land Company in May, 1946. The company employed J. A. Thompson and Son to fill the lot and grade it for the purpose of subdivision and sale. The grading and filling were finished the same month and Mr. Thompson filed his affidavit on June 26, 1946, with the Department of Building and Safety averring that the lot had been filled and compacted in accordance with engineering requirements for the construction of a one-story residential building. The lot was approved for such construction by the department on July 8, 1946.

During the period of filling and grading, Marlow Burns sold the lot to Robert A. Dewey. In October, 1950, the latter sold the lot to appellant. While Mr. Wicker was in possession, he employed one Bushman, a licensed building contractor to build thereon a one-story house and garage. At the same time, at appellant's request, Bushman called at the office of the Department of Building and Safety of Los Angeles and inquired with reference to lot 14 and found from the records that the lot had a compacted fill and that it had been approved by both the City of Los Angeles and the Federal Housing Authority for the construction of a one-story residence. He communicated this information to appellant. Thereafter, he dug a trench for the foundation twelve inches by fourteen inches and found no evidence of an improperly compacted fill. Neither did the city inspector, nor the loan inspector who approved the excavation before the cement was poured, find such evidence. From the communications of Bushman, appellant acquired a knowledge that lot 14 was not only approved for a building site for a one-story residence, but also that the area beneath the surface was compacted, filled ground.

In February, 1951, appellant sold the property to Mr. and Mrs. George Pemmitt for $17,500 through William Hummell. Mrs. Pemmitt testified that the salesman told the buyers that the house had been built on the *"original land"* and that there was filled ground on only the back of the lot to a point eight feet from the porch. While Mrs. Pemmitt examined the premises with care she testified that she relied upon Hummell's statements and that she purchased the property solely because of her reliance upon his declarations, despite the fact that there was other testimony that the hilly character of the immediate vicinity would have suggested to any person who inspected the lot that it had been filled and graded. The trial court chose to believe Mrs. Pemmitt and we are bound by its decision in that respect.

There is no doubt that both appellant and his agent Hummell knew that the house was built on filled land. Appellant testified that he had been so informed by Bushman. Hummell indicated his own knowledge when he testified that in his opinion it was apparent to a casual observer that the house was located on filled land. He further testified that he never told the Pemmitts that the house was built on filled land.

[1] Appellant argues that there was no fraud because Mrs. Pemmitt inspected the property and had knowledge that the house was built on filled land and therefore did not rely on Hummell's representation, citing Carpenter v. Hamilton, 18 Cal.App.2d 69, 71, 62 P.2d 1397, 1399. But that case holds only that the right to rely on representations "* * * does not exist where a purchaser chooses to inspect the property before purchase, and, in making such inspection, *learns the true facts* * * *" (Emphasis added.) In the case at bar Mrs. Pemmitt testified that she did not know the house was on filled land until after it was sold to respondent. The trial court believed this testimony and made its findings

accordingly. It is not our prerogative to review and reevaluate the evidence. We cannot say that the findings of concealment and misrepresentation on the part of appellant, through his agent, are not supported by the evidence.

In July, 1953, the Pemmitts sold the house and lot to respondent for $21,000 and he occupied the premises. At a later time he observed that the back porch was off the foundation and in March, 1954, he caused five photographs to be taken which disclosed clearly the damaged condition of the house. Thereupon, the Pemmitts assigned the respondent their claim against appellant for damages resulting from soil subsidence, and respondent commenced this action alleging in his pleading that appellant had, prior to the sale to the Pemmitts, concealed the fact that the lot had been filled and not properly compacted, and did not reveal to the Pemmitts that the dwelling house had been "constructed on filled land." It was not alleged that appellant had represented to the Pemmitts that the residence on lot 14 had been constructed on the original ground but the case was tried upon all three issues without objection. Thus we have two frauds alleged, to wit, one for concealment; one for a positive misrepresentation.

[2, 3] Of course, fraud is complete where a vendor knowingly suppresses a serious vice of his property which the vendee had no reason to suspect. Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 68, 113 P.2d 465; Clauser v. Taylor, 44 Cal.App.2d 453, 454, 112 P.2d 661. Where material facts are accessible to the vendor only and he knows them to be not "within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee" and where he fails to do so, a prompt rescission by the vendee will be adjudged. Clauser v. Taylor, supra. The evidence showed that the water main broke at 2:00 a. m.; that the house was in a damaged condition; that a penetrometer test of the subsurface established that the degree of compaction beneath the house was not as high as it should have been if properly tamped; that the fill increased toward the rear.

[4, 5] Not only did appellant conceal from the Pemmitts the true condition of the ground beneath his house, but at the time he was negotiating a sale his agent told Mrs. Pemmitt that the house stands on the original soil. Her testimony to that effect was adopted by the court and the denials of Mr. Hummell are unavailing. It is hornbook law that reliance by a vendee upon a positive, false, material representation entitles the vendee to recover. This is especially true where the vendee is not competent to judge the facts without expert advice. Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935; Hobart v. Hobart Estate Co., 26 Cal.2d 412, 434, 159 P.2d 958. Mrs. Pemmitt testified that she did not know the house was built on filled ground. Whether she acted with reasonable reliance upon the representation was a question for the trial court's decision. Sanders v. Park Beverly Corp., 109 Cal.App.2d 698, 702, 241 P.2d 597.

[6, 7] Appellant assigns as prejudicial error the award of $5,450 as the damage suffered by respondent as a result of the fraud. The damages are neither speculative nor excessive. The proof was that when Mrs. Pemmitt purchased the property for $17,500, it was worth $7,800. She testified as to the value at a time when she was owner. She was competent to give such testimony. Long Beach City High School District of Los Angeles County v. Stewart, 30 Cal.2d 763, 772, 185 P.2d 585, 173 A.L.R. 249. Also, the proof was that when respondent purchased the lot, it was worth from $10,000 to $11,000. He was entitled to recover the "out-of-pocket loss," or the difference between the price Mrs. Pemmitt paid and the actual value at the time she made the purchase. Civ.Code, sec. 3343; Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 759–760, 192 P.2d 935. Such difference is greater than the award.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

Howard CALVIN and Jewell Calvin, Plaintiffs and Appellants,

v.

Joseph H. THAYER et al., Defendant and Respondent.

Civ. 21997.

District Court of Appeal, Second District, Division 3, California.

May 1, 1957.

Rehearing Denied May 29, 1957.

Hearing Denied June 26, 1957.

Malpractice action against doctor who allegedly erroneously attributed to organic ailments a post-traumatic subdural hematoma. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that evidence, on limitations issue, sustained finding that plaintiffs had had knowledge of allegedly incorrect diagnosis for more than one year prior to bringing action.

Affirmed.

1. Limitation of Actions ⟹95(1)

Statute of limitations commenced to run when plaintiffs acquired knowledge of facts constituting their cause of action.

2. Limitation of Actions ⟹197(2)

In malpractice action against doctor who allegedly erroneously attributed to organic ailments a post-traumatic subdural hematoma, evidence, on limitations issue, sustained finding that plaintiffs had had knowledge of allegedly incorrect diagnosis for more than one year prior to bringing action. West's Ann.Code Civ.Proc., § 340, subd. 3.

3. Limitation of Actions ⟹95(1)

Patient had a single cause of action for damage allegedly resulting from malpractice, and could not avoid bar of statute of limitations by claiming that even if patient had had knowledge of malpractice more than one year prior to bringing of action she had believed injury to be temporary and had only learned of permanency of injuries within one year prior to institution of action. West's Ann.Code Civ.Proc., §§ 340, subd. 3, 597.

4. Limitation of Actions ⟹31

Where physician had assumed no duties other than those within usual relationship of physician and patient, namely, use of judgment, skill and care demanded for complete and competent professional service, patient's action, predicated upon misdiagnosis, sounded in tort and was governed by one year statute rather than by statute applicable to breach of contract causes. West's Ann.Code Civ.Proc., § 340, subd. 3.

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Richard C. Dyer, Frederick M. Kraft, Los Angeles, Low & Stone, Sheldon Berlin, Beverly Hills, for appellants.

Reed, Callaway, Kirtland & Packard, Henry E. Kappler, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiffs-appellants brought this action against the defendant physician and surgeon claiming damages for malpractice. The first cause of action of the complaint alleged that on June 15, 1952, Mrs. Calvin was injured in an automobile accident; she engaged the services of Dr. Joseph H. Thayer and numerous John Does (who were not served), as physicians and surgeons to examine, diagnose, treat and operate upon and care for her; she was suffering from a post-traumatic subdural hematoma which caused intracranial pressure causing her to suffer "constant severe headaches, dizziness, loss of memory, marked changes in personality, and loss of vision resulting from the choking of the optical discs and atrophy of the optic nerves"; the condition required immediate surgery; defendants knew or should have known that if they failed to perform their full duties Mrs. Calvin would suffer injury and pain; that defendants wrongfully and negligently failed to properly diagnose or treat plaintiff's condition and they negligently failed to associate or refer plaintiff to another physician and surgeon who was qualified. It was alleged that if defendants had correctly diagnosed and treated her condition she would have wholly recovered from her injuries in two or three months, but that as a result of the negligence of defendants she suffered intense and excruciating pain and mental anguish and her optic nerves have been irreparably damaged and her vision permanently impaired. In a second cause of action Mr. Calvin realleged all the allegations of the first cause of action and prayed for damages which he had sustained.

Dr. Thayer filed an answer denying the accusations of negligence and damage. As a special defense it was alleged that the action, having been filed more than one year after the Statute of Limitations had commenced to run, was barred by the provision of section 340, subd. 3, of the Code of Civil Procedure. The action was filed January 28, 1954. It was alleged that on or about January 17th, 18th and 19th, 1953, plaintiffs and each of them knew that Mrs. Calvin was suffering from a post subdural hydroma or hematoma as a result of her automobile accident, which was causing the ailments from which she was suffering, and they knew or should have known of any alleged failure on the part of Dr. Thayer to properly diagnose and treat Mrs. Calvin. As a further separate defense it was alleged that plaintiffs accepted $5,000 from Philip F. Pomerantz and executed in his favor a release of all persons from all claims for damages arising out of the injuries suffered in the automobile accident.

The cause was set for trial to a jury. At the opening of the trial defendant made a motion that the special defenses be tried first, pursuant to section 597, Code of Civil Procedure. The motion was granted and pursuant to stipulation of the parties the special defenses were tried to the court.

There was evidence of the following facts: For some two years Mrs. Calvin had been under the care of Dr. Thayer; among her ailments was what the doctor thought was a gall bladder condition that required an operation. Mrs. Calvin engaged defendant's services shortly after her accident and was placed in a hospital on three occasions, but without receiving medical or surgical treatment for injuries suffered in the accident; from the time of the accident until the following January Mrs. Calvin suffered from extreme pains in her head, dizziness, nausea and impairment of vision. Dr. Thayer attributed this condition to ailments from which she had previously suffered. Although X-rays were taken they did not suggest to Dr. Thayer that the condition that was causing Mrs. Calvin's suffering was an accumulation of fluid that was creating brain pressure and injury to the optic nerves. He did not discover that the condition was of traumatic origin.

Although on January 6th defendant was still advising a gall bladder operation either he or an associate recommended that Mrs. Calvin consult Dr. Seletz, a specialist in neurology and neurological surgery. Dr. Seletz acquainted himself with the patient's history and learned of a cerebral concussion which Mrs. Calvin had received in the accident. On January 9th, in a thorough examination, Dr. Seletz ascertained there was a swelling of the optic disc. He referred Mrs. Calvin to Dr. Schwartz, an ophthalmologist, who examined the patient and confirmed the findings of Dr. Seletz. Dr. Schwartz concluded and reported that the condition had a traumatic basis. On January 9th Dr. Seletz informed plaintiffs that there was an increased pressure within Mrs. Calvin's head due to a head injury and that he feared that it was a surgical condition, but believed it was one he could likely cure. On January 17th Dr. Seletz stated to plaintiffs there was another test that should be made (an air study), and that this test would not be made without an understanding beforehand that if, in the doctor's opinion, surgery was indicated he had permission to immediately proceed with an operation. Plaintiffs expressed their agreement. Mrs. Calvin entered the hospital January 17th. A writing was prepared which stated, in part: "Mrs. Jewell Calvin, Dr. E. Seletz, Subdural Hematoma—preoperative diagnosis, possible Subdural Hematoma." Dr. Seletz testified that the diagnosis was written by him and that he signed the paper. Mr. and Mrs. Calvin signed another paper which stated, in part: "Pre-operative diagnosis, possible Subdural Hematoma." This was over the signature of Dr. Seletz. On January 19th Mrs. Calvin signed a paper which read, in part: "Operation and anesthetic record * * * pre-operative diagnosis, shaving of head." Mrs. Calvin testified that the three papers dated January 17th were signed by her in blank. The papers which contained the diagnosis stated that the signers certified that the diagnosis was written in before the operation. Dr. Seletz testified that he wrote in the diagnosis, that he never operated without writing in the diagnosis, and that to the best of his knowledge it was written in before the signatures of plaintiffs were attached.

The court found that on or about January 20, 1953 plaintiffs and each of them knew or in the exercise of reasonable care and diligence should have known that Mrs. Calvin was suffering from a post-traumatic subdural hydroma or hematoma as a result of the automobile accident and knew or in the exercise of ordinary care should have known of any failure on the part of Dr. Thayer to properly diagnose and treat the plaintiff, Mrs. Calvin. It was found that the relationship of physician and patient terminated January 6, 1953. These findings were made as to each affirmative defense of the Statute of Limitations. The court found to be untrue the allegation of the execution of a release that would operate in favor of Dr. Thayer and that the separate defense based upon the alleged release was not sustained. The court concluded that the action was barred by the provisions of Section 340, subd. 3, of the Code of Civil Procedure (the one year statute). Judgment was for the defendant and plaintiffs appeal.

Plaintiffs' contentions are the following: (1) The findings as to the defense of the Statute of Limitations are without support in the evidence for the following reasons (a) plaintiffs did not have knowledge of the facts constituting their cause of action more than one year prior to the institution of the action; (b) even if they had knowledge prior to January 28, 1953, that the failure of the defendant to properly diagnose and treat Mrs. Calvin was responsible for her suffering up to that time, it was believed to be a temporary condition, that plaintiffs only learned of the permanency of the injuries within one year prior to institution of the action, and that if the action for damages due to what was believed to be a temporary condition was barred, there was yet a cause of action for permanent injuries that was not barred; (2) upon a trial of all the issues in the action plaintiffs might have been able to establish a cause of action for breach of contract or for deceit, and (3) they were "coerced" by the court into stipulating to try the special issues without a jury.

Although plaintiffs contend that they were prejudiced in some manner by the trial of the special issues, they do not point out wherein they claim that the procedure directed by the court was an abuse of discretion or that the introduction of evidence on their behalf in trial of the special defenses was unduly restricted.

Although these several contentions are elaborated upon in some 80 pages of briefs of plaintiffs we think it is self-evident that if there was substantial evidence to support the foregoing findings the judgment was correct and the appeal is without merit.

[1, 2] With respect to the finding as to their knowledge of facts which they claim constituted malpractice, plaintiffs say: "The only substantial conflict in the evidence concerned two questions * * * whether hospital records, signed by appellants prior to January 28, 1953, stated that the pre-operative diagnosis of Dr. Seletz was a hematoma when appellants signed them or whether this information was subsequently added without their knowledge." Such a statement made by an appellant is a tacit admission of the sufficiency of the evidence and, presently, we consider it to be an admission that there was sufficient evidence to support the implied finding that the rec-

ords in question contained the statements appearing thereon at the time they were signed by plaintiffs. However, this was not the entire evidence relevant to the finding of knowledge. The information conveyed to plaintiffs by Dr. Seletz before and after the operation was such that plaintiffs must have known the facts constituting their cause of action, namely, that Dr. Thayer had not made a correct diagnosis nor given Mrs. Calvin the care and treatment that her condition demanded. Dr. Seletz explained to plaintiffs before the operation that Mrs. Calvin was suffering from pressure on her brain due to a head injury, and after the operation he explained what he had done to correct the condition. There was no denial by plaintiffs that Dr. Seletz made it clear to them on January 19 and again on January 20 that Dr. Thayer had made an incorrect diagnosis. The Statute of Limitations commenced to run when plaintiffs acquired knowledge of the facts constituting their cause of action. The relationship between plaintiffs and Dr. Thayer had been severed prior to that time and the doctor was guilty of no act or omission thereafter that would have interrupted the running of the statute or estopped him from relying upon it. As to the evidence of their knowledge plaintiffs say: "Even if all the evidence be considered, sufficient error was committed to justify a weighing of the evidence by the appellate court. And the overwhelming weight of the evidence leads to a conclusion that this defense lacks any merit whatsoever." In considering whether there was substantial evidence to justify the findings of knowledge we have come to the conclusion that the court could not reasonably have found that plaintiffs did not have knowledge of the facts we have mentioned as early as January 19, 1953.

[3] With respect to plaintiffs' knowledge of the extent of Mrs. Calvin's injuries, both temporary and permanent, plaintiffs argue that they have one cause of action for the injuries which they considered to be temporary and another cause of action for the permanent injuries. The argument has no support in reason or authority. Mr. and Mrs. Calvin had, severally, a single cause of action for his or her damages. Any recovery would have included compensation for damages sustained to the time of trial and also for future detriment that could be established as the reasonably probable consequence of the injury.

[4] Plaintiffs argue further that under the allegations of the complaint, upon the trial of all the issues, they might have been able to establish a cause of action for breach of contract or for deceit, and that neither cause of action would have been barred by the one year statute.

The sole theory of the complaint was the alleged negligence of Dr. Thayer. The duties assumed by defendant were those within the usual relationship of physician and patient, namely, the use of judgment, skill and care demanded for complete and competent professional service. There was no pleading or evidence whatever that defendant assumed any other duty or obligation. The action sounds in tort and was barred under the provisions of Section 340, subd. 3, of the Code of Civil Procedure. Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908; Rubino v. Utah Canning Co., 123 Cal.App.2d 18, 266 P.2d 163; Speer v. Brown, 26 Cal.App.2d 283, 79 P.2d 179.

Plaintiffs argue further that upon a trial of all the issues they might have been able to establish liability of the defendant for deceit. None of the elements of a cause of action for deceit was pleaded and none was shown by the evidence.

In their briefs plaintiffs speak of having been "coerced" into waiving a jury for trial of the special defenses. There is nothing whatever in the record to justify any such statement. Plaintiffs' counsel objected to a separate trial of the special defenses and were overruled. The court thereafter merely suggested the inadvisability of trying the special defenses to a jury. Counsel expressly conceded that those defenses if tried separately should be tried by the court, and both Mr. and Mrs. Calvin, when questioned by the court, agreed with their counsel to a trial by the court. Counsel were free to reject the court's suggestion and the record does not indicate that their acquiescence was due to timidity or misunderstanding.

As we have stated, the crucial question on the appeal is whether there was substantial evidence to support the findings as to the facts which started in operation the Statute of Limitations. Instead of confining their argument to this point by a fair discussion of the evidence and citation of applicable authorities, plaintiffs' briefs have wandered far from the point and cite 175 cases of decisions, code sections, law reviews, textbooks, etc., in support of numerous propositions of law having no relevancy whatever to the questions this court has for decision.

The legal principles applicable to the facts found in the present case were aptly stated by the court in Hemingway v. Waxler, 128 Cal.App.2d 68, 274 P.2d 699. It would serve no good purpose to repeat them or to extend our opinion further.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Vinka BIAKANJA, Plaintiff and Respondent,
v.
Thomas J. IRVING, Defendant and Appellant.*
Civ. 17093.

District Court of Appeal, First District, Division 2, California.
March 14, 1957.

Hearing Granted May 8, 1957.

Action for damages for drawing invalid will. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Stone, J. pro tem., held that where defendant, who was a notary public and not a licensed attorney, acted as an attorney and not as a scrivener when he drew will, the drawing of will was in violation of statute limiting practice of law to active members of State Bar, and this violation permitted sole beneficiary of will to recover from defendant the difference between amount beneficiary would have received had will been valid and amount actually distributed to her according to laws of intestate succession.

Judgment affirmed.

1. Attorney and Client 🔑11

The drawing of will constitutes "practice of law" under statute prohibiting person from practicing law unless he is active member of State Bar. West's Ann.Bus. & Prof.Code, § 6125.

See publication Words and Phrases, for other judicial constructions and definitions of "Practice of Law".

2. Attorney and Client 🔑11

A single act may constitute a violation of Business and Professions Code which prohibits a person, not an active member of the state bar, from practicing law. West's Ann.Bus. & Prof.Code, § 6125.

3. Attorney and Client 🔑26

In action for damages for drawing invalid will, evidence sustained finding that defendant, who was a notary public and not a licensed attorney, was acting as an attorney and not as a scrivener. West's Ann.Bus. & Prof.Code, § 6125.

4. Appeal and Error 🔑996

If inference drawn from evidence by trial court is not unreasonable and is supported by some substantial evidence, trial court's finding will not be reversed by appellate court simply because another or different inference could well be drawn from same evidence.

5. Appeal and Error 🔑994(1)

Appellate court does not attempt to determine the credibility of witnesses.

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* Opinion vacated 320 P.2d 16.

6. Appeal and Error 🔑994(3)

Determination of credibility of witnesses was within exclusive province of trial court sitting without a jury.

7. Attorney and Client 🔑11, 26

Where defendant, who was a notary public and not a licensed attorney, acted as an attorney and not as a scrivener when he drew will, the drawing of will was in violation of statute limiting practice of law to active members of State Bar, and this violation permitted sole beneficiary of will to recover from defendant the difference between amount beneficiary would have received had will been valid and amount actually distributed to her according to laws of intestate succession. West's Ann.Bus. & Prof.Code, § 6125.

8. Attorney and Client 🔑32

The practice of law is regulated for benefit of members of that class or segment of public which might be injured if unskilled or untrained persons were permitted to practice the profession. West's Ann.Bus. & Prof.Code, § 6125.

9. Attorney and Client 🔑26

A legatee or devisee comes within class of persons intended to be protected from unlicensed and unlawful practice of law in the preparation of a will. West's Ann. Bus. & Prof.Code, § 6125.

10. Attorney and Client 🔑26

An injured legatee or devisee may recover damages suffered by negligent preparation of will by unlicensed person practicing law in violation of statute. West's Ann. Bus. & Prof.Code, § 6125.

Lloyd J. Cosgrove, San Francisco, for appellant. Herbert Chamberlin, San Francisco, of counsel.

Joseph E. Isaacs, Lenz, Jarvis, Miller & Decker, San Francisco, for respondent.

STONE, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiff for the sum of $7,131 damages against the defendant, a Notary Public for drawing an invalid will. The action was tried before the court sitting without a jury. John Maroevich was a janitor in one of the schools in San Francisco. He had one brother and four sisters of whom plaintiff is one of the sisters. Defendant, a notary public and accountant, had known Maroevich from about 1942, until his death on December 13, 1953. He had prepared Maroevich's income tax returns from 1943 and had kept his books from 1949, and occasionally typed letters for him. On November 27, 1949, defendant typed and notarized a will for decedent and by the terms of the will he left all of his property to his sister, the plaintiff herein. There were no witnesses to the will at the time Maroevich signed it, but defendant affixed his notarial seal. There is no dispute in the evidence as to defendant's belief that a notarized will could be admitted to probate and that witnesses were unnecessary. It does appear, however, that some time later, one Harry Edwards signed the will as a witness but only decedent was present at that time. Subsequently, one Sidney Aitken affixed his signature to the document. The will was not admitted to probate because of insufficient attestation. The estate of John Maroevich was distributed according to the laws of intestate succession, and plaintiff succeeded to one-eight of the the estate rather than the whole thereof. Plaintiff filed this action against the defendant for the difference between the amount which she would have received had the will been valid and the amount actually distributed to her. The trial court found in favor of the plaintiff and judgment was entered against the defendant for the sum of $7,131. From that judgment defendant has perfected this appeal.

Appellant relies almost entirely on the case of Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862. In that case as here the plaintiff was named as legatee and devisee in a will but was prevented from taking under the will because of the negligence of the attorney who prepared the ineffective document for the deceased testator. In the Buckley case the plaintiff relied upon two theories, negligence or tort and third party beneficiary. A demurrer alleging the complaint failed to state a cause of action was sustained and a judgment was entered accordingly. Plaintiff appealed and the Supreme Court held against his contentions on both grounds. The court held the contract to make a valid will established a relationship between the testator and the attorney, but not the legatee and therefore the duty of care was owed to the testator alone. Although the legatee was the one who was injured and the testator was dead, the court held no duty of care was owed the injured legatee and he could not state a cause of action predicated upon negligence. The court also held the third party beneficiary theory untenable. They concluded that the contract between the testator and the attorney was to make a will, and although the legatee was a beneficiary under the will, he was not a beneficiary of the contract to make a will. The court's reasoning is summarized by the following excerpt from the opinion, 110 Cal. at page 374, 42 P. at page 902: "It was a contract for employment of defendant's services as an attorney, to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire. Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff * * * not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria,* against which the courts are powerless to relieve."

[1, 2] The Buckley case has not been overruled but the instant case can be distinguished. The will in our case was prepared by a notary public rather than by an attorney as in the Buckley case. Business and Professions Code, § 6125 was enacted after the Buckley case was decided in 1895. Business and Professions Code, § 6125 provides, "No person shall practice law in this State unless he is an active member of the State Bar." The drawing of a will constitutes the practice of law and it is well established in California that a single act may constitute a violation of Business and Professions Code, § 6125. Agran v. Shapiro, 127 Cal.App.2d Supp. 807, 273 P.2d 619; People v. Sipper, 61 Cal.App.2d Supp. 844, 142 P.2d 960; State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432; People v. People's Trust Co., 180 App.Div. 494, 167 N.Y.S. 767; People v. Ring, 26 Cal.App.2d Supp. 768, at page 773, 70 P.2d 281. After this appeal was submitted, a decision involving a void will prepared by a notary public was filed. It is the case of Mickel v. Murphy, 147 Cal.App.2d 718, 305 P.2d 993, and held the devisee could not recover from the notary public. At first impression the Mickel case would seem to be controlling. However, that case did not go to trial but rather was decided on the pleadings. The court held the complaint failed to allege that the notary public was acting as an attorney. We quote the following language from 147 Cal.App.2d page 721, 305 P.2d at page 995: "In the instant case it is not alleged that defendant acted other than as a scrivener in the preparation of the will and no facts are alleged showing that it was defendant's duty under the circumstances to advise the decedent that the will required 'attestation thereto of two witnesses.'"

[3] The decision is actually based upon the finding that the defendant was not prac-

ticing law and therefore could not have violated Business and Professions Code, § 6125. In the instant case the trial court found that appellant was acting as an attorney and not as a scrivener. This finding is supported by substantial evidence. The testimony of Attorney Archbold discloses that after Maroevich's death he asked appellant if he had prepared a will for John Maroevich and appellant answered yes. Furthermore, appellant advised Mr. Archbold that a notarized will was legal and could be admitted to probate. During the trial appellant denied the conversation but the trial court believed Archbold. In fact, at the conclusion of the trial and at the time of rendering his decision, the court made it clear he did not believe appellant and felt he had deliberately committed perjury. The question of whether appellant was acting as an attorney or as a scrivener was in the court's mind during the course of the trial as is indicated by the questions directed by the court to appellant while on
cur in the foregoing dissenting opinion.
the witness stand.

> "The Court: Q. Did you check it, compare it, after it was typed? A. Yes, I read it over and gave it to John Maroevich to read over.
>
> "Q. Did you compare it with the notes? A. No, I just read it over.
>
> "Q. You read it to him out loud? A. No, I handed it to him to read.
>
> "Q. Did you ask him if that's what he wanted? A. I asked him if it was O.K., is exactly the word, and he said 'Yes' ".

Furthermore, the evidence discloses appellant believed wills were to be notarized and as such were valid. When he affixed a notarial acknowledgment to the will which he had prepared for Maroevich, it could be inferred he thought he was solemnizing a will which would be practicing law.

[4–6] If an inference drawn from the evidence by the trial court is not unreasonable and is supported by some substantial evidence, it is established law the trial court's finding will not be reversed by an appellate court simply because another or different inference could well be drawn from the same evidence. Nor does the appellate court attempt to determine the credibility of witnesses. In this case the credibility as between appellant and Attorney Archbold, whose testimony was categorically denied by Irving, was a determination which was within the exclusive province of the trial court.

[7] It was admitted appellant was a notary public and not a licensed attorney. The trial court found he was practicing law. It follows therefore appellant violated Business and Professions Code, § 6125. In the Mickel case the court held that a violation of Business and Professions Code, § 6125 does not create a civil liability. This is dicta, however, in view of the holding in the Mickel case that the defendant was not practicing law. An analysis of the question leads us to a conclusion contrary to that dicta. The holding in the Mickel case that a violation of Business and Professions Code, § 6125 cannot be the basis for civil liability is predicated primarily upon the case of Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777, 778, and in particular the following language which was quoted from the Clinkscales case: "A statute that provides for a criminal proceeding only does not create a civil liability; if there is no provision for a remedy by civil action to persons injured by a breach of the statute it is because the Legislature did not contemplate one. A suit for damages is based on the theory that the conduct inflicting the injuries is a common-law tort * * *."

Looking at the Clinkscales decision in its entirety the facts disclose that the defendant had run a stop sign which had been erected pursuant to a county ordinance. It was contended the ordinance was invalid because of admitted defects in publication. The court said 22 Cal.2d at page 74, 136 P.2d at page 778: "This contention would make the question of negligence *per se* turn upon the irregularity of the authorization. Whatever the effect of the irregularity on defendant's criminal liability, it cannot be assumed that the conditions that limit it also limit civil liability. The propriety of taking from the jury the determination of negligence does not turn on defendant's criminal liability." and 22 Cal.2d on page 75, 136 P.2d on page 778: "The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. (See Holmes, The Common Law, 120–129; Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv.L.Rev. 453.) The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances."

The Clinkscales case appears to stand for the proposition that in a civil action for negligence any criminal statute has a bearing if it sets up a standard of care covering the circumstances of the particular case which is accepted by the courts. It further holds that if a standard of care is not incorporated in the criminal statute, it does not mean that a violation of such criminal statute does not constitute negligent conduct and the basis for liability in a civil action as a matter of law.

If the portion of the Clinkscales decision quoted in the Mickel case can be considered apart from the rest of the opinion as a definitive statement of law, nonetheless, we believe there is an essential distinction between the Clinkscales case involving a traffic ordinance and the Business and Professions Code section before us.

[8] Although both statutes stem from the same attribute of sovereignty, the police power of the state, each arises from a different facet of the police power. The vehicle code section in a criminal statute designed to protect the safety of the general public and as a safety measure it cannot be said the Legislature had any class in mind when enacting it. On the other hand, Business and Professions Code, § 6125 is regulatory in nature, limiting or licensing the practice of the law, a particular profession. In the absence of such legislation, to practice law without a license would be a perfectly lawful act. The practice of the law is regulated for the benefit of the members of that class or segment of the public which might be injured if unskilled and untrained persons were permitted to practice the profession. The following cases which construe statutes concerning licenses appear to be more in point. The case of Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, involved an unlicensed elevator operator and the court held hiring a person to operate an elevator without a license was negligence per se. In Andreen v. Escondido Citrus Union, 93 Cal.App. 182, 269 P. 556, the court held the failure to procure a license to spray and fumigate was admissible as relevant and material to show negligence, although the action was not for a violation of the statute. In Hudson v. Craft, 33 Cal.2d 654, 204 P.2d 1, 7 A.L.R.2d 696, a boxing promoter who failed to secure a state license was held liable to a minor participant who was injured in a boxing match promoted by him. The court said, 33 Cal.2d at page 660, 204 P.2d at page 4:

> "* * * the promoter is liable where he conducts boxing matches or prize fights without a license and in violation of the statutory provisions above discussed, regardless of the rights as between the contestants, and that the consent of the combatants does not relieve him of that liability." and

> "It has been held that a violation of an act making it a criminal offense to intercept and publish a telephone message could be the basis of a civil action. Reitmeister v. Reitmeister, 2 Cir., 162 F.2d 691; that the employment of a minor without a permit in violation of the Child Labor Laws is a

> basis for civil responsibility for injuries received by the minor in such employment. [Citations.]"

The general rule of law in California as stated in 19 Cal.Jur. section 65, p. 632 is that "a violation of a statute or of a county or municipal ordinance, which directly causes injury to another, constitutes negligence as a matter of law." This rule is modified by the following limitation: "A violation of a statute or ordinance within the above rule is actionable negligence only as to those persons for whose benefit or protection it was enacted, and if a plaintiff does not come within that class a violation does not supply the element of duty owing." (19 Cal.Jur. p. 635 § 66.)

[9] A regulatory statute is enacted for the benefit of those who might be injured in the absence of such regulation. For whose benefit was Business and Professions Code, § 6125 enacted? Certainly, not to protect attorneys against encroachment upon their franchise. In the case of a will, who would be affected or injured by its negligent preparation by an unlicensed person? Not the testator, even though he is the contracting party because when it is determined the will is void by reason of some negligence, the testator is dead. He never knows whether or not the objects of his bounty receive his estate. Certainly, the Legislators who enacted the statute could not have had the testator in mind. The person damaged is the legatee or devisee named in the void will. He, and only he, is injured by such unlawful practice of the law. Thus, we are drawn to the inevitable conclusion that a legatee or devisee comes within that class of persons intended to be protected against the unlicensed and unlawful practice of the law in the preparation of a will.

[10] We are not unmindful of the fact this interpretation of Business and Professions Code, § 6125 will present an anomalous situation until or unless the case of Buckley v. Gray is modified. Under our interpretation of the law an injured legatee or devisee may recover damages suffered by the negligent preparation of a will by an unlicensed person who violates Business and Professions Code, § 6125, while under the Buckley case a legatee similarly injured by the negligent practice of the law by a licensed attorney may not recover. We simply point out that to say that only the testator has been wronged is contrary to fact and a legal fiction.

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

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150 Cal.App.2d 327

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Plaintiff and Respondent,

v.

SAFEWAY STORES, Incorporated, a corporation, Defendant and Appellant.

Civ. 17230.

District Court of Appeal, First District,
Division 1, California.
April 22, 1957.

Suit by city and county to enjoin, as public nuisance, use of mercantile store's traffic easement over property in residential zone, for purposes of ingress and egress to its parking lot in another zone, by general public and delivery trucks. The Superior Court, City and County of San Francisco, Clarence W. Morris, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence sustained trial court's finding that use of such easement injuriously affected adjacent property and constituted a public nuisance.

Affirmed.

1. Municipal Corporations 🔑669

The use of traffic easement in residential zone for purposes of ingress and egress to parking lot on mercantile store premises, in another zone, by general public and delivery trucks, was a violation of residential zoning ordinance.

2. Municipal Corporations ⚷601(4)

It is property itself which is zoned and not any particular interest therein, and traffic easement as well as fee is subject to zoning.

3. Nuisance ⚷84

In suit by city and county, to enjoin, as public nuisance, use of a mercantile store's traffic easement for purposes of ingress and egress to its parking lot by general public and delivery trucks, in violation of zoning restrictions, evidence sustained trial court's finding that the use of such easement injuriously affected real and personal property and personal enjoyment and health of residents in vicinity and constituted a public nuisance. West's Ann.Civ.Code, §§ 3479, 3480.

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Albert F. Skelly, San Francisco, for appellant.

Dion R. Holm, City Atty., Lawrence S. Mana, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

Plaintiff sued to have defendant's use of a certain traffic easement for ingress to and egress from its property upon which its store is located, by its customers and others, declared a public nuisance and enjoined. Defendant appeals from a judgment in plaintiff's favor.

Questions Presented.

1. Is the use of a traffic easement in a residential zone for purposes of ingress and egress to a parking lot on mercantile store premises by the general public, delivery trucks, etc., a violation of the zoning restrictions?
2. Is such a violation a public nuisance?

Facts.

There is no conflict in the evidence, the facts having been mostly stipulated. The Stonesons prior to and on March 13, 1940, owned a tract of land in San Francisco, bounded by 19th Avenue, Ocean Avenue, Eucalyptus Avenue and a municipal right of way. It was divided into lots. Lots 9 to 16, both inclusive, front on 19th Avenue. On March 13, 1940, they were zoned by a San Francisco ordinance as first residential zone. Lots 8, 17 and 18 constitute the easterly portion of said tract. By said ordinance lots 17 and 18 were zoned as commercial zone. In 1948 most of lot 8 was so zoned "with stipulations" limiting it to use for parking only. Defendant maintains its store on lot 18, with an extension thereof on a portion of lot 8 which portion was zoned "commercial" for that purpose in 1950. March 15, 1940, the Stonesons recorded a "Declaration of Easement," which after reciting that they were the owners of the above entire tract, described a portion of said tract and then stated: "Now Therefore, the undersigned, Henry Stoneson and Ellis L. Stoneson, do hereby create and declare and there is hereby created and there shall hereafter exist a traffic easement upon and over that portion of said property herein lastly described, and which said easement shall be kept open and unobstructed at all times."

Lots 9 to 16, both inclusive, are held in separate ownerships. Lots 8, 17 and 18 belong to defendant. Prior to May, 1953, the line between the easement and defendant's property was fenced, thus preventing access from the easement to that property. In that month defendant removed a portion of the fence near Eucalyptus Avenue, thereby connecting the parking lot with the traffic easement. While there is an "exit" sign at this point, it is ignored as cars go both in and out of the parking lot there. Moreover, some drivers now use the easement as a cutoff, coming off 19th Avenue into Eucalyptus, thence through the easement into the parking lot and on to Ocean Avenue. Defendant's customers desiring to go from the parking lot to Ocean Avenue use the driveway of the residents on the easement in order to make the turn. In so doing they damage property. Trucks and suppliers of service to Safeway frequently use the easement for both ingress and egress. Since defendant's property was opened for parking through the easement, the traffic has increased immensely. The easement is now used as a thoroughfare.

1. Commercial Use.

Defendant contends that the use of the easement for entry into and exit from the parking area adjoining its store is not an integral or essential part of its commercial operation, and therefore is not a commercial use or a violation of the ordinance. This question has never been directly passed upon in California. The decisions in other jurisdictions are not uniform. Ones supporting the action of the trial court here are City of Yonkers v. Rentways, Inc., 1952, 304 N.Y. 499, 109 N.E.2d 597; Village of Great Neck Estates v. Bemak & Lehman, 1928, 248 N.Y. 651, 162 N.E. 562, affirming 128 Misc. 441, 218 N.Y.S. 359; Town of Brookline v. Co-Ray Realty Co., 1950, 326 Mass. 206, 93 N.E.2d 581.

In the City of Yonkers case it was held, based upon prior decisions of that state, that the use of a lot in a residential zone for ingress to and egress from an adjoining public garage in a business zone, was a business use and violative of the residential zoning ordinance. "* * * it can hardly be denied that the day in, day out moving of vehicles across private land from a public street to the shelter of a garage building is part of the business of garaging vehicles." 109 N.E.2d at page 599.

The Village of Great Neck case involved the same type of question. It was held that the use of the property as a driveway to the public garage was a public use, although there apparently was some use of the driveway for the storage and repair of automobiles. The court stated in 218 N.Y.S. at page 360: "The interesting question involved is as to whether the owner of a garage located entirely outside the village may be restrained from permitting his customers to drive into his garage and out of it, over a driveway connected with a private residence in a zone within the village, which is restricted to residence uses."

In the Town of Brookline case the defendant owned a tract of land partly in the City of Boston and partly in the Town of Brookline. It proposed to construct an apartment house on the Boston portion and to use the Brookline portion as a rear yard and service entrance. The Brookline portion was in a "single residence district." The proposed use was held to be a violation of the single residence zoning ordinance.

Cited as opposing this doctrine is Borough of Prospect Park v. McClaskey, 1943, 151 Pa.Super. 467, 30 A.2d 179, where it was held that the use of a driveway in a commercial zone to take supplies into the yard of a brick manufactory in an industrial zone and to haul bricks out was not such an accessory use to the industry as to violate an ordinance. The reason is expressed as follows, 30 A.2d at page 181: "A driveway for the purpose of affording means of passage to trucks is equally advantageous and suitable for commercial as for industrial purposes." It is significant that the court also said: "* * * it is conceivable that the public use of a private driveway lying within a residential district in connection with a public garage located in an adjoining commercial district may so change the character of the driveway as to render its public use prohibitive as 'a commercial use' * * *".

In State ex rel. Szodomka v. Gruber, 1942, 201 La. 1068, 10 So.2d 899, also cited by defendant, it was held that the use of a 100 foot lot and a 75 foot driveway thereto in a residential zone for parking and entrance to a restaurant in an adjoining commercial zone was not a use which could be considered as a part of the restaurant business, and hence was not a violation of the residential zoning ordinance. It is significant, however, that the court stated that the only one complaining was a person residing more than 100 feet away, and that "The fact that the municipal authorities, the city attorney and other officials who are entrusted with the enforcement of the municipal ordinances, are not complaining or contending that the" use objected to was a violation of the zoning ordinance, confirmed the court's opinion that there was no violation. It then said: "If the municipal authorities should construe the ordinance as forbidding such use * * * the municipality would either stop this use of the property or lift the ban against it." 10 So.2d at page 902.

In Faulkner v. City of Keene, 1931, 85 N.H. 147, 155 A. 195, cited by defendant, the plaintiffs sought a declaratory judgment holding among other matters that the proposed use of a 25 foot lot in a residential zone adjacent to a proposed filling station in a commercial zone was not a commercial use or a violation of the residential zone ordinance. The case is of no value to us for the reason that as the court points out, no one contended that the use of the lot as an approach to the filling station was a violation of the ordinance. The defendants were contending that the real purpose was to use the lot for servicing cars. The court then held that such was not the intended use.

Another case cited by defendant is Sudduth v. Snyder, 1938, 120 W.Va. 746, 200 S.E. 55, which dealt with the following situation: The plaintiff sought to compel the city of Bluefield to issue to him a permit to construct a filling station and approaches thereto, on his property. The proposed filling station proper was within a zone permitting filling stations. However, the balance of the plaintiff's property upon which he proposed to construct the approaches to the filling station was within a zone prohibiting such stations. The position of the city was that the filling station proper and its approaches thereto were one project. The court held that the ordinance controlling the location of filling stations was based on the theory of protection against fire, and was intended to apply to the station proper, as distinguished from the approaches thereto, and that the right to construct a filling station carries with it the right to such approaches as are reasonably necessary to its use. Such approaches being essential to that use, and not being in conflict with the purposes of the ordinance respecting fire protection, the construction and use thereof cannot be prohibited. The court was careful to point out that there was no contention that the use of the property would constitute a public nuisance, thus indicating that a different decision might have been reached if the use were a public nuisance.

[1] Mercantile stores surrounded by large parking areas are a modern development. The success of such stores depends greatly upon the parking facilities provided. Foot patronage is minimum. Most of the shoppers come in automobiles which must be parked on the store grounds. To hold otherwise would be neither factual nor realistic. Such parking is an essential and integral part of the store's business. A large number of trucks daily visit such stores bringing fresh supplies. Thus the use of property zoned for residence for the vast amount of public ingress and egress necessarily connected with a store of the Safeway type, is a violation of a residential zoning ordinance.

[2] Defendant seems to contend that the use of a traffic easement in connection with its store business and parking facilities cannot be a commercial use, thereby implying that the right to pass over the easement is superior to the right to zone that easement. In effect, defendant is contending that property held in fee may be zoned for a particular use but that a lesser interest, such as an easement, cannot be zoned. The fallacy of this argument is that it is the property itself which is zoned and not any particular interest in it as such. Obviously, if a parcel of land is zoned the particular interest therein of any individual is subject to that zoning.

This is not a case, as defendant seems to consider it, of a question of the rights of the owner of a dominant tenement over the owners of servient tenements. There is no question of defendant's ownership of an interest in the traffic easement, any more than its ownership of the parking and store area. The question here is concerning defendant's right to use its interest in violation of a zoning ordinance.[1] The trial court properly held that defendant had no right to do so.

2. Public Nuisance.

[3] Plaintiff brought this action and the court made its findings upon the premise that the violation of the ordinance constituted a public nuisance and was injurious to the general public and not only to individuals in their private rights.

The evidence showed that automobiles patronizing defendant's store, and the trucks supplying it, go in and out over the easement; that trucks servicing the store spill swill on the easement; that trucks, by reason of their size, have blocked traffic; that the traffic on the easement has increased "immensely" in connection with the Safeway store; that accident hazards have been created; that children playing on the property adjoining the easement have been endangered; that the patrons of the store back their cars on and injure private property. Defendant offered no evidence to controvert any of the foregoing, nor to show that the actions of their patrons in this respect were without its knowledge or approval. This evidence plus the fact that by stipulation of the parties, the trial judge visited the scene,[2] amply supports the court's findings to the effect that the use of the easement by defendant injuriously affects the real and personal property and personal enjoyment and health of the residents in the vicinity and neighborhood of said easement and that such commercial use of the easement was a public nuisance.[3]

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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[1] "A municipality has the power to establish and maintain residential and quasi-residential districts, and to exclude therefrom all non-conforming and conflicting uses. 12 Cal.Jur. 10-yr. Supp. 147, § 8, and cases there cited." City of Los Angeles v. Gage, 127 Cal.App.2d 442, 451, 274 P.2d 34, 38.

"Private agreements imposing restrictions are not to be considered when determining the validity of a zoning ordinance for the reason that such private agreements are immaterial." O'Rourke v. Teeters, 63 Cal.App.2d 349, 352, 146 P.2d 983, 985.

[2] See Wheeler v. Gregg, 90 Cal.App.2d 348, 366, 203 P.2d 37, for effect on finding of a trial judge's visit to scene.

[3] Section 3479, Civil Code, defines a nuisance: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance." A public nuisance is defined in section 3480, Civil Code: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

150 Cal.App.2d 558

Francis STEPHENS, Plaintiff and Respondent,

v.

BAKER AND BAKER et al., Defendants and Appellants.

No. 17235.

District Court of Appeal, First District, Division 1, California.

April 30, 1957.

Action for services rendered and materials furnished as a plaster contractor, wherein the complaint said nothing about plaintiff's being a licensed contractor, though he testified to that effect and no contradictory evidence was offered. Judgment for plaintiff in the Superior Court, City and County of San Francisco, George W. Schonfeld, J., and the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that defendants' objection to the testimony as to the licensing of plaintiff came too late when made for the first time on appeal.

Judgment affirmed.

1. Appeal and Error ⚷197(3)

In action for services rendered and materials furnished as a plaster contractor, where complaint said nothing about plaintiff's being a licensed contractor, though he testified to such fact and defendants interposed no objection to the testimony or raised any question in the trial court with respect to deficiency in pleading, objection on appeal came too late. West's Ann.Bus. & Prof.Code, §§ 7000–7145, 7031.

2. Licenses ⚷39.44

In action by a plaster contractor for services rendered and materials furnished, pleading of a license as a contractor is not jurisdictional. West's Ann.Bus. & Prof. Code, §§ 7000–7145, 7031.

3. Licenses ⚷39.44

Statutory requirement that a contractor plead and prove the possession of a license when seeking to recover for labor or materials does not manifest the legislative intent to proscribe a waiver of such requirement, in view of the harmless error provision of the constitution. West's Ann. Bus. & Prof.Code, §§ 7000–7145, 7031; West's Ann.Const. art. 6, § 4½.

4. Appeal and Error ⚷1178(8)

In action for services rendered and materials furnished as a contractor where the complaint said nothing about plaintiff's being a licensed contractor although he testified to that effect, Appellate Court would not send the case back to permit plaintiff to amend to conform to proof, where proof had already been made and the pleading had been waived. West's Ann. Bus. & Prof.Code, §§ 7000–7145, 7031.

◆

Ralph Leon Isaacs, San Francisco, for appellants.

Marshall E. Leahy, John F. O'Dea, San Francisco, for respondent.

FRED B. WOOD, Justice.

The sole question presented in support of this appeal is the fact that in this action for services rendered and materials furnished as a plaster contractor the complaint said nothing about plaintiff's being a licensed contractor, though he testified that he was such at all times under the state contractor's licensing act, Bus. & Prof.Code, §§ 7000–7145, and no contradictory evidence was offered.

Defendant-appellants invoke section 7031 of the code: "*No person* engaged in the business or acting in the capacity of a contractor, *may bring or maintain any action in any court* * * * for the collection of compensation for the performance of any act or contract * * * *without alleging and proving that he was a duly licensed contractor* * * *" (Emphasis added.)

[1] Defendants interposed no objection to plaintiff's testimony that he was licensed and at no time did they in the trial court mention or raise any question concerning his failure to include in the complaint an allegation that he was licensed.

Their objection comes too late when thus made for the first time upon appeal. It is like the situation which obtained in Viglione v. City & County of S. F., 109 Cal.App.2d 158, 240 P.2d 68. The city contended that the writ of mandate should not have issued because the complaint failed to allege that there were moneys available to pay the plaintiff's demand. However, at the trial plaintiff's counsel announced in his opening statement that payment was being sought out of a certain appropriation and that there was money on hand to pay the claim. "An opportunity was thus afforded appellants to urge the alleged defect in the pleadings. Having declined to take advantage of the opportunity offered they cannot now be heard to complain for the first time on appeal." 109 Cal.App.2d at pages 160–161, 240 P.2d at page 70. The objection came too late because the case was tried and evidence introduced on the theory that this issue was presented by the pleadings. The court said that this "rule is based upon the principle of equitable estoppel. It is unfair for a party to withhold an objection to a pleading founded upon a defect, which, if pointed out in time might have been remedied by amendment, thereby inducing his opponent to rely upon his pleading as sufficient, until it is too late to correct the defect, in order that he may have the advantage of the fatal defect upon appeal." At page 160 of 109 Cal.App.2d, at page 69 of 240 P.2d. See also Palpar, Inc., v. Thayer, 115 Cal.App.2d 333, 338, 252 P.2d 51.

Defendants invoke Shields v. Shoaff, 116 Cal.App.2d 306, 253 P.2d 1002, and Albaugh v. Moss Construction Co., 125 Cal.App.2d 126, 269 P.2d 936, but in each the issue was raised in the trial court and the lack of a license was shown as a fact.

[2] Defendants claim that the pleading of a license is jurisdictional; hence, that here the trial court had no power to act. Such a contention was overruled in Marogna v. Mitchell, 104 Cal.App.2d 799, 233 P.2d 70, holding that the appellant waived the failure of respondent to plead and prove the existence of a contractor's license. He did so by failing to mention this point in his statement of grounds of appeal pursuant to Rule 7(a). Said the reviewing court of sections 7026 and 7031 of the Business and Professions Code: "These sections have to do with the legality of contracts and penalties for failure to comply with the licensing requirements provided therein, not the jurisdiction of courts in the premises. It is true that a general demurrer will be sustained to a complaint by a contractor on a contract such as is described in section 7026 of the Business and Professions Code which does not allege and prove that the contractor was licensed, Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23, but the insufficiency of the complaint as to its allegations does not deprive the court of jurisdiction to try the action." 104 Cal.App.2d at page 805, 233 P.2d at page 74.

[3] The requirement that a contractor plead and prove the possession of a license is for the protection of the general public in respect to the making of structural improvements to real property where special skill, training and ability are required. Franklin v. Nat. C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37; Bowline v. Gries, 97 Cal.App.2d 741, 743, 218 P.2d 806. If a beneficiary of such a statute chooses, as in this case, to suffer proof of the license without its first being pleaded, we are aware of no state policy that would prevent or prohibit the waiver that is thereby implied. Nor do we think the Legislature when it enacted this statute intended to proscribe any such waiver, especially in view of the policy expressed in section 4½ of article VI of the state Constitution that no judgment be set aside or new trial granted "for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." See discussion of this policy in Rosenthal v. Harris Motor Co., 118 Cal.App.2d 403, 408–409, 257 P.2d 1034.

In short, the statute requires the contractor to be a competent workman. It does not require him to be a better pleader than other litigants. It does not render inapplicable the rules which normally apply to pleadings and the waiver of pleading requirements.

[4] We could, of course, send the case back for the limited purpose of permitting plaintiff to amend to conform to proof. See Siemens v. Meconi, 44 Cal.App.2d 641, 112 P.2d 904, cause remanded to permit pleading and proof of the existence of a contractor's license. That hardly seems necessary where, as here, proof has already been made and the pleading has been waived. It is not unlike the situation in which upon appeal an amendment to conform to proof will be treated as if made, when amendment would cause no injustice to the adverse party. (See 41 Am.Jur. 506, Pleading, § 310, note 8, and authorities cited.)

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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150 Cal.App.2d 479

Roland F. ZILLMER, Plaintiff and Appellant,

v.

Elmer B. BICKERT and Anne Bickert, his wife, Defendants and Respondents.

Civ. 17139.

District Court of Appeal, First District, Division 1, California.

April 26, 1957.

Action to impose involuntary trust upon one of two unimproved lots, wherein defendants filed cross-complaint. The Superior Court, San Mateo County, A. R. Cotton, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that the evidence supported finding that oral agreement between plaintiff and one of the defendants to purchase such lots jointly had been annulled by mutual agreement before defendant, who had made deposit on lots, paid balance of purchase price and took title in himself and his wife.

Judgment affirmed.

1. Trusts 🔑110

In action to impose involuntary trust on one of two unimproved lots, evidence supported finding that oral agreement by plaintiff and defendant to purchase such lots jointly had been annulled by mutual agreement before defendant, who had made deposit on lots, paid balance of purchase price and took title to lots in himself and his wife.

2. Joint Adventures 🔑1.14

Statement "absolutely, O.K.", made in reply to offer made by telephone to withdraw from oral agreement to purchase unimproved lots jointly, could reasonably be interpreted as an acceptance of offer.

3. Appeal and Error 🔑996

Reasonable interpretation by trial court of telephone conversation as constituting acceptance of offer to withdraw from oral agreement was binding on reviewing court.

4. Appeal and Error 🔑194(1)

Where action to impose involuntary trust upon one of two unimproved lots was tried on theory that only defense was that oral agreement to purchase such lots jointly had been annulled by mutual agreement and objection that answer did not specifically plead such defense was raised for the first time on appeal, pleadings sufficiently raised issue as to continued existence of agreement which necessarily included question of termination or annulment of agreement.

◆

Carr, McClellan, Ingersoll & Thompson, Burlingame, for appellant.

O'Keefe & O'Keefe, James T. O'Keefe, Redwood City for defendants.

AGEE, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendants (husband and wife) in an action to impose an involuntary trust upon one of two unimproved lots in Burlingame, referred to herein as lots 14 and 15. Defendant wife did not actively participate in the transaction and defendant husband is the one hereinafter referred to as respondent.

Appellant had learned that lots 14 and 15 were for sale. He contacted respondent and they orally agreed to buy said lots jointly for $15,000. Each agreed to put up his one-half of the money at the time of closing and then toss a coin to determine which lot each would get. In accordance with their agreement, respondent deposited $1,000 and signed a deposit receipt agreement. The first deposit receipt agreement had to be changed for reasons not pertinent here and the second was signed by respondent on January 31, 1955. Appellant did not put up any part of the deposit and his name did not appear of record in the transaction.

On February 6, 1955, appellant telephoned to respondent and told him that he and several associates were attempting to buy other lots in the same block and offered to withdraw from the purchase of lots 14 and 15 if he, appellant, was able to acquire lots 10 and 11 for himself. Appellant admits the making of such offer but denies that it was accepted by respondent. Respondent contends that he did accept the offer in the same conversation and that the condition subsequent, i. e., the acquisition of lots 10 and 11 by appellant, occurred shortly thereafter. The record does not show the closing date of appellant's purchase of lots 10 and 11 but appellant testified that he made the deposit thereon on February 11, 1955, and on February 22, 1955, appellant, in referring to such purchase, stated that "lot number 11 *cost* him more money" than he had anticipated. (Emphasis added.)

The next time after February 6, 1955, that the parties talked to each other was on February 22, 1955. In this conversation, appellant asserted a right to either lot 14 or lot 15. Respondent stated that both lots were his. Appellant replied, obviously referring to his offer of February 6, 1955, "'You did not confirm it.'"

Appellant commenced this action on March 3, 1955. Nevertheless, on March 17, 1955, respondent put up the balance of the purchase price and took title in himself and his wife by deed recorded March 25, 1955.

It is thus apparent that the determinative issue in this case is whether respondent accepted appellant's offer of February 6, 1955. The trial court held for respondent on this issue and made the following finding: "That any agreement between plaintiff and defendants for the joint purchase of said real property, or any part or parcel thereof, was abrogated and annulled by a mutual understanding and agreement fully entered into and understood by plaintiff and defendants prior to and at the time defendants so purchased the said real property." Since both respondent and appellant testified that their agreement made in January, 1955, remained in effect until February 6, 1955, it is obvious that the annulment found by the trial court did not occur until then and that "the time defendants so purchased" was meant to be March 17, 1955, when respondent paid the balance of the purchase price and obtained the deed.

[1] Respondent's testimony fully supports the finding that the agreement between the parties was annulled by mutual agreement. Both parties agree that in the conversation of February 6, 1955, appellant made an offer to withdraw from the agreement and to disclaim any interest in lots 14 and 15 in return for a release of his obligation to put up one half of the purchase money therefor, such offer being subject to the condition subsequent heretofore discussed. In support of his contention that he accepted this offer in the same conversation in which it was made, respondent testified as follows: "He [appellant] called me up on February 6th and he asked me if I would be willing to take over the two

lots that I had a deposit on; that he had two or three other people or parties that were going in with him to make a deposit on Lots 10, 11, 12 and 13, and as the conversation went on, I said *at first,* 'Well, I will ask—' meaning my wife, and as the conversation *went on,* he says, 'Well, if I get these corner lots,' he says, 'I can put up one for sale and put it up high enough and you can do the same thing.' *I said, 'O.K.'* but he says, 'Now, remember, if I don't get the lot, if I don't get the lot, if I don't get the corner lot 10 and 11, I want one of those lots.' I said, *'Absolutely, O.K.'* " (Emphasis added.)

[2, 3] The question is therefore narrowed to whether respondent's reply to appellant's offer in the conversation just quoted can reasonably be interrupted as an acceptance thereof. We hold that it can be and that such interpretation is therefore binding upon this court. As was said in Rutherford v. Berick, 82 Cal.App.2d 331, at page 336, 186 P.2d 23, at page 26: "So here, while the [oral] contract is possibly susceptible of the interpretation that the amount set was a 'net' rather than an asking price, it is also susceptible of the interpretation which the trial court gave it, * * *"

Appellant complains that respondent's answer did not specifically plead the defense of annulment or termination of the agreement. This objection is raised for the first time on appeal. The case was tried upon the theory that the defense of respondent and his only defense was that the agreement which he himself admitted and testified to was annulled by mutual agreement of the parties. Appellant himself states in his closing brief herein that after he, appellant, had made out a prima facie case, respondent's position was as follows: "Thereupon, it was Respondent's *burden to show* by way of defense that * * * [t]he *agreement* had been otherwise discharged or *terminated* (of which there was no evidence); * * *." (Emphasis added.) Thus, appellant himself acknowledges the right of respondent to prove a termination. He only argues that there was no evidence to support it.

[4] Moreover, the respondent's cross-complaint alleged that it was "a further and separate defense to said action," that respondent and his wife were the owners of the lots in question and that appellant's claim of an interest therein was "without right whatever" and that appellant had "no estate, right, title or interest whatever" in said lots. Respondent's prayer asked for a decree declaring that appellant had "no estate or interest whatever in or to" said lots. We conclude that the pleadings sufficiently raised the issue as to the continued existence of the agreement between the parties and that the question of termination or annulment thereof was necessarily included therein.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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150 Cal.App.2d 334

ESTATE of G. F. WILLIAMSON, Deceased.

Esther LICHTENFELD, Appellant,
v.
Lloyd A. FREDERICK and Bank of America National Trust and Savings Association, as Executor of the Last Will and Testament of G. F. Williamson, Deceased, Respondents.

No. 17294.

District Court of Appeal, First District, Division 1, California.
April 22, 1957.

Proceeding in the matter of the estate of deceased testator. The Superior Court, County of Monterey, Anthony Brazil, J., entered an order adverse to defaulting purchaser of realty of estate of deceased purchaser, and purchaser appealed. The District Court of Appeal, Fred B. Wood, J., held that where purchaser defaulted, and realty was resold, commission of real estate broker employed by executor to obtain the purchaser was an "expense" within meaning of the Probate Code providing that if amount realized on resale does not cover bid and "expenses" of previous sale, defaulting purchaser at previous sale is liable to the estate for the deficiency.

Order affirmed.

1. Executors and Administrators ⚷372

Where purchaser of realty of estate defaulted, and realty was resold, expense of executor in resisting rescission suit of purchaser and purchaser's petition in probate to vacate the sale was an "expense" within meaning of section of the Probate Code providing that if amount realized on resale does not cover bid and "expenses" of previous sale, defaulting purchaser at previous sale is liable to estate for deficiency. West's Ann.Prob.Code, § 788.

See publication Words and Phrases, for other judicial constructions and definitions of "Expense".

2. Executors and Administrators ⚷372

Where purchaser of realty of estate defaulted, and realty was resold, and purchaser filed petition to vacate sale and for return of entire down payment, on ground of alleged misrepresentations of broker, and broker petitioned for commission, expense incurred by executor in preparing an answer to petition of broker was an "expense" within meaning of section of the Probate Code providing that if amount realized on resale does not cover bid and "expenses" of previous sale, defaulting purchaser at previous sale is liable to estate for deficiency. West's Ann.Prob.Code, § 788.

3. Attorney and Client ⚷71

Normally, one party can not recover from an adverse party in an action for fees paid or payable to his own attorney for services rendered in that action, in absence of special agreement, special statutory provision, or exceptional circumstances. West's Ann.Code Civ.Proc., § 1021.

4. Attorney and Client ⚷71

Attorney fees incurred by executor because of default by purchaser of realty of estate are recoverable by executor as damages under section of the Probate Code providing that if amount realized on resale does not cover bid and "expenses" of previous sale, defaulting purchaser at previous sale is liable to the estate for the deficiency. West's Ann.Prob.Code, § 788.

5. Courts ⚷472(4)

Demand of real estate agent, employed to sell realty belonging to an estate, is a claim which comes under the head of expense in care, management, and settlement of estate, and of such claims the court, sitting in probate, has complete and exclusive jurisdiction.

6. Executors and Administrators ⚷375

A contract for sale of realty of estate, when confirmed by probate court, is enforceable by the estate and by the purchaser.

7. Executors and Administrators ⚷375

When sale of realty of estate is confirmed by probate court and thereby becomes binding on the estate and on the purchaser, it is an "actual sale" within meaning of section of the Probate Code providing that by execution of a contract by an executor with an agent to secure a purchaser for realty of estate, no personal liability shall attach to executor, and no liability of any kind shall be incurred by estate unless an "actual sale" is made and confirmed by probate court, whether title passes concurrently or subsequently. West's Ann.Prob.Code, § 760.

See publication Words and Phrases, for other judicial constructions and definitions of "Actual Sale".

8. Executors and Administrators ⚷372

Where purchasers of realty of estate defaulted, and realty was resold, commission of real estate broker employed by executor to obtain the purchasers was an "expense" within meaning of the Probate

Code providing that if amount realized on resale does not cover bid and "expenses" of previous sale, defaulting purchaser at previous sale is liable to the estate for the deficiency. West's Ann.Prob.Code, § 788.

* * *

Noland, Hamerly & Etienne and Morton B. Harper, Salinas, for appellant.

Hudson, Martin, Ferrante & Street, Monterey, for Bank of America Nat. Trust and Savings Ass'n.

Rosendale, Thomas & Muller, Edson G. Thomas, Salinas, for respondents.

FRED B. WOOD, Justice.

Esther Lichtenfeld and others (hereinafter referred to as Lichtenfeld) signed a deposit receipt whereby they agreed to buy certain real property of the estate for $325,000, making a deposit of $16,750, the balance to be paid within 60 days. The deposit receipt stated that "should the purchaser fail to pay the balance, of said purchase price, or fail to complete the purchase, as herein provided, the amounts paid hereon may, at the option of the seller, be retained as the consideration for the execution, of this agreement by the seller."

The executor when signing as seller stipulated: "I agree to sell subject to confirmation of court the above described property upon the terms and conditions herein stated. I agree to pay said broker [Lloyd A. Frederick Company], employed by me to sell said property, as commission the sum of Sixteen Thousand Two Hundred Fifty Dollars * * * subject to court approval or one-half of the amounts paid hereon should same be forfeited by purchaser. One-half of said amount, however, shall not exceed said commission."

The sale was confirmed by the probate court. The order of confirmation allowed the broker a commission of $16,250 for services as agent in procuring the purchasers.

After the lapse of 60 days without further payment by the purchaser, the executor petitioned the probate court to vacate the sale and to order a resale. Meanwhile, Lichtenfeld petitioned to vacate the sale upon the ground that the bid was induced by alleged false representations of the broker. The court vacated the sale, authorized a resale and instructed the executor to retain the $16,750 deposit until further order of the court, all without prejudice to Lichtenfeld with respect to her petition and without prejudice to the rights of the broker.

The down payment, despite the forfeiture clause of the deposit receipt agreement, is held by the vendor as security pending determination of the amount of his loss. He is not allowed to retain the amount, if any, by which the down payment exceeds the damages caused by the vendee. The retention of such excess would be an unjust enrichment. Freedman v. Rector, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1. It was proper for the court, when vacating the sale to direct the executor to retain the down payment subject to further order of the court and to postpone determination of the rights of Lichtenfeld and of the broker. "When and if the property is resold the rights of the respective parties to the down payment will be determined." In re Estate of Mesner, 37 Cal.2d 563, 567, 233 P.2d 551, 554. If and when a resale is conducted, the vendee will be "liable to the estate for the deficiency", if any, as provided in section 788 of the Probate Code. The executor "is entitled to retain the down payment as security for [the defaulting purchaser's] obligation until the extent thereof is determined." 37 Cal.2d at page 567, 233 P.2d at page 554.

The property was later resold to other purchasers at the same price, $325,000. When confirming this sale the court allowed a broker's commission of $16,250. The amount realized on the resale obviously did "not cover the bid and the expenses of the previous sale." Prob.Code, § 788.

Later, after hearing petitions of the executor and the broker and Lichtenfeld's petition above-mentioned, the probate court found against Lichtenfeld in respect to her claim that the purchasers were fraudulently induced to buy, and ordered disposition of the $16,750 deposit as follows: (1) payment of a commission ($8,125) to the broker who procured the first sale, (2) a $500 fee to the executor and a $1,500 fee to its attorney for certain extraordinary services rendered the estate,[1] and (3) $360.35 in connection with the first sale, all of which the court found were "expenses of the previous sale within the meaning of section 788 of the Probate Code"; and (4) that the residue ($6,264.65) be paid to Lichtenfeld.

Lichtenfeld has appealed, claiming the entire $16,750 should have been awarded her as purchaser, save only (a) publication costs relative to notice of the first sale and reappraisal fee if a subsequent appraisal was necessary for the subsequent sale, and (b) reasonable compensation for the services of the executor and its attorney in preparing the notice of the first sale and presenting the petition for confirmation of that sale.

Concerning the item of $360.35, appellant has not furnished a record which shows the specific purposes for which the expenditures were made, nor has she in her briefs indicated any thereof. Accordingly, there is no basis for disallowance of that item by a reviewing court.

This leaves for consideration the question whether the trial court was correct in treating the broker's fee and the compensation for all of the indicated services of the executor and its attorney as "expenses of the previous sale" within the meaning of that term as used in section 788 of the Probate Code.[2]

(1) *Did the trial court erroneously find and conclude that all of the compensation of the executor and its attorney here involved was an expense of the sale to Lichtenfeld?*

The answer turns on the meaning of "expenses" as used in section 788 of the Probate Code: "If the amount realized on such resale does not cover the bid and the expenses of the previous sale, the defaulting purchaser at such previous sale is liable to the estate for the deficiency."

This measure of damages differs from that which obtains in the absence of a resale under section 788, which would be the amount, if any, by which the sale price exceeds the value of the property at the time of the breach, plus expenses (in addition to those the vendor would have incurred if the transaction had been consummated) made necessary by the vendee's breach. In re Estate of Mesner, supra, 37 Cal.2d 563, 567, 233 P.2d 551; Royer v. Carter, 37 Cal.2d 544, 549–551, 233 P.2d 539; Freedman v. Rector, supra, 37 Cal.2d 16, 20–23, 230 P.2d 629. In short, section 788 substitutes the amount realized upon the second sale for the value at the time of the breach, and the expenses of the first sale for expenses made necessary by the purchaser's breach. A purchaser doing business with a probate estate does so in contemplation of this measure of damages just as if the provisions of section 788 were typed into the contract of sale.

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[1] It appears from the court's findings (made by reference to those allegations of the executor's petition which the court found to be true) that the $500 award to the executor and the $1,500 award to its attorneys were compensation for services rendered by them (1) in relation to the execution of the deposit receipt agreement with Lichtenfeld, the reception of her bid, and the proceeding for confirmation of that sale, (2) successful resistance to an independent action brought in the superior court by Lichtenfeld to rescind the sale and recover the deposit, presenting therein a general demurrer which was sustained, (3) successful institution and prosecution of a proceeding in the probate court to vacate the sale to Lichtenfeld, and (4) the preparation and filing, in the probate court, of answers to Lichtenfeld's petition therein for rescission and the broker's petition for payment of commission in procuring Lichtenfeld as a purchaser.

Clearly, this did not include compensation for the services of the executor or of its attorney in negotiating, obtaining confirmation of or consummating the second sale, nor for their participation in the subsequent hearing which resulted in the order appealed from.

[2] Appellant does not question the reasonableness of the amount allowed for services of the executor or the attorney. She does claim that some of those services bear no relation to the "expenses" of the sale to her and that because of the lump sum allowance this portion of the order must be reversed.

She also claims that the estate is not obligated to pay the broker any commission; therefore, there is nothing in that regard chargeable to her as an expense of the sale to her.

The purpose of this measure of damages seems clearly to be that of making the estate whole, of preventing any loss to the estate when the purchaser defaults and there is a resale. This is accomplished by using the sale price (instead of the value at the time of the breach) as the yardstick. The estate is not subjected to the hazards of a fluctuating market. Even if the value at the time of the breach equals or exceeds the original sale price and the resale (taking place several months or a year or more later) produces considerably less, the defaulting purchaser makes good the difference between the two sales prices.

[1] So, when the Legislature said the estate will absorb the expenses of the second sale and recoup the expenses of the first sale, it must have intended to include in the latter all reasonable expenses attendant upon the first sale, including those made necessary by the purchaser's default, the defense of litigation brought by him to rescind and the expense of vacating the sale, not limited to the cost to the estate of the mere making of that sale. The need to resist Lichtenfeld's rescission suit and her petition in probate to vacate, is obvious and compelling. If not successfully resisted no "expense" of any kind would have been recoverable by the estate.

[2] Resistance to the broker's petition for the allowance of a commission, appears to be in the same category. Lichtenfeld had filed her petition to vacate the sale and for return of the entire deposit, predicated upon asserted misrepresentations of the broker. The broker of course had a justiciable interest in the matter. In re Estate of Efird, 130 Cal.App.2d 227, 229–230, 278 P.2d 730. He petitioned for a commission of $16,250 or of $8,125, as the court might determine, and sought to enforce payment out of the deposit "or otherwise." The proceeding initiated by his petition well could have borne such a relation to the purchaser's default that the expense to the estate of preparing an answer to his petition would be an "expense of the previous sale." Lichtenfeld, who has the burden as appellant, has failed to show how or why that is not so. Accordingly, there is no basis for us to disturb the trial court's finding as to this type of expenditure.

There is some similarity between the "expenses of the previous sale" § 788, in case of a resale and expenses made necessary by a vendee's breach when there is no resale. In the latter case a liberal rule applies. For example, in Major Blakeney Corp. v. Jenkins, 121 Cal.App.2d 325, 337–338, 263 P.2d 655, 662, it was said that the trial "court was entitled to take into consideration the fact that the land was off the market for almost a year, that no interest had been paid, that added taxes fell due, and similar factors. It cannot be said that defendants were unjustly enriched by pocketing the $1,000 down payment * * *" In Mathews v. MacArthur, 119 Cal.App.2d 196, 258 P.2d 1068, the trial court allowed the vendor the difference between the contract value and the amount obtained upon a resale (which latter was treated as evidence of the value of the property at the time of the breach, in the absence of evidence of a declining market) and deducted from the resale price the sum of $1,800 expended by the vendor in repairs to the building subsequent to the contract of sale. "In estimating the damages caused by appellant's breach on the basis of the resale price it was proper to take into consideration that the price paid reflected an increase in the value through this expenditure for repairs and improvements. If appellant had completed the contract as agreed those repairs would have been a burden on him alone. No reason is given why they should not be deducted from the resale price." 119 Cal.App.2d at page 198, 258 P.2d at page 1069.

See also Petersen v. Ridenour, 135 Cal.App. 2d 720, 725, 287 P.2d 848.

We conclude that "expenses of the previous sale" in this case properly included the expense to the estate of the fees of $500 and $1,500 respectively awarded by the court for services of the executor and its attorney.

[3] Perhaps a word should be said about attorney fees. Normally, one party can not recover from an adverse party in an action for fees paid or payable to his own attorney for services rendered in that action. Code Civ.Proc. § 1021; Woodward v. Bruner, 104 Cal.App.2d 83, 230 P.2d 861. That is so "in the absence of a special agreement, special statutory provision, or exceptional circumstances." In re Estate of Reade, 31 Cal.2d 669, 671, 191 P.2d 745, 746. Here we have a special statutory provision, section 788 of the Probate Code, which, as we have seen, provides for recoupment by the estate of such attorney and executor fees as reasonably may be deemed "expenses of the previous sale."

We are not without precedent. There is considerable similarity to section 539 of the Code of Civil Procedure which requires an attaching plaintiff to give bond that he will "pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment." Under that clause a defendant may recover reasonable counsel fees incurred in successfully defending the action to the extent that those fees are for services that relate to the attachment. Soule v. United States F. & G. Co., 82 Cal.App. 572, 255 P. 886; Reachi v. National Auto. & Cas. Co., 37 Cal.2d 808, 236 P.2d 151.

Similarly, section 529 of the Code of Civil Procedure requires the applicant for an injunction to give bond that he will "pay to the party enjoined such damages, * * * as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto." "Damages" as there used include reasonable counsel fees paid an attorney for his services in obtaining a dissolution of the injunction. Mason v. United States Fidelity & Guaranty Co., 60 Cal. App.2d 587, 141 P.2d 475.

[4] In such and similar types of cases attorney fees and other reasonable items of expense are recoverable as "damages," not as costs. Reachi v. National Auto. & Cas. Co., supra, 37 Cal.2d 808, 236 P.2d 151. See also 14 Cal.Jur.2d 724–731, Damages, §§ 104–110.

(2) *Was the award to the broker, out of the moneys on deposit, erroneous?*

[5] No one doubts that the amount of the legal obligation of an estate to pay a broker a commission for procuring a purchaser, would be an "expense" of the resulting sale.[3]

Whether there is here such an obligation depends largely upon the meaning properly to be ascribed to section 760 of the Probate Code. It sanctions a written contract by an executor with a bona fide agent "to secure a purchaser for any real * * property of the estate." The contract shall provide for the payment of a commission to such agent "out of the proceeds of a sale to any purchaser secured by him." The amount of commission "must be fixed and allowed by the court upon confirmation of the sale." When "said sale is confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so allowed by the court."

Section 760 concludes with this qualifying statement: "By the execution of any such contract no personal liability shall attach to the executor * * *, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court."

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[3] "'A demand of a real estate agent, employed to sell real property belonging to an estate, is a claim which comes under the head of expense in the care, management and settlement of the estate, and of such claims the court, sitting in probate, has complete and exclusive jurisdiction.'" In re Estate of Efird, supra, 130 Cal.App.2d 227, 230, 278 P.2d 730, 732.

Here, all of the requirements of this statute were met, if there was an "actual sale." The requirement that such a commission be paid "out of the proceeds of" the sale is, in effect, read into the contract. In re Estate of Mitchell, 20 Cal.2d 48, 50–52, 123 P.2d 503; In re Estate of Efird, supra, 130 Cal.App.2d 227, 230, 278 P.2d 730.

The words "actual sale," if they stood alone, might mean "sale" in the primary sense of a "transfer of the property in a thing for a price in money," a transaction in which title is transferred for a price. Milana v. Credit Discount Co., 27 Cal.2d 335, 339, 163 P.2d 869, 871, 165 A.L.R. 621. See also 22 Cal.Jur. 903, Sales, § 2; 46 Am.Jur. 194, Sales, § 2; and cases collected in 2 Words and Phrases, p. 467, under "Actual Sale" and "Actual Purchase or Sale." If that be the meaning of this term as used in section 760, there was no sale here and no liability to pay a commission, for title did not pass.

But that is not its meaning. The complete expression is "unless an actual sale is made and confirmed by the court." Confirmation normally precedes the passing of title. Except in the limited types of cases specified in sections 770 and 771 of the code (such as perishables and stocks and bonds) "all sales of property must be reported to the court and confirmed by the court before the title to the property passes." Prob.Code, § 755. In the instant case the sale when confirmed gave the purchaser 60 days to complete his payments and then take title.

[6] A contract of sale when confirmed by the probate court is enforceable by the estate. McCarty v. Wilson, 184 Cal. 194, 193 P. 578; Baldwin v. Stewart, 218 Cal. 364, 23 P.2d 283; 11B Cal.Jur. 134, § 740, and by the purchaser (11B Cal.Jur., 134–135, § 741, and 162, § 765).

The very predicate of the resale provisions of section 788 is a "sale" which has been confirmed and with the terms of which the purchaser neglects or refuses to comply. Also, after it is vacated and a resale is effected it is still referred to as a sale, the "previous sale."

[7] The Supreme Court in Re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 55 A.L.R. 1319, expressed this concept quite pointedly. When interpreting section 760 it emphasized (by italicizing) the expressions "'*when said sale is confirmed to such purchaser, such contract shall be binding and valid* as against the estate * * *'" and "'[*b*]*y the execution of any such contract no personal liability shall attach to the executor * * *, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court,*'" saying that the latter expression "clearly indicates that in the contemplation of the statute the sale is not regarded as 'made' unless and until it is confirmed by the court. Hence, strictly speaking, the purchaser cannot be regarded as 'secured' until the sale has been confirmed, nor, by the other italicized language of the section, is the contract valid or binding for any purpose unless and until the sale is confirmed." 25 Cal.2d at pages 9–10, 152 P.2d at page 1007. It would seem automatically to follow that when it is confirmed and thereby becomes binding that it is an "actual sale," whether title passes concurrently or subsequently.

Litchtenfeld attaches undue significance to some things said in Wilson v. Fleming, 106 Cal.App. 542, 289 P. 658, particularly a statement to the effect that there can be no "actual sale" until title has passed to the purchaser. The court assigned several grounds for its decision. The principal ground, as we read the opinion, was that by his complaint plaintiff therein sought to recover a commission based upon a contract to pay it in any event, whether there were "proceeds of the sale" or not. Said the court: "Plaintiff throughout his complaint, * * * alleges that the payment of the commission in question was never at any time or in any manner dependent upon whether anything was paid at all by the purchaser, but that the actual agreement was that the commission was to be paid 'in any event.'" 106 Cal.App. at page 547, 289 P. at page 660. This, the court held, was not the kind of contract-for-commission which the law sanctioned. Accordingly, we do not deem what the court additionally said about an "actual sale," as pivotally significant. Nor do we attach special significance (as Lichtenfeld would have us do) to the reference to the Wilson case which appears in Re Estate of Rule, supra, 25 Cal. 2d 1, at page 16, 152 P.2d 1003; at least, not as a holding by the Supreme Court that title *must* pass before there is an actual sale, particularly in view of the statement quoted above, made by the Supreme Court in the Rule case, and the further statement that the provisions of the Probate Code "are to be liberally construed with a view to effect its objects and to promote justice", 25 Cal.2d at page 16, 152 P.2d at page 1010, a rule of interpretation which the court specifically applied in the Rule case.

The contention is made that because this contract of sale was terminated and not fully consummated, there were no "proceeds" of sale out of which to pay the broker his commission; hence, under 760 of the Probate Code, the estate has no obligation to pay the broker any fee, and accordingly, has no "expense" in that regard to charge to the defaulting purchaser. We do not so view it. But for the limitations of the probate law the broker would have "earned" his commission when the vendor and vendee "'executed a binding, written agreement between them upon the terms provided in the contract of employment of the broker * * *.'" Lipton v. Johansen, 105 Cal.App.2d 363, 369, 233 P.2d 648, 652. In probate, this rule has these limitations: (1) the broker's contract shall provide for payment of a commission to him "out of the proceeds of a sale"; (2) the amount of the commission must be fixed and allowed by the court upon confirmation of the sale; (3) when such a sale is "confirmed to such purchaser, such contract [with the broker] shall be binding and valid as against the estate for the amount so allowed." Prob.Code, § 760. Here, the purchaser made a deposit of $16,750 and agreed that it, plus any additional amounts she might pay, be retained by the executor in case of the purchaser's default. The purchaser has shown us no reason why that did not token an intent of the parties that such moneys were in such a case to be used to defray the executor's expenses incident to the sale, including the payment of the broker's fee; especially in view of the fact that the executor and the broker contracted that the latter's fee would be well within the amount of moneys the purchaser might forfeit in case of a forfeiture.

[8] When the sale to Lichtenfeld was confirmed the court fixed the broker's commission at $16,250. It said nothing about reducing or limiting it in the event of a default by the purchaser. When, later, the court vacated that sale and ordered a resale, it had before it a petition by the purchaser to void the sale for alleged fraudulent representations of the broker. It was quite appropriate, therefore, to reserve jurisdiction to determine such issues in due course, including the rights of the broker. When that determination was made (adversely to the claims of the purchaser) the court had before it a request by the broker to confirm his fee at the amount originally fixed or at half that amount. The court chose the latter figure. We see no lack of authority of the court to act under such circumstances. See In re Estate of Efird, supra, 130 Cal.App.2d 227, 229–230, 278 P. 2d 730.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

C. FANNING, Plaintiff and Respondent,

v.

YOLAND PRODUCTIONS, Inc., and Cardinal Pictures, Inc., Defendants,

Cardinal Pictures, Inc., Appellant.

Civ. 21697.

District Court of Appeal, Second District, Division 3, California.

April 25, 1957.

Rehearing Denied May 16, 1957.

Hearing Denied June 19, 1957.

Action by assignee of rights of motion-picture actor for compensation due under motion-picture contract. The Superior Court of Los Angeles County, Clarence B. Runkle, J., entered judgment for assignee and motion-picture company appealed. The District Court of Appeal, Parker Wood, J., held that where contract for services of motion-picture actor provided compensation based on percentage of revenue from picture together with a minimum guarantee and such contract was assigned by instruments stating, unknown to actor, that assignee would not assume liability for guarantee and assignee required actor to perform in accordance with contract, assignee was estopped to deny liability on guarantee.

Affirmed.

1. Assignments ⚷109

Generally, mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor.

2. Assignments ⚷109

Under statute, an exception is created to the rule that mere assignment of rights under executory contract does not cast upon assignee any of the personal liabilities imposed by contract upon the assignor, and a voluntary acceptance of the benefit of the transaction is equivalent to consent to all obligations arising from it so far as the facts are known or ought to be known to the person accepting. West's Ann.Civ.Code, §§ 1589, 3521.

3. Assignments ⚷109

Where contract for services of motion-picture actor provided payment based on percentage of revenue from picture together with minimum guarantee and such contract was assigned by instrument stating, unknown to actor, that assignee would not assume liability for guarantee and assignee required actor to perform in accordance with contract, assignee was estopped to deny liability for guarantee. West's Ann.Civ.Code, §§ 1589, 3521.

4. Estoppel ⚷107, 110, 114

Ordinarily estoppel must be pleaded but an exception arises where it is relied on by a plaintiff to meet new matter affirmatively pleaded in the answer and statute permits introduction of evidence of estoppel to meet new matter pleaded in answer. West's Ann.Code Civ.Proc., § 462.

5. Estoppel ⚷115

In action to recover compensation due movie actor under guarantee provisions of contract that had been assigned, where complaint alleged that assignee had agreed to be bound by all the obligations of original contract and assignee's answer pleaded that it did not assume guarantee provisions of contract, evidence was admissible as to whether assignee was estopped to rely upon alleged special defense without specific pleading of estoppel by plaintiff. West's Ann.Code Civ.Proc., § 462.

6. Appeal and Error ⚷1043(6)

In action to recover compensation due to movie star under guarantee provision of contract that had been assigned to assignee by instrument stating that assignee did not assume liability for guarantee provisions of original contract, record failed to show that under circumstances assignee was prejudiced in not having an opportunity to take actor's deposition on issue of assignee's estoppel to deny liability for guarantee provisions.

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Herbert T. Silverberg, Los Angeles, for appellant.

Barry Brannen, Beverly Hills, for respondent.

PARKER WOOD, Justice.

Plaintiff is assignee of the rights of Ronald Colman to compensation under a motion-picture contract. This is an action to recover $75,000, the balance of the amount guaranteed to be paid to him under the contract. In a nonjury trial, judgment was for plaintiff for said amount against defendants Yoland Productions, Inc., and Cardinal Pictures, Inc. Defendant Cardinal Pictures, Inc., appeals from the judgment.

On June 9, 1949, Yoland Productions, Inc., a motion-picture producer, and Ronald Colman, an actor, entered into a written agreement whereby Colman agreed to render services as an actor for Yoland in the production of a motion picture, and whereby Yoland agreed (in paragraph "Third") to pay him for his services certain percentages of the gross proceeds from the picture, after $500,000 from the proceeds had been paid to the producer; provided (as stated in paragraph "Fourth") that "Notwithstanding the provisions of Paragraph Third * * * the Producer hereby guarantees" that Colman's share of such proceeds shall be not less than $100,000 to be paid as follows: $25,000 one week after starting the principal photography; and $75,000 out of the receipts of the picture "as a guaranteed minimum amount to be paid under the percentage terms specified in Paragraph Third," and that the $75,000 to be paid to Colman and charged against his percentages shall be paid to him not later than two years following the general release of the picture.

On July 15, 1949, Yoland assigned the Colman contract to Cardinal Pictures, Inc., a motion-picture producer. Under the assignment Cardinal agreed to perform all the provisions of the Colman contract, "excepting Paragraph Fourth (b) which provides for a guarantee to Colman" of $75,000. The first paragraph of that assignment provided as follows: "We hereby assign to you our employment agreement with Ronald Colman dated June 9, 1949, and grant to you all our rights and benefits to and from his services and obligations thereunder to the same extent as though said agreement with said Colman had been made by you with him in the first instance in respect of said rights and benefits thereunder, ~~and you agree to assume our duties and obligations to said Colman~~ HMP ~~thereunder~~. GM We agree to remain fully liable to said Colman under said agreement. However, with respect to all the provisions of said agreement, excepting Paragraph Fourth (b) which provides for a guarantee to Colman as therein recited, you agree to perform all of said remaining provisions of said agreement." The assignment also stated that Yoland had concurrently therewith sold and assigned to Cardinal the story and screenplay (upon which the picture was to be based); that after the picture was produced and the bank and other loans were paid, Cardinal would convey an undivided one-half interest in the picture to Yoland; and after all production expenses were paid, the producer's net profits from distribution would be divided equally between Cardinal and Yoland.

Colman consented to the assignment and he fully performed his part of the contract. Cardinal completed the production of the picture in September, 1949, and it released the picture on April 27, 1950. Cardinal paid the $25,000 to Colman, as provided in the contract. The $75,000, balance of the guaranteed amount of $100,000, was not paid to Colman by Cardinal, Yoland, or at all. There was no evidence that Colman was entitled to receive any money as a percentage in excess of the $75,000. (Counsel for plaintiff stated at the trial that no evidence would be offered regarding a percentage in excess of the guaranteed amount (balance) of $75,000. It appears that the proceeds from the picture did not amount to $500,000, which was the amount to be received by the producer before a percentage of the proceeds (other than the $75,000) was to be paid to Colman.)

On October 13, 1952, Colman assigned to plaintiff Fanning all his rights to receive from Yoland and Cardinal amounts due or to become due under said agreement of June 9, 1949.

The present action to recover $75,000, balance of the guaranteed amount, was commenced October 24, 1952.

The court found, among other things: That Yoland orally advised Colman of the fact of the assignment of the contract of June 9, 1949, before Colman started to render services, but Colman was not shown the written assignment or advised by Yoland or Cardinal or anyone of any of the terms of the assignment until long after Colman had completed his services, and Colman rendered his services to Cardinal in the belief that Cardinal had assumed all of Yoland's obligations under said contract. That on August 18, 1949, Cardinal commenced the principal photography, and, while the contract of June 9 was still executory, Cardinal demanded of Colman and received from him the rendition of his services under the assigned contract. Pursuant thereto Colman commenced his services to Cardinal on August 18, 1949, and continued to perform his services and all the terms of said contract on his part to be performed until the completion of the picture on September 29, 1949. The picture was released about April 27, 1950, and since that time has been distributed throughout the world. During the week following the commencement of the photography, Cardinal paid Colman $25,000 pursuant to the contract of June 9, 1949. Since said payment of $25,000, neither Colman nor his assignee (plaintiff) has received for Colman's services any other payment from Yoland or Cardinal, either on account of said percentages or said guarantee. The sum of $75,000 became due to Colman from Yoland and Cardinal, and each of them, on April 27, 1952, and said sum is due to plaintiff.

The court made conclusions of law, as follows: Cardinal as assignee of said employment contract accepted the burdens as well as the benefits thereof, and, by demanding and accepting said services of Colman and the full benefits thereof, became bound to pay Colman or his assignee the compensation stipulated in said employment contract. Cardinal, as assignee of said contract, and as recipient of the full benefits thereof, is estopped to set up as a defense to the claim of plaintiff the provisions of the agreement of June (July) 15, 1949, between Cardinal and Yoland, and particularly that portion thereof which purports to except from the obligations assumed by Cardinal the provisions of paragraph Fourth (b) of said employment contract of June 9, 1949.

Appellant (Cardinal) contends that under the uncontradicted facts and as a matter of law there was no liability on the part of Cardinal for the $75,000 guarantee. Its argument is that the evidence shows that neither Yoland nor Cardinal intended that Cardinal should be liable to Colman for the guarantee; and that since the assignment expressly provided that Cardinal should not assume the $75,000 guarantee, there was no liability on the part of Cardinal for the guarantee.

[1, 2] As above shown, the assignment did provide that Cardinal did not assume the guarantee, and that Yoland agreed to remain liable to Colman. The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor. Armstrong Co. v. Shell Co. of California, 98 Cal.App. 769, 775, 277 P. 887; Weidner v. Zieglar, 218 Cal. 345, 349, 23 P.2d 515. An exception to the rule is based upon sections 1589 and 3521 of the Civil Code. Section 1589 provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Section 3521 provides: "He who takes the benefit must bear the burden." In Fruitvale Canning Co. v. Cotton, 115 Cal.App.2d 622, at page 626, 252 P.2d 953, at page 955, it was said that an exception to the rule "requires the assignee of an executory contract to accept the burdens when all the benefits of a full performance have inured to him." It was also said in that case, 115 Cal.App.2d at page 626, 252 P.2d at page 955, that the excep-

tion is stated in Robinson v. Rispin, 33 Cal. App. 536, 165 P. 979. In the Robinson case it was said, 33 Cal.App. at page 541, 165 P. at page 982: "Of course, as suggested by respondent, the mere assignment of the rights under an executory contract would not make the assignee liable to the other contracting party. * * * But where, after the assignment is made, the executory provisions of the contract are fully performed, the benefit inuring solely to the assignee, and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor." It may be stated generally that the facts in the Robinson case were: Robinson and Rispin entered into a written agreement for the drilling of oil wells. Robinson agreed to furnish the tools and labor, and to drill the wells. Rispin agreed to pay a certain amount for each foot drilled, and to furnish the casing. Before Robinson began the drilling, Rispin assigned all his interest in the drilling agreement to a corporation. The trial court therein found that the corporation accepted the assignment, benefits and obligations arising from the agreement with Robinson, with full knowledge of all the facts, and that the work thereafter proceeded under the corporation's directions and instructions. After Robinson had drilled a well to a depth of 400 feet, the corporation and Robinson mutually agreed that it should be abandoned as an oil well and converted into a water well. Robinson was paid $1,800 for drilling that well. When he had drilled another well to a depth of 907 feet, the corporation (and Rispin) failed to furnish the casing, and thereupon Robinson ceased drilling. Thereafter Robinson sued the corporation and Rispin for the amount due for drilling and for damages for breach of contract. Judgment therein was for plaintiff against both defendants. On appeal therein, one of the contentions of the defendant corporation (the assignee) was that it did not assume any liability under the contract made by Robinson and Rispin. The court said, 33 Cal.App. at page 541, 165 P. at page 981: "There can be no doubt, however, that the record supports the finding of the court to the effect that Rispin transferred, set over, and assigned all his right, title, and interest, under the assignment made by him with Robinson, to the defendant corporation, this transfer having been made * * * while the contract was wholly executory; that defendant corporation voluntarily accepted the assignment and the benefits and obligations arising from the transaction and the agreement with Robinson, with full knowledge of all the facts relating thereto, and thereafter requested Robinson to perform the work stipulated under and pursuant to the terms of that agreement." The judgment therein was affirmed as to corporation; but was reversed as to Rispin (apparently for the reason that he was denied an opportunity at trial to prove an alleged novation).

In Pecarovich v. Becker, 113 Cal.App.2d 309, 248 P.2d 123, plaintiff Pecarovich, who was a football coach, entered into a contract with Becker, who was owner of a professional football team, whereby Pecarovich agreed to coach Becker's team. Becker assigned to Dardi a one-half interest in Becker's football franchise and in the contracts and assets of the football club. Pecarovich continued to coach the team after the assignment to Dardi. Pecarovich sued Becker and Dardi for his salary. Dardi (the assignee) appealed from a judgment in favor of plaintiff, and he contended that he had not assumed any liability under the Becker-Pecarovich contract. On appeal, the court said, 113 Cal.App.2d at page 315, 248 P.2d at page 127: "The evidence by conduct also shows that appellant [Dardi] received the benefits of the Becker-Pecarovich contract, the services of respondent in coaching the team. That brings into play section 1589 of the Civil Code: 'A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.' Section 3521 of the same code is of similar import: 'He who takes the benefit must bear the burden.'

See Jegen v. Berger, 77 Cal.App.2d 1, 174 P.2d 489, for a discussion of these several principles of law; and Bergin v. Van der Steen, 107 Cal.App.2d 8, 18, 236 P.2d 613, and Walmsley v. Holcomb, 61 Cal.App.2d 578, 582, 143 P.2d 398, concerning the significance of sections 1589 and 3521 of the Civil Code."

[3] In the present case the assignment agreement stated, as above shown, that Yoland assigned the Colman employment agreement to Cardinal and granted to Cardinal all of Yoland's rights and benefits to and from Colman's services and obligations under the agreement to the same extent as though the agreement had been made with Cardinal in the first instance in respect to the rights and benefits thereunder. Pursuant to the terms of the Yoland-Colman contract, and the terms of the assignment thereof, Cardinal made the picture and used the services of Colman in making it. Cardinal gave directions to Colman with reference to the performance of his services, and held itself out as his employer. Colman fully performed his part of the employment contract. The negative of the picture was owned by Cardinal (subject to the provision in the assignment that after loans were paid a one-half interest therein would be conveyed to Yoland). It thus appears that Cardinal accepted the benefits of the services of Colman under the Yoland-Colman contract. Approximately one week after starting the principal photography, Cardinal paid $25,000 to Colman as provided in the Yoland-Colman contract. The assignment of the contract did provide that Cardinal would perform all the provisions of the Yoland-Colman contract, except the provision regarding the guarantee of payment to Colman. The court found, upon substantial evidence, that the assignment was not shown to Colman and no one advised him of any of the terms of the assignment until long after he had completed his services; and that Colman rendered his services in the belief that Cardinal had assumed all of Yoland's obligations under the Yoland-Colman contract. It was stipulated at the trial that if Colman were called as a witness he would testify that he was not advised as to any of the specific terms of the assignment until approximately a month before this action was filed. (The action was filed about three years after the services were rendered.) Colman was not required to consent to the assignment. If he had been advised that Cardinal and Yoland had inserted a provision in the assignment that Cardinal would not perform the guarantee provision of the employment contract, it is reasonable to conclude that Colman would not have rendered his services for Cardinal. There is no reason to assume that Colman would have rendered his services for Cardinal under a financial arrangement that was less favorable to himself. It is apparent that Colman rendered his services for the consideration stated in his employment contract. The agreement between Cardinal and Yoland, which was not disclosed to Colman, to the effect that Cardinal did not assume the payment of the $75,000 guarantee was not binding upon Colman. Cardinal accepted the benefits of Colman's services which were rendered under the provisions of his employment agreement with Yoland. Under the provisions of section 1589 of the Civil Code, the acceptance by Cardinal of such benefits, under the circumstances here, is "equivalent to a consent to all the obligations arising from" the employment contract between Colman and Yoland. Also under the provisions of section 3521 of the Civil Code, since Cardinal accepted such benefits from the employment contract, it must also bear the burdens of that contract. Notwithstanding the private arrangement between Cardinal and Yoland with respect to the nonliability of Cardinal for the guarantee, Cardinal is liable, under the circumstances here, for the $75,000 guarantee stated in the Yoland-Colman employment contract. The liability of Cardinal, under the circumstances here, is based upon principles of estoppel.

[4–6] Appellant (Cardinal) also contends in effect that the judgment is erroneous for the reason that Colman did not plead estoppel. Colman's complaint alleged that Cardinal had agreed to be bound by all obligations undertaken by Yoland in the Yoland-Colman contract. Cardinal pleaded, in its answer, to the effect that it did not assume the guarantee provisions of the employment contract, but expressly agreed with Yoland by said assignment that Cardinal should not be obligated to perform the provision of the employment agreement regarding the guarantee. The answer presented the issue as to whether Colman was bound by the provision in the assignment which purported to eliminate liability on the part of Cardinal for the guarantee. "While ordinarily estoppel must be pleaded this is subject to the settled exception that where it is relied upon by a plaintiff to meet new matter affirmatively pleaded in the answer the provisions of section 462, Code of Civil Procedure, take the place of a replication at common law and permit the introduction of evidence of estoppel to meet the new matter pleaded in the answer." Wilson v. Grey, 49 Cal.App.2d 228, 230, 121 P.2d 514, 515; see Hedlund v. Sutter Med. Serv. Co., 51 Cal.App.2d 327, 332, 124 P.2d 878; see General Motors Accept. Corp. v. Gandy, 200 Cal. 284, 294, 253 P. 137. Evidence was admissible with reference to whether Cardinal was estopped to rely upon its alleged special defense. At the oral argument on appeal, counsel for Cardinal asserted in effect that at the trial he expected Colman to prove his allegations that Cardinal agreed to be bound by all the obligations of Yoland, and that Colman consented to the assignment upon the express agreement of Cardinal that it became bound by Yoland's contract; and he asserted that he was not expecting that there would be reliance by Colman upon an alleged estoppel. He argued further tnat Cardinal was prejudiced by Colman's failure to plead estoppel, in that, if estoppel had been pleaded he would have had an opportunity to take Colman's deposition. The reporter's transcript shows, on page 27, that counsel for plaintiff said: "[I]t is a legal question as to whether or not the terms of the contract on which they are bound are an express contract. Actually, on the theory of this case it's perfectly true; they [Cardinal] are bound upon this contract, and they're estopped from setting up anything to the contrary." The trial proceeded thereafter for approximately two hours and then was continued in order to give the attorneys an opportunity to file briefs. About nine weeks later the trial was resumed. Another continuance was ordered, and about four weeks later the trial was resumed. It thus appears that the issue of estoppel was referred to in the early part of the trial, but it does not appear that, during the extended proceeding, counsel for Cardinal requested a continuance in order to take Colman's deposition. The contention to the effect that Cardinal was prejudiced in not having an opportunity to take Coleman's deposition is not sustainable.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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150 Cal.App.2d 349

Marlon B. GIDEON, Plaintiff and Respondent,

v.

George D. GIDEON, III, Sun Valley National Bank, California Bank and Security-First National Bank, Defendants,

George D. Gideon, III, Appellant.

Civ. 21756.

District Court of Appeal, Second District, Division 1, California.

April 22, 1957.

Hearing Denied June 19, 1957.

Action by wife for divorce. From order of Superior Court of Los Angeles County, Victor R. Hansen, J., modifying pendente lite order granting fees to wife's attorney by increasing amount thereof and an order denying husband's motion to quash execution of such modified order, husband appealed. The District Court of Appeal, Fourt, J., held that pendente lite order was not invalidated by vacation of interlocutory judgment granting wife divorce, on theory pendente lite order had merged in interlocutory judgment, and therefore trial court had power to modify order for attorney's fees after interlocutory judgment, notwithstanding that statute authorizing modification of original award for attorney's fees, had, in one place, used terminology "before entry of judgment".

Appeal from order modifying attorney's fees dismissed and order quashing execution affirmed.

Opinion, 303 P.2d 619, vacated.

1. Divorce ⟹229

Pendente lite order granting wife an attorney's fee was not invalidated by vacation of interlocutory judgment granting wife divorce on any theory that pendente lite order had merged in interlocutory judgment, and therefore trial court had power to modify order for attorney's fees after interlocutory judgment notwithstanding that statute authorizing modification of original award for attorney's fees had, in one place, used terminology "before entry of judgment". West's Ann.Civ.Code, § 137.3.

2. Divorce ⟹221, 229

Court has power to modify order for attorney's fees in divorce action, and can order fees for past services.

3. Divorce ⟹226

In wife's divorce proceedings against husband opposing allowance of attorney's fee to wife pendente lite, record failed to support husband's assertion of lack of good faith on part of wife.

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George D. Gideon III, Sun Valley, in pro. per.

Hahn, Ross & Saunders, Los Angeles, for respondent.

FOURT, Justice.

The notice of appeal in this matter states in substance that George Gideon, III, the defendant and appellant, hereinafter referred to as the husband, appeals from an order made in the superior court on March 3, 1955, which in effect modified an order previously made for an allowance of attorney's fees to Marion B. Gideon, the plaintiff and respondent, hereinafter referred to as the wife, and from an order made on July 7, 1955, which in effect denied an application of the husband to quash the execution which had been issued. The effort to appeal from the March 3, 1955, order has been abandoned, and the cause now pertains only to the July 7, 1955, order.

A resume of the facts is as follows: The wife brought an action in divorce against the husband, on or about November 13, 1953. As a part of the proceedings, she filed an order to show cause and an affidavit in re attorney's fees and costs. The order to show cause was heard on November 20, 1953, and among other things, the husband was "ordered to pay forthwith direct to counsel for each of the parties $275 attorney's fees, on account and $39 costs, each". The case ultimately proceeded to trial, and an interlocutory judgment of divorce was granted the wife on November 24, 1954. The interlocutory decree provided, among other things:

"It is further ordered, adjudged and decreed that defendant pay forthwith to Gertrude LaVoie Elliott, attorney for plaintiff, the sum of $200.00 for attorney's fees, plus $51.05 for court costs, these sums being in addition to the $275.00 attorney's fees and $39.55 court costs heretofore ordered."

A notice of intention to move for a new trial was filed by the husband on December 10, 1954, and the motion was heard on January 20, 1955, and granted January 24, 1955. The order granting the new trial set forth that the affidavits which had been filed did not show any irregularities in the proceedings, as was claimed by the husband, but, that the court had failed to find on material issues raised by the answer of the husband in reference to provocation and recrimination, and the motion for a new trial was granted upon such grounds. Thereafter, on February 11, 1955, the wife filed an "order to show cause and affidavit in re modification of original order for further attorney's fees and further court costs". The affidavit of the wife in connection with the latter proceeding showed her necessity and the husband's ample ability to respond to any reasonable order. The affidavit of the wife's attorney in connection with the application showed that the trial had consumed two and one-half days; that many affidavits were prepared by such attorney in preparation for the motion for new trial proceedings; that such attorney appeared and argued at the motion for a new trial proceeding, and further that no part of the $200 ordered by the trial judge in the interlocutory judgment of divorce had been paid, and that no part of the costs so ordered had been paid. The attorney then set forth certain expenditures in time and money which had been made in taking depositions and the like, interviewing witnesses and other proceedings, for which the attorney was not compensated in any previous order. The affidavit further set forth that the husband had, up to that time, paid one attorney $275, another attorney $275, and substantially the same amount to still another, or a total of $825 to his various counsel. The attorney for the wife set forth that she had performed forty-two hours of legal work and consultations, excluding and apart from the forty hours spent in preparation and in trying the contested matter on May 28, 1954. This order to show cause was set for hearing March 3, 1955. On the date the matter was to be heard the husband filed a notice of motion for a continuance based upon certain affidavits. Among the matters set forth in the affidavits were statements by the husband that the wife's attorney had guided the wife to introduce false testimony in the trial, that he had not had time to prepare a defense on the order to show cause and that there was a lack of good faith upon the part of the wife. The continuance was not granted and the matter proceeded to a hearing before a commissioner. The commissioner found as a fact that there was no showing in the record that the attorney for the plaintiff "had knowingly participated to the defendant's injury in the plaintiff's wrongful and inequitable conduct in connection with the suit." It was further found that the husband paid his attorneys $1,100 plus costs to date, and that he had no agreement with his then attorney as to future fees, and that he had ample ability to pay added fees to the wife's attorney. It was then recommended by the commissioner, and so ordered by the court on March 3, 1955, that the husband pay to the attorney for the wife $300 on account of attorney's fees, and that the balance of attorney's fees and court costs, if any, be fixed at the time of trial. The order was filed and entered on March 7, 1955.

The husband paid no part of said order for attorney's fees and costs, and a writ of execution issued. On June 30, 1955, the husband filed a "Notice of Motion to Quash Executions and for Order Declaring Prior Order Void." By stipulation, the hearing on such motion was continued to the time of the second trial, and transferred to the trial department. The second trial was had on July 6 and 7, 1955.

On July 7, 1955, an interlocutory decree of divorce was granted the wife wherein the husband was ordered to pay the wife's attorney fees in the sum of $1,250, and $267.64 costs, and the motion of the husband to quash the execution was denied.

The appeal here is from the order denying the motion to quash the execution, and denying the motion for an order declaring void the prior order of March 3, 1955.

It may be noted that only a copy of the minute entry of the court of July 7, 1955, denying the motion to quash is before us and that the husband, acting as his own attorney, has not provided us with a copy of the judgment, or of any written order made by the judge in that matter. The husband, acting as his own attorney, petitioned for a writ of review in this court, which was denied July 27, 1955. Thereafter, on September 1, 1955, the husband filed a notice of appeal.

The husband contends that the court did not have the authority to modify a pendente lite order for attorney's fees after an interlocutory judgment, which had itself been vacated by an order granting a motion for a new trial, because the temporary order became merged in the interlocutory judgment, and when the judgment was set aside, the temporary order went with it. Further, that where the record shows that the new trial was granted because the findings of fact were insufficient to support the judgment, the court does not have the authority to order the husband to pay attorney's fees to the wife to the end that she can have legal services in an attempt to obtain a new judgment in a second trial, and further, that where there is an affidavit of misconduct of the wife's attorney, the court has no authority to make an order of attorney's fees until the matter of the so-called misconduct is determined.

[1] We are of the opinion that a reading of the statute itself demonstrates that the court had the power to make the order it made in this instance. Section 137.3 of the Civil Code is set forth in a footnote hereto.[1] The action for divorce was certainly pending during all of the time in question, and although the husband puts great reliance on the phrase "and before entry of judgment", we do not believe that under the circumstances, the legislature intended that a judgment which has been set aside is the type of judgment referred to in the section. Upon the motion for a new trial being granted the effect was to vacate and set aside the first interlocutory judgment and the parties were right where they were just immediately prior to the start of the first trial. The order for the $200 added attorney's fees and costs in the interlocutory judgment was vacated, but nothing else was stated in the judgment about attorney's fees.

The husband has cited many cases which were decided prior to the 1953 amendment to section 137.3, and so far as we are able to determine, in each instance, the order questioned was one for alimony and not for attorney's fees.

[2] It has been determined repeatedly that the court has the power to modify an order for attorney's fees. Warner v. Warner, 34 Cal.2d 838, 215 P.2d 20; Glesby v. Glesby, 73 Cal.App.2d 301, 166 P.2d 347.

Under the law as it presently is, the court can order fees for past services, and from the record here it is indicated that at least part of the fees so ordered were for past services performed by the attorney for the wife, such as preparing the affidavits in opposition to the motion for a new trial, the time expended in taking the deposition and the time consumed in consulting with three different sets of attorneys of the husband before the second trial.

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[1] "§ 137.3 [Cost of maintaining or defending action and attorney fees during pendency of action: Enforcement of order.] During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the support, maintenance or education of children, upon an order to show cause or motion, and if such relief is requested in the complaint, cross complaint or answer, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees; and from time to time and before entry of judgment upon application as aforesaid, the court may augment or modify the original award, if any, for costs and attorney's fees as may be reasonably necessary for the prosecution or defense of the action or any proceeding relating thereto. In respect to services rendered after the entry of judgment, upon application by an order to show cause or motion, the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter upon application as aforesaid augment or modify any award so made. Attorney's fees and costs within the provisions of this section may be awarded for legal services rendered or costs of action incurred prior, as well as subsequent, to any application or order of court therefor, including services rendered or costs incurred prior to the filing of the complaint. Any such order may be enforced by the court by execution or by such order or orders as, in its discretion, it may from time to time deem necessary."

There is no court reporter's transcript of the proceedings before the commissioner, and his findings of fact, as heretofore indicated, recite that there is no showing in the record of conduct such as the husband attributed to the wife's attorney. The commissioner and two trial judges have now ruled against the husband on his contention in this respect.

[3] As to the lack of good faith of the wife, the record belies any such assertion upon the part of the defendant. The authorities cited by the husband have to do with good faith in the taking of an appeal, and not as to a proceeding such as is present in this case.

The appeal from the order of March 3, 1955, is dismissed and the order of July 7, 1955, is affirmed.

WHITE, P. J., and DORAN, J., concur.

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Bernard P. CALHOUN, Defendant and Appellant.*
Cr. 1099.

District Court of Appeal, Fourth District, California.
April 24, 1957.
Rehearing Denied May 20, 1957.
Hearing Granted June 19, 1957.

Prosecution for (1) conspiring to violate Elections Code by soliciting political contributions from liquor licensees for use in re-election campaigns of Equalization Board member, (2) conspiracy to do acts injurious to public morals and to pervert and obstruct justice, and (3) agreeing to prepare false papers and records for fraudulent purposes for use in proceedings and inquiries authorized by law. The Superior Court of San Diego County, John A. Hewicker, J., denied defendant's new trial motion and entered judgment on a verdict finding defendant guilty on all three counts, and he appealed. The District Court of Appeal, Barnard, P. J., held that the evidence would not sustain defendant's contentions that he had acted merely as agent, that funds had come from regular dues paid by members of association of wholesale liquor distributors and had been in no way solicited, and that he had not been connected with any conspiracy that might have existed.

Affirmed.

1. Conspiracy 🔑47

In prosecution for conspiring to violate Elections Code by soliciting contributions from liquor licensees for use in reelection campaigns of Equalization Board member, evidence would not sustain defendant's contentions that he had acted only as agent, that funds had come from regular dues paid by members of wholesale liquor distributors' association employing him, and that he had not been connected with any conspiracy that might have existed. West's Ann.Elections Code, § 5002.5.

2. Criminal Law 🔑423(1)

Where existence of conspiracy is established, evidence of acts and declarations of conspirators in furtherance of conspiracy is admissible.

3. Conspiracy 🔑23

It is not essential to conviction of conspirator that coconspirators be tried and convicted.

4. Criminal Law 🔑680(1)

It was not necessary to connect defendant with conspiracy at beginning of evidence, or before any evidence of conspiracy was received.

5. Criminal Law 🔑680(1)

Court had reasonable discretion as to order of proof in criminal prosecution.

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* Opinion vacated 323 P.2d 427.

6. Conspiracy ⚷47

A conspiracy may be established by direct evidence or by circumstantial evidence, or a combination of both.

7. Conspiracy ⚷24

In conspiracy prosecution, it need not be shown that parties entered into definite agreement, and it is sufficient to show that they positively or tacitly came to mutual understanding to accomplish act and unlawful design.

8. Conspiracy ⚷45

In conspiracy prosecution, evidence may cover many transactions, extending over long period of time, and show acts which occurred some time before alleged formation of conspiracy, so long as facts shown have some bearing or some tendency to prove ultimate facts in issue.

9. Conspiracy ⚷45

In conspiracy prosecution, any competent evidence which tends to prove the existence of conspiracy is admissible.

10. Criminal Law ⚷539(1), 1169(3)

In prosecution for conspiring to violate Elections Code by soliciting contributions from liquor licensees for use in reelection campaigns of Equalization Board member, it was not error to admit, over objection, testimony voluntarily given by defendant to Grand Jury before which he had been subpoenaed, notwithstanding his contention that the Prosecution merely desired to show thereby that he had refused to answer certain of questions there propounded on ground that answers might tend to incriminate him; but, in any event, he waived his right to complain when he testified at trial, giving in great detail his version of all of his acts and conduct in connection with same matters. West's Ann. Pen.Code, § 1323.5.

11. Criminal Law ⚷419(10), 1169(3)

In prosecution for conspiring to violate Elections Code by soliciting contributions from liquor licensees for use in reelection campaigns of Equalization Board member, it was error to permit witness to testify, over hearsay objection, that hotel manager had told witness that he had arranged with defendant to "fix" hotel's liquor license suspension; but such error could not have been prejudicial in view of other witnesses' direct testimony as to what had occurred and defendant's own admission on stand that he had intimated to hotel manager that a campaign contribution "might be helpful to his case".

12. Criminal Law
⚷655(1), 713, 1166½(12), 1171(1)

In prosecution for (1) conspiring to violate Elections Code by soliciting political contributions from liquor licensees for use in reelection campaigns of Equalization Board member, (2) conspiracy to do acts injurious to public morals and to pervert and obstruct justice, and (3) agreeing to prepare false papers and records for fraudulent purposes for use in proceedings and inquiries authorized by law, neither error nor prejudice appeared with regard to conduct and remarks of trial judge and prosecuting attorney complained of by defendant. West's Ann.Elections Code, § 5002.5; West's Ann.Pen.Code, § 182, subd. 5.

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John W. Preston, Los Angeles, William P. Mahedy, San Diego, Charles H. Carr, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., James Don Keller, Dist. Atty., Jack R. Levitt, Deputy Dist. Atty., San Diego, for respondent.

BARNARD, Presiding Justice.

The defendant, with William G. Bonelli and certain John Does, were charged in an indictment with conspiring to violate section 5002.5 of the Elections Code, it being alleged that they, together with ten unindicted co-conspirators, conspired to commit the crimes of soliciting, asking and receiving political contributions from persons licensed to sell liquor by the Board of Equalization, such contributions being for use in campaigns for the reelection of Bonelli as a member of that Board. In second and third counts they were charged with conspiring to do acts injurious to public morals and to pervert and obstruct justice, and with having agreed to prepare false papers and records for fraudulent purposes for use in proceedings and inquiries authorized by law, in violation of section 182, subd. 5 of the Penal Code.

For well known reasons Mr. Bonelli was not available for the trial, and the trial proceeded as to this defendant alone. A jury found him guilty on all three counts, his motion for a new trial and his application for probation were denied, and judgment was entered providing for imprisonment and fines. He has appealed from the judgment and from the order denying his motion for a new trial.

On a former application for a writ of prohibition, Calhoun v. Superior Court, 46 Cal.2d 18, 291 P.2d 474, the Supreme Court, in reviewing the evidence before the grand jury, briefly outlined the pattern of the plan which was followed in various counties in soliciting, receiving and using campaign contributions from liquor licensees in connection with the 1950 and 1954 campaigns of Bonelli for reelection to the Board of Equalization. Among other things, it was pointed out that checks for contributions from retail liquor licensees were made payable to the National Democratic Club, the Aldine Printing Company, the Woolever Press, and a fictitious company known as the Allied Printing Company; that Calhoun was general counsel and "Public Relations Man" for the Southern California Spirits Foundation, an association composed of wholesale liquor distributors whose members paid regular dues which were supposed to be used for certain purposes only; that another fund existed known as the "Research and Public Relations Fund" to which the Spirits Foundation was the largest contributor but which contained other contributions arranged for by Calhoun; that as a practical matter Calhoun exercised control over the expenditure of the money in this fund; that on his instructions large amounts were drawn on this fund by checks payable to cash, and other checks were drawn in payment of bills presented by the above-named printing companies and an advertising company for expenses in connection with the Bonelli campaign; that these funds and checks were manipulated in various ways; and that the evidence indicated that a check payable to Calhoun, as trustee, was used to replace several small checks made payable to Aldine and signed by retail liquor licensees. The court there summarized the testimony of several of the witnesses.

It would serve no useful purpose to repeat here the factual matters summarized in the opinion in the prohibition case. The same facts appear in the record here, but more in detail and with additional evidence. At the trial 59 witnesses testified for the prosecution, and 17 for the defendant. The reporter's transcript contains 2498 pages, including the testimony of the defendant which takes up 370 pages. His explanations of his various acts in handling these funds and what he did in connection with Bonelli's campaigns are hardly consistent with his innocence in connection with these charges, and apparently his explanations were no more convincing to the jury than they appear to be from reading the record. He spent many thousands of dollars from funds of the Spirits Foundation and Research Fund without direct authorization for the particular expenditures, the checks being made to the same printers and advertisers as were the checks of the retail licensees. None of them showed on their face that they were for Bonelli's campaign, and the way many checks were issued, receipts handled, and entries made on the records kept seems to have been designed to conceal that fact. Calhoun ordered a large amount of the printing for Bonelli's campaign, conferred with Bonelli and with the printers, and cashed certain checks and had others issued in their place before paying some of these bills. In many instances individuals and firms were told to send checks to these printing companies, and later received invoices for printing which they had never ordered or received. Several witnesses testified that they were told to do this by Calhoun. He told one Casteel, who offered to make a contribution to Bonelli's 1954 campaign, to make the check payable to the National Democratic Club. When Casteel objected, Calhoun said to make it to the Aldine Printing Company and that "We will see that you get a bill for printing or something of that sort and that will take care of it." One member of the Spirits Foundation testified that he asked Calhoun at several meetings where the funds of the Foundation were being spent and was told by several people, and possibly by Calhoun, that he "probably better not know." There is a great deal of evidence that checks from liquor licensees, which were solicited, were payable to these printing firms which were doing large amounts of printing for the Bonelli campaigns, and that Calhoun took a large part in the operations in that connection which were carried on for the purpose of securing the reelection of Bonelli. Many inferences reasonably to be drawn from the evidence fully support the conclusion that he was an active participant in a conspiracy carried on for that purpose. There was evidence that in four instances Calhoun agreed to help hotels in getting suspensions of their licenses reduced or set aside, as a result of which contributions for Bonelli's campaigns were received. Calhoun was charged not only with soliciting but with receiving such contributions, and the evidence shows that, aside from the dues paid into the Spirits Foundation, he received political contributions from six other concerns and individuals which were used for the benefit of the Bonelli campaign. He admitted telling Casteel how to make a contribution to Bonelli, and the evidence indicates that he had good reasons for refusing to answer 47 questions when he appeared before the grand jury. While he insisted that he had used the dues paid in by the members of the Spirits Foundation strictly in accordance with the authorization and desires of the members of that organization, several members testified that they did not know how he was using this money and that they would not have approved of its being used in that way. He testified on the stand that in 1954 he spent more time with Bonelli than in any prior campaign, primarily because of Proposition No. 3; that "* * * * it is almost impossible to segregate the two campaigns"; that "The bills that I paid were bills he (Bonelli) always gave to me and asked if I could take care of. That was the net result. I paid those bills directly to the parties who had sent in the bills and paid them by check"; that "I think all of the payments that went for Bonelli's bills came out of the Research and Public Relations Fund." When asked why he had paid this money into the Bonelli campaign he replied that he did it because the members of the association had to keep Bonelli on their side; and that "They had to conduct their business under Mr. Bonelli's direction and the liquor business is very highly regulated and suspensions can be had very easily for violations, intentional or otherwise, many times unintentional." When asked why he had claimed his privilege and refused to answer certain questions before the grand jury, he replied: "Because I thought it would lead into a series of questions about expenditures for Bonelli and I had been advised prior to going before the grand jury not to answer those questions."

[1] Although not separately stated or argued, the appellant's basic contentions are that he was the mere agent of the Spirits Foundation, and that his acts and conduct in receiving and handling funds and paying bills in connection with Bonelli's campaigns were solely those of such an agent; that these funds came from regular dues paid by the members, and were in no way solicited; and that if any conspiracy existed the evidence is not sufficient to connect him with the acts and conduct of Bonelli and other actors in any such conspiracy. As pointed out in Calhoun v. Superior Court, supra, the evidence there referred to was sufficient to justify inferences contrary to these contentions. While the court was there concerned only with whether the evidence was sufficient to show probable cause the evidence here, with the inferences which may

reasonably be drawn therefrom, is amply sufficient to sustain the implied finding that in many, or most, of his activities in connection with these matters the appellant was not acting merely as the agent of the Spirits Foundation, and that he was a member of and took part in a conspiracy to solicit and receive money from liquor licensees for use in the Bonelli campaigns. Many of the specific points raised by the appellant are largely based upon the contentions that the evidence was not sufficient to show the existence of any conspiracy, or if one existed that he had any connection with it.

[2, 3] The appellant first contends that the court erred in telling the jury that although Bonelli was not present at the trial the jury would have to try each and all acts committed by Bonelli as though he were present and being tried. It is argued that the court thereby implied that if Bonelli was guilty of conspiring with any of the named but unindicted conspirators other than Calhoun, then Calhoun would also be guilty; that Bonelli could be guilty and Calhoun innocent of the crime charged, and it was reversible error "to indissolubly connect them together"; and that there was no evidence reasonably tending to show that there was conspiracy between Bonelli and Calhoun.

The judge told the jury, in effect, that there would be no change in the testimony because of the absence of Mr. Bonelli; that the case would have to be tried on the same basis as if Bonelli were present and represented by counsel; and that "* * * you have to try each and every act that he committed, *if there was a conspiracy here,* try each and every act within the conspiracy, *if one existed,* as though he were sitting down there". (Emphasis added.) Where the existence of a conspiracy is established evidence of the acts and declarations of the conspirators in furtherance of the conspiracy is admissible, and the judge in no way intimated that a conspiracy did exist or that any act was done within the scope of any conspiracy. In a prosecution for conspiracy it is not essential to the conviction of a co-conspirator that another or all other co-conspirators shall be tried and convicted. People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770. Where the conspirators are not jointly tried, the admissibility of evidence as to the conspiracy may well be the same and the co-conspirator be liable for the acts of the other conspirators done in furtherance of the conspiracy. No error appears in this connection.

[4–9] It is contended that the court erred in admitting in evidence hundreds of pages of testimony relating to matters occurring before the formation of the alleged conspiracy, and in the absence of any evidence that any conspiracy existed or that defendant was a member thereof if one existed. It is argued that the court admitted the testimony of the first 20 witnesses without any showing that a conspiracy existed or that the defendant was a member thereof, and that "the great bulk of the testimony of the other thirty-nine witnesses for the State also failed to show that a conspiracy existed between Bonelli and defendant to solicit, ask and receive campaign contributions for Bonelli from liquor licensees of the Board of Equalization." The record does not bear out the contention that 20 witnesses were allowed to testify before any evidence was introduced to establish the existence of a conspiracy. The testimony of the first witness, Al Tossas, was sufficient to establish, prima facie, the conspiracy charged in the first count. Count 2 was established by the second witness called, Mary Forsythe, and Count 3 by the third witness, Raymond McCullough. It was not necessary to connect the defendant with the conspiracy at the beginning of the evidence, or before any other evidence of a conspiracy was received. As the defendant concedes, the court had a reasonable discretion as to the order of proof and there is nothing to indicate that this discretion was abused. It is well settled that a conspiracy may be established by direct evidence or by circumstantial evidence, or a combination of both; that it need not be shown that the parties entered into a definite agreement but is sufficient if they positively or tacitly come to a mutual understanding to accomplish the act and unlawful design; that the evidence may cover many transactions, extend over a long period of time, and show acts which occurred some time before the alleged formation of the conspiracy, so long as the facts shown have some bearing or some tendency to prove the ultimate facts in issue; and that any competent evidence which tends to prove the existence of the conspiracy or any competent acts or declarations tending to prove a common design, is admissible. People v. Stevens, 78 Cal.App. 395, 248 P. 696; People v. Lyon, 135 Cal.App.2d 558, 288 P.2d 57; People v. Steccone, 36 Cal. 2d 234, 223 P.2d 17; People v. Chait, 69 Cal.App.2d 503, 159 P.2d 445; People v. Malone, 20 Cal.App.2d 1, 66 P.2d 216. No particular evidence is pointed out in this connection as being inadmissible and the contention that all of this evidence was inadmissible for the reasons stated is without merit.

[10] It is contended that the court erred in admitting over objection the testimony given by the defendant before the 1954 grand jury. It is argued that the established rule that a person cannot be compelled to be a witness against himself in a criminal case was thus violated; that section 1323.5 of the Penal Code provides that an accused person shall at his own request, but not otherwise, be deemed a competent witness; that the defendant was subpoenaed before the grand jury and therefore was not a voluntary witness and did not testify at his own request; and that his testimony before the grand jury was used at the trial merely to show that he had refused to answer some 47 questions before the grand jury on the ground that his answers might tend to incriminate him. People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633 is cited in support of this contention.

The defendant was subpoenaed before the grand jury but he testified there voluntarily. He took an oath to tell the truth but refused to take an oath of secrecy and was not required to do so. He was told at the beginning that he had the right to refuse to answer any or all questions and, after stating that he understood his rights in the matter, he proceeded to testify. He answered some sixty questions before claiming any privilege, and a great many questions thereafter. His testimony before the grand jury takes up 114 pages of the transcript. Except for a few pages in which he refused to answer certain questions on the ground that this might tend to incriminate him, he disclosed a willingness to answer all questions about his acts, and went into a great deal of detail in explaining his transactions and his handling of funds and checks in connection with the matters under investigation. When asked whether he felt he had not done anything wrong he replied: "I still am going to invoke the constitutional privilege on any question dealing with Mr. Bonelli or his campaign. Now, that's my position." He also expressed a willingness to answer questions concerning certain checks with the understanding that this did not tie in with Mr. Bonelli. The defendant was a lawyer and with full knowledge of his rights willingly testified before the grand jury. His willingness to testify when he knew it was not necessary, and his evident desire to fully explain, at that time and place what he had done with the funds under his control and all of his acts in connection with the matters under investigation, with the exception noted, sufficiently disclose that he was testifying at his own request, within the meaning of the statute. He later testified at the trial giving in great detail his version of all of his acts and conduct in connection with these same matters. Having voluntarily testified at great length, with full knowledge of his rights, he waived the right to claim, under section 1323.5 of the Penal Code, that he had not been a competent witness before the grand jury. While his testimony before the grand jury might better have been used after he testified at the trial by way of impeachment, the testimony in question was material, if not as an admission at least as an accusatory statement, with the defendant's reaction thereto. While some of the facts here are slightly different, it must be held that such cases as People v. Byers, 5 Cal.2d 676, 55 P.2d 1177, People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, and People v. Walsh, 47 Cal.2d 36, 301 P.2d 247, are applicable here, rather than People v. Talle, supra, and that no reversible error appears in this connection.

[11] It is contended that the court erred in permitting one Pettigrew to testify that Stanley, the manager of the Ambassador Hotel in Los Angeles, told him that he had arranged with the defendant to fix the hotel's suspension of its liquor licenses. It is argued that this was hearsay and the court emphasized the error by telling the jury that Stanley was one of the conspirators in this case, if a conspiracy existed. While this was hearsay, no prejudice appears since other witnesses testified directly as to what had occurred and the defendant admitted on the stand that he had intimated to Stanley that a campaign contribution "might be helpful to his case", and that "I just said it (giving money on Bonelli's behalf) might be helpful."

It is contended that the court erred in allowing one Kennedy to testify that either Bonelli or the defendant owed him a balance of $13,692.00 for billboard advertising in the 1954 election. It is argued that Kennedy testified that he had billed this amount to the Research Fund, which it had not paid; that the defendant himself owed nothing to Kennedy, and if he did it was not material to the matter of the conspiracy; and that one purpose of bringing in this testimony was "to pillory defendant before the jury as a deadbeat." Kennedy testified that Calhoun had ordered him to do this work and to bill it to the Research Fund, and there was evidence that this work was for the Bonelli compaign and not for Proposition No. 3. There was a great deal of evidence on this matter, including a long explanation of it by defendant while on the stand. It was an incidental part of the entire transaction and it cannot reasonably be supposed to have affected the result.

It is contended that the court erred in admitting the testimony of one Tomerlin concerning payment of attorney's fees to the defendant, and concerning his payment of $4,500 to his employee, Dennis Moore; and in admitting evidence that Calhoun paid $3,000 from the funds of the Spirits Foundation to Leonard Wilson as attorney's fees in defending Charles E. Berry in a prior action. It is argued with respect to the Tomerlin matters that this testimony was hearsay, that it is not shown to have any connection with the offenses charged in the indictment, and that there was no evidence of what Moore did with the money. With respect to the Berry matter it is argued that the question was not relevant to any issue in this case. The Tomerlin matter was in connection with the Wilton Hotel, and was one of the four hotel matters above mentioned. There was evidence that Tomerlin gave the money to Moore upon instructions from Calhoun in connection with an effort to have the suspension of a liquor license revoked, and that no legal work or appearance was made by Calhoun. Calhoun had told Tomerlin that someone would contact him for certain money which was to go to Bonelli, and it was material although it was not directly shown exactly where the money went. The Berry matter, while not very material, was one of a long list of things done by the various conspirators.

It is contended that the court erred in admitting "hundreds of pages of testimony concerning the deposits of cash and checks by" one Snyder in the bank account of the National Democratic Club, and disbursements from said fund by Snyder; in admitting the testimony of Al Weigel and other witnesses concerning deposits in and checks drawn upon the Research and Public Relations Fund; and in admitting scores of checks, deposit slips, invoices and other documents without showing that the defendant was connected therewith, and without first establishing prima facie the existence of a conspiracy and that the defendant was a member thereof. These contentions are based on the basic claims that no conspiracy was established, and that it was in nowise shown that the defendant took any part in any conspiracy. These basic contentions are not supported by the record, and these various matters were properly admitted under the well established rules governing the receipt of evidence for the purpose of establishing a conspiracy.

[12] Finally, it is contended that the defendent was not given a fair and impartial trial because of certain statements made by the trial judge, and because the district attorney was guilty of prejudicial misconduct in certain respects. Complaint is made that the trial judge improperly commented on the defendant's appearances as attorney in cases before the Board of Equalization by saying that he (the trial judge) had practiced law for 25 years and had never appeared before the Board; that the judge asked the defendant why he did not draw checks on these funds directly to Mr. Bonelli; that he compared the defendant to a real estate broker who represents both parties and is the agent of both; and that in a long talk before giving his instructions he made many inaccurate statements which were likely to mislead the jury. In this latter contention it is stated that the court said "During this proceeding I am always right; I am never wrong"; that in referring to the testimony of Mr. Kennedy he said "He is in the hole about $13,000. Well, he was unhappy and you can't blame him"; that he dragged in an illustration based on the payment of a bribe to a mythical judge; that he stated that assuming there was a conspiracy over a period of many years you could bring in evidence to show what was done during all of those years; that he told the jury that if there was a conspiracy Mr. Stanley was one of the co-conspirators; that he used an illustration in one of his statements which was only a slight variation of a chart used by the district attorney; that he told the jury that two sections of the Elections Code were involved in this case; and that he told the jury that this case was to be tried as though the alleged co-conspirator Mr. Bonelli was present, and that "you have to try each and every act that he committed." It is argued that the judge thus implied that any lawyer that practiced before the Board must be a "shyster"; that he practically told the jury that the defendant was the agent of the contributors to Bonelli's campaigns and also was the agent of Bonelli; that he thus assumed facts which were not proven, and virtually compelled the jury to infer that a conspiracy existed and that defendant and Stanley were members thereof; and that these statements, in effect, amounted to charging the jury as to matters of fact, and constituted an invasion of the province of the jury.

While some of these statements were unnecessary and had better been left unsaid, when they are considered in their context neither error nor prejudice appears. Immediately before making the first statement the court stated that every lawyer has the right to appear before any court or any administrative body, and that "the purpose of asking the question was to determine whether or not these people that were mentioned actually did appear." When the defendant was testifying about bills that Bonelli had asked him to pay the court asked "Why didn't you give him the check?" and the defendant replied that he did not know why he didn't, but that he paid it direct to the party that presented the bill. In talking about an agency the court merely stated, without reference to the defendant, that an agency can work two ways and gave an illustration. Just prior to talking about the agency the court had told the jurors that he was not going to tell them what the evidence was, and he repeatedly told them that they were the sole judge of the evidence, and that if he made any comments on the evidence it should be disregarded. The statement that he was always right was a part of a longer statement explaining to the jury that it must take the law from the court, and that it must be taken that he was correct as to what the law is even though it should later turn out that he was wrong. His statement about Mr. Kennedy being in the hole $13,000 was made with respect to an argument that the liquor licensees were satisfied and did not ask for their money back. The jury was merely told that the fact that the people who made the contributions were satisfied was not to be considered in this case. His statement about a mythical judge being bribed was used in illustrating why the fact that both parties to an illegal act were satisfied would not be a defense to a criminal charge. The judge did not assume or state as a fact that a conspiracy existed. His statement that Stanley was a co-conspirator, if a conspiracy existed, was justified by the evidence and the jury was correctly told that a number of other unindicted persons were accomplices if a conspiracy did exist. The court did not state that two sections of the Elections Code were involved. He first said that the defendant was charged under section 5002.6, and when his attention was called to the fact that the charge was based upon section 5002.5, he told the jury that he had gotten the two sections mixed up. His statement that this did not make any difference was based on his instruction that the defendant was charged with conspiracy and not with a substantive crime.

With respect to the contention that the district attorney was guilty of prejudicial misconduct, it is claimed that the district attorney said in his opening statement that he would prove certain things which he knew he would not be able to prove, and which he did not prove; that in referring to the defendant's refusal to answer questions before the grand jury the district attorney knew that such evidence was improper because the defendant had not voluntarily testified there; that he improperly used a chart containing inaccurate figures which he knew could not be proven to be true; and that he offered hundreds of pages of testimony and scores of exhibits which were irrelevant to any issue in the case or were pure hearsay. It is argued that this was reversible error, citing People v. Talle, supra. The facts of the Talle case were entirely different from those in the instant case and that case is not controlling here. The things which the district attorney said he intended to prove were proven, most of the evidence claimed to be inadmissible was admissible, and there was nothing to show that the district attorney knew that any evidence he offered was inadmissible, or that he was guilty of prejudicial misconduct. There is nothing in any of the matters here complained of, when considered with the context and with the surrounding circumstances, which discloses prejudicial misconduct or which indicates that the defendant did not receive a fair trial.

There was ample evidence of the existence of a conspiracy to solicit and receive contributions from liquor licensees for use in the Bonelli campaigns. There was strong evidence that the appellant took an active part in such transactions, including some direct evidence and a large amount of circumstantial evidence, that cannot reasonably be reconciled with his innocence. While some of the funds he used in these campaigns may have been legally obtained and used, the evidence abundantly justifies many inferences and inferences most reasonably to be drawn leading to the inevitable conclusion that he also took an active part in obtaining and using other contributions from liquor licensees for the same purpose; and that he manipulated these contributions in various ways through the use of false receipts, invoices for goods never ordered or received, and by switching checks and funds around to accomplish that purpose while concealing the source of the funds.

While some minor errors may appear, as is not unusual in long cases of this nature, these are not sufficient to justify a reversal and it cannot reasonably be said that the appellant did not have a fair trial. We are not of the opinion that any errors which may appear resulted in a miscarriage of justice, within the meaning and intent of Article VI, Section 4½ of the Constitution. It does not appear to us as reasonably probable that a result more favorable to the appellant would have been reached in the absence of any errors which may here appear.

People v. Watson, 46 Cal.2d 818, 299 P.2d 243.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

150 Cal.App.2d 354

J. C. COLLINS, Petitioner,

v.

SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 22022.

District Court of Appeal, Second District,
Division 1, California.
April 22, 1957.

Proceeding on writ of certiorari to review orders of the Superior Court, Los Angeles County, adjudging petitioner in contempt of support orders issued by such court in an annulment action brought by petitioner's wife. The District Court of Appeal, 302 P.2d 805, annulled judgment. On motion to recall remittitur and correct judgment or to modify opinion rendered in explanation of judgment, the District Court of Appeal, Fourt, J., held that the superior court, in the contempt proceeding, could take judicial notice of the child support orders it had made but could not take judicial notice and assume as true the facts stated in affidavits upon which the orders to show cause in the contempt proceeding were issued until defendant had an opportunity to challenge such facts as evidence, and, in doing so, court deprived husband of due process.

Motion denied.

1. Contempt 🔑67

Petition for writ of certiorari, which contained prayer that Superior Court judge be commanded to certify transcript of record and proceedings in matter of order adjudging petitioner guilty of contempt of court and sentencing him to jail so that "the same" could be reviewed by the District Court of Appeal and "thereupon the said Court to review said proceedings *an* annul" contempt order, was sufficient to request an annulment of the contempt order, and, therefore, judgment of District Court of Appeal did not, in granting such annulment, exceed relief prayed for in the petition.

2. Marriage 🔑66

Where proceeding for modification of child support payments in annulment decree and proceeding for contempt arising from failure to make such payments were heard before the same court consecutively, reviewing court's opinion, which was based on partial transcript which covered the contempt proceeding, was based on evidence properly before the reviewing court, even though reviewing court did not have before it the full transcript which, in addition, contained the modification proceeding.

3. Affidavits 🔑18

Affidavits, upon which orders to show cause were issued, and which served as the complaint charging the contempt, could also serve as evidence at the contempt hearing when offered and received by the court, but, upon being offered, person accused of contempt would have had right to question the relevancy or competency of any matter stated therein.

4. Witnesses 🔑271(1)

In contempt proceeding in which affidavits, upon which orders to show cause were issued, served as the complaint charging the contempt, upon offer and receipt in evidence of the affidavits as evidence at the contempt hearing, person accused of contempt would have had right to cross-examine the affiant.

5. Constitutional Law 🔑273
Marriage 🔑64

Where, in proceeding requiring husband to show cause why he should not be adjudged guilty of contempt for wilfully disobeying child support order, affidavits, upon which orders to show cause had been issued, were offered in evidence without husband having had right to challenge relevancy or competency of matter set forth in the affidavits, husband was deprived of a trial of the issues, which were tendered by the affidavits, in accordance with rules and principles for enforcement and protection of private rights, and, therefore, procedural due process was lacking, and the judgments of contempt would have to be annulled.

6. Constitutional Law ⚷273
Evidence ⚷43(2)

Where contempt proceeding which arose from husband's failure to comply with child support payments was ancillary to annulment action, court, in the contempt proceeding, could take judicial notice of the child support orders it had made but could not take judicial notice and assume as true the facts stated in affidavits upon which the orders to show cause in the contempt proceeding were issued until defendant had an opportunity to challenge such facts as evidence, and, in doing so, court deprived husband of due process.

7. Court Commissioners ⚷4
Motions ⚷57

Court commissioner has no power to order a party to do anything, and court is not bound to make an order in accordance with commissioner's findings or his recommendations, and, therefore, party, who is present at hearing before commissioner, is not charged with knowledge of order thereafter made by the court.

8. Contempt ⚷23

Where only proceeding had on date of order in which petitioner was charged with contempt was a hearing before court commissioner who had no power to make any order, and the actual order involved was made six days later in chambers by approval of commissioner's recommendations, fact that petitioner was present at hearing before commissioner would not cause him to be charged with knowledge of the order subsequently made by the court.

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Herbert W. Simmons, Jr., Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Thomas H. Carver, Deputy County Counsel, Los Angeles, for respondent.

FOURT, Justice.

The respondent herein made a motion to have this court "recall the remittitur issued on January 3, 1957, and to correct the judgment filed on November 2, 1956, or in the alternative, to modify the opinion rendered in explanation of said judgment."

For the facts of the case, we quote verbatim from the opinion of November 2, 1956, Collins v. Superior Court, 145 Cal. App.2d 588, 302 P.2d 805, 806:

"Petitioner is the defendant in an action brought by one Bettye Lois Collins seeking a divorce from him or, in the alternative, an annulment of her marriage to him. Contemporaneously with the commencement of the action Bettye caused petitioner to be cited before the respondent court to show cause why he should not be ordered to pay to her reasonable sums for attorney's fees, court costs, alimony, and for the support of the minor child of the parties. Hearing was had upon the order to show cause on October 25, 1955, before a commissioner of the court, and on that day the commissioner in the presence of petitioner made a finding that petitioner had the ability to pay $80 per month for the support of the minor child of the parties. Under that same date he made written findings and recommendations to the court recommending that petitioner be ordered to pay through the court trustee the sum of $80 per month for the support of the minor child of the parties, payable at the rate of $20 per week on the first four Fridays of each month, the defendant to be credited upon such payments for payments made for the support of petitioner through the city attorney (order apparently had been made for the payment of $32 per month in a failure-to-provide proceeding before the city attorney); and that he be ordered to pay to counsel for Bettye the sum of $175, payable at the rate of $15 per month.

"On October 31 the court approved these findings and recommendations and made its order accordingly. This order was not made in the presence of petitioner, nor was it served upon him.

"On April 4, 1956, the action was tried as a default in the absence of petitioner; and on April 5, 1956, a decree annulling the marriage of Bettye and petitioner, and ordering petitioner to pay Bettye the sum of $80 per month for the support of the minor child of the parties at the rate of $20 per week, payable on the first four Fridays of each month was filed; and on the 9th of April, 1956, this decree was entered. On July 2, 1956, petitioner filed in the respondent court an affidavit alleging that on April 4, 1956, the respondent court made an order that petitioner pay to the plaintiff for the support of the minor child the sum of $80 per month, payable at the rate of $20 per week on the first four Fridays of each month, and alleging that since the making of the said order the conditions and circumstances surrounding said parties had materially changed, and setting forth that petitioner had a net income of $260 per month and obligations of over $300 per month, and praying that the order of April 4 be modified so as to reduce the amount which the petitioner would be required to pay for the support of his child.

"Upon this affidavit an order was issued and served upon Bettye requiring her to show cause why the decree, insofar as it provided for payment by petitioner for the support of his child, should not be modified. On July 31, 1956, an order to show cause was issued by the respondent court directed to petitioner requiring him to show cause why he should not be adjudged guilty of contempt of court for willfully disobeying 'the Order heretofore made on the 4th day of April 1956' as more particularly described in the affidavit of the plaintiff, which was annexed.

"The affidavit of the plaintiff, which was the basis for the order to show cause, alleged in substance that on the 4th of April, 1956, the court had made the order which we have hereinbefore set forth as having been contained in the decree of annulment, that the petitioner had only made certain payments, which are set forth in detail in the affidavit and which totaled the sum of $79, and was delinquent in the sum of $253. It alleged that the defendant had the ability to make the payments in which he was delinquent but had willfully failed and refused so to do. It alleged that petitioner was not present when the order was made, and that the order was not pronounced in his presence; but in answer to the question set forth in the affidavit, 'What other knowledge of the Order has the adverse party received?', stated, 'Through his atty, and O. S. C. re modification filed by defendant herein shows actual notice.' It further stated that petitioner had sufficient income to comply with the order and that that income was in the sum of $260 per month net.

"On the same day an order to show cause issued requiring petitioner to show cause why he should not be adjudged guilty of contempt for willfully disobeying the 'Order heretofore made on the 25th day of October 1955.' The affidavit filed by Bettye which was the basis for this order to show cause alleged that on the 25th of October, 1956,[1] the court had ordered petitioner to pay to plaintiff for the support of the minor child of the parties $80 per month payable on the first four Fridays of each month; that payments totaling $440 had accrued under said order; that there had been paid on account thereof the sum of $155 only; and that petitioner was delinquent in the sum of $285. The affidavit alleged that the order of October 25 was audibly pronounced in the presence of petitioner; and in answer to the ques-

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"[1] This is the date given in the affidavit, but all parties apparently understood it to refer to October 25, 1955."

tion, 'What other knowledge of the Order has the adverse party received?', stated, 'Through his attorney.' It made the same allegations as to the ability of petitioner to support his minor child as were set forth in the affidavit heretofore mentioned.

"All orders to show cause were made returnable on August 21, 1956, and on that day the court apparently received some evidence upon the issues tendered by the order requiring Bettye to show cause why the order as to child support of April 4, 1956, should not be modified. After this evidence was taken, the court proceeded to determine the issues of contempt presented by the order to show cause directed to petitioner."

The petitioner was found guilty of contempt in each instance and sentenced to jail for five days on each charge, the sentences to run consecutively.

Respondent now contends that the judgment was an error of law because it exceeded the relief prayed for in the petition for the writ of certiorari and the order to show cause. The respondent asserts that the prayer of the petition for the writ of certiorari only asks that the court direct the respondent court to certify fully a transcript of the record and proceedings in the matter of the contempt proceedings. The prayer of the petition reads as follows:
"Therefore Your Petitioner Prays:

"1. A Writ of Certiorari may be issued out of the above entitled Court directed to the said Superior Court of the State of California, In and for the County of Los Angeles and to the Honorable Joseph Raycraft, commanding the said Court to certify fully at a time and place to be specified in said Writ of Certiorari, a transcript of the record and proceedings in said court in the matter of said order adjudging your petitioner guilty of contempt of said court and sentencing your petitioner guilty of contempt to serve ten days in jail, so that the same may be reviewed by this Court and thereupon the said Court to review said proceedings *an* annul said order adjudging your petitioner guilty of contempt of Court sentencing your petitioner to ten days in jail as aforesaid.

"2. That pending a determination of the merits of the contention of your petitioner that the order sentencing your petitioner to serve ten days in jail be stayed until further order of this court."

[1] It is at once apparent that the respondent is incorrect in its contention, as the prayer does request an annulment of the order of contempt, which is exactly what this court ordered.

[2] The respondent further asserts that the opinion is based on evidence not properly before the court in that this court considered a partial transcript filed by the petitioner and certified by the court reporter as being a true and correct partial transcript of the proceedings held in the matter. The partial transcript was not certified by the judge as being true and correct. It may be noted here that here was no objection at the time of the hearing to the use of the partial transcript, and everybody, including counsel for the respondent, apparently assumed that it was a true and correct partial transcript. The respondent has now furnished to this court a full and complete transcript of the entire proceeding, consisting of thirty-five pages. We have compared this full transcript with the partial transcript and find that the partial transcript is identical with pages 27–35 of the full transcript, with the exception of some very minor and insignificant changes, such as typographical corrections, which have no bearing on the meaning and sense of what was said and done.

The first twenty-six pages of the full transcript were not before us in the first instance, but a reading of the matter therein contained now does not tend, in any wise, to change our opinion as heretofore given. The substance of what was said and done, as related in the first twenty-six pages of the full transcript, is that the attorneys talked at length in the first instance about how they were to proceed about a stipulation having to do with the change of circumstances and its effect upon the introduction of evidence in the modification proceedings. Finally, the following was said:

> "The Court: There is a contempt proceeding here that you are proceeding with as I understand.
>
> "Mr. Stephenson: The order to show cause in re modification.
>
> "The Court: You are proceeding with the contempt matter?
>
> "Mr. Stephenson: Yes.
>
> "Mr. Simmons: My understanding is that the modification was filed first. I'd like the Court possibly to hear that first.
>
> "Mr. Stephenson: That's satisfactory.
>
> "Mr. Simmons: Take the stand."

J. C. Collins was then called as a witness in the proceeding having to do with his petition to modify the support allowance. He testified about his job, his living conditions and earnings. During cross-examination the following occurred:

> "Mr. Stephenson: While the defendant is on the stand, may I ask him some questions which would pertain to the contempt order, your Honor?
>
> "The Court: Is that agreeable with you, Mr. Simmons?
>
> "Mr. Simmons: I'd rather finish the modification, if I could.
>
> "The Court: You may because when it pertains to the contempt matter, of course, he may refuse to answer, to take the stand, if he wishes. It's quasi-criminal. Anything else?
>
> "Mr. Stephenson: I think not, but may I look this over just once more?"

It is fairly obvious that it was understood that the first part of the proceeding had to do with petitioner's request for a modification of the order for support and maintenance of the child, and counsel made it abundantly plain and clear that the contempt proceeding would come afterward, and the two were separate and apart and were not being considered as one proceeding.

Bettye Collins, the plaintiff in the action, testified that she was remarried and as to what her needs were for the child's support and maintenance. The order had theretofore been for $80 per month, and she stated that she could now support and maintain the child on $60 per month. Counsel for the plaintiff then announced "That's all on the question of modification, your Honor", indicating that he certainly had no thought that the proceedings up to that time had had anything to do with the contempt action. Afterward, the attorney for the petitioner cross-examined the plaintiff as to matters pertinent to the application for modification and counsel for the plaintiff again announced, "That's all on the modification". The court then asked, "Do you want to proceed on the contempt matter?", indicating that it had not, up until that time, been engaged in the proceeding on the contempt matter. The attorney for the plaintiff then asked the attorney for petitioner about stipulating to certain matters having to do with the contempt proceeding, and the attorney for petitioner stated, "I can't stipulate to anything, counsel."

The court took a recess and then resumed the session. The proceedings following the recess had to do with the contempt matter with which we are now concerned, and what was said and done is related and contained in the partial transcript which this court had before it at the time of the prior decision and reference to which has heretofore been made.

The pertinent parts of the partial transcript were quoted in the previous decision and are here set forth:

> "The Court: Number 5, Collins, and you may proceed with the contempt.
>
> "Mr. Stephenson: We arrived at a stipulation which we feel will dispose of the matter of the contempt.
>
> "We offer to stipulate that the amounts set forth as the arrearage in each of the contempt affidavits be found by the Court to be the amount in arrears as of July 31, 1956 on each order.

"The Court: July 31st?

"Mr. Stephenson: Yes, and in other words, there would be then an arrearage of $285.00 on the order of October 25th, 1955, and an arrearage of $253.00 on the order of April 4th, 1956 for child support, and an arrearage of $135.00 as of that July 31st on the order for attorney's fees which was made on October 25, 1955.

"We further offer to stipulate that the Court need not find the defendant in contempt on these orders, but in lieu thereof the Court make an order now for the payment of these arrearages and whatever amount per month the Court feels is reasonable that the defendant should pay.

"Mr. Simmons: We are willing to stipulate, your Honor. We would like to ask the Court to make note of the fact that the defendant has during this period of time in question paid either eight, seven or eight, and in a few instances $10.00 a week except for a few weeks.

"Mr. Stephenson: I have the list here of payments that were made and they were fairly regular, your Honor.

"The Court: Do you wish to offer that list, Mr. Simmons?

"Mr. Stephenson: I have no objection if you feel you'd like to offer it.

"Mr. Simmons: It might be well to have it in the file.

"The Court: You are offering it, Mr. Simmons. It will be received.

"Mr. Simmons: Stipulation that they are not my figures?

"Mr. Stephenson: I stipulate.

"The Court: This list of payments received is received as Defendant's Exhibit A."

The court then orally announced its decision modifying the decree of annulment insofar as it provided for the support and maintenance of the child of the parties, and immediately, without taking any further evidence and without the affidavits of the plaintiff having been offered or received in evidence, proceeded to find the petitioner guilty of contempt. Counsel for the petitioner apparently was surprised at the course of events and asked if he might interrupt the court before the order was made, stating that he understood the contempts were dismissed by stipulation. Counsel for the petitioner then advanced the argument that there was no showing of service on the April 4th order, and thereupon the judge told him to "sit down and listen for a while. When we get all through, then if you don't like it, you take an appeal." The petitioner was then sentenced to five days in jail on each of the matters, the sentences to run consecutively. It was then called to the court's attention by petitioner's attorney, but to no avail, that the petitioner had been sick a part of the time in question and was off work, and that there was no evidence showing his ability to pay during that period of time. The court thereupon informed counsel that there was no evidence in the record of any illness and that his statement after judgment was such that he, the judge, would not consider it. Counsel pointed out further that all of the testimony taken was directed to the modification proceedings in any event, and that counsel was taken completely by surprise. The attorney for the petitioner attempted to explain to the court that no evidence had been introduced by the petitioner on the contempt matter and that he understood that the contempt hearing was to be separate and apart from the modification hearing. Our reading of the records leads us to the same conclusion.

The respondent has asserted that the transcript demonstrates that both orders to show cause, the modification and contempt proceeding matters, were heard simultaneously, and that the evidence was introduced as to both matters. We have set forth sufficient to indicate that there is no merit in such an assertion. Moreover, petitioner was not afforded an opportunity to examine the plaintiff as a witness in any contempt proceeding, and he had no opportunity to testify himself in any such proceeding.

The respondent also asserts that the affidavits of the plaintiff were received in evidence and the petitioner had the opportunity to cross-examine her and to offer evidence to excuse his delinquency. The record speaks for itself and we can find no place therein where the affidavits of plaintiff were received in evidence and the respondent has not referred us to the place or places in the record where such was done. We have set forth the testimony and statements of the various participants in the proceedings to show that the petitioner did not get the opportunity to examine the plaintiff on the contempt proceeding, and he was told in substance that he was too late as to any matter in excuse of any delinquency such as, for example, sickness and inability to work.

In our former opinion we stated, and we restate here [145 Cal.App.2d 594, 302 P.2d 808]:

"Proceedings such as this to have a person adjudged guilty of an indirect contempt because of a violation of an order of the court, although ancillary to the action in which the order which it is alleged the defendant has violated was made, are nevertheless quasi-criminal in character. Ex parte Ah Men, 77 Cal. 198, 200, 19 P. 380; Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061; Ex parte Gould, 99 Cal. 360, 33 P. 1112, 21 L.R.A. 751; Phillips v. Superior Court, 22 Cal.2d 256, 257, 137 P.2d 838.

"In order that the court may have jurisdiction to try one charged with contempt, the affidavit which initiates the proceeding must state the facts constituting the offense and must affirmatively show that the person charged with the contempt had knowledge of the order he is charged with violating, Phillips v. Superior Court, supra, 22 Cal.2d at page 258, 137 P.2d 838; Warner v. Superior Court, 126 Cal.App.2d 821, 273 P.2d 89, and the hearing had in the proceeding must be such as to constitute procedural due process, Warner v. Superior Court, supra.

"While no exact definition of due process may be formulated, it is established that due process is absent if a party is denied the right to have his cause tried and determined in accordance with the procedures that are applied in other cases of like character. San Jose Ranch Co. v. San Jose etc. Co., 126 Cal. 322, 326, 58 P. 824; Gray v. Hall, 203 Cal. 306, 317, 265 P. 246. It implies the right not to be deprived of one's property or liberty without evidence having been offered against him in accordance with the established rules, and an opportunity to cross-examine those whose evidence is given against him, and the opportunity to present evidence in his own behalf. McClatchy v. Superior Court, 119 Cal. 413, 420, 51 P. 696, 39 L.R.A. 691; Matter of Lambert, 134 Cal. 626, 633, 66 P. 851, 55 L.R.A. 856; Langendorf United Bakeries v. Industrial Acc. Comm., 87 Cal.App.2d 103, 104, 195 P.2d 887, and cases cited.

[3–6] "In the case at bar no evidence was offered against petitioner. The affidavits upon which the orders to show cause were issued served as the complaint charging the contempt. They might also serve as evidence at the hearing but they did not constitute such evidence until offered and received by the court, and upon their being offered petitioner would have the right to object to any matter stated therein upon any proper legal ground as to its relevancy or competency. In the proceedings here he would also have the right, if the evidence was offered and received, to cross-examine the affiant, Langendorf United Bakeries v. Industrial Acc. Comm., supra; 16A C.J.S., Constitutional Law, § 624, p. 834. Without the affidavits having been offered and without the petitioner having had a right to challenge the relevancy or the competency of the matter set forth in the affidavits, he was deprived of a trial of the issues tendered by the affidavits according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. It is true that the proceeding in contempt being ancillary to the annulment action, the court might take judicial notice of the orders it had made; but it could not take judicial notice of and assume as true the facts stated in the affidavits until the defendant had had the opportunity to challenge those facts as evidence, and when it did so it deprived petitioner of due process, Moore v. California Minerals etc. Corp., 115 Cal.App.2d 834, 837, 252 P.2d 1005. Procedural due process being lacking, the judgments of contempt must each be annulled.

[7, 8] "As to the judgment finding petitioner in contempt of the order denominated as one of October 25, 1955, is concerned, the facts disclosed by the file of the respondent court in the annulment action negative the truth of the finding made in the judgment of contempt that the defendant had knowledge of that order; for while the affidavit which is the foundation for the order to show cause in that contempt proceeding states that the order was audibly pronounced in the presence of petitioner, the proceedings had in that matter and of which the court was charged with judicial notice show that the only proceeding had on October 25 was a hearing before the commissioner who had no power to make any order, and that the actual order of the court was not made until October 31, 1955, and then was made in chambers by the approval of the recommendations of the commissioner. We advert to this phase of the matter not because it could in any wise affect the decision which we have necessarily come to, as heretofore announced, but because it has apparently been common practice to assume, contrary to the facts, that a party who is present at the hearing before the commissioner is charged with knowledge of an order thereafter made by the court. That this is not true follows not only from the fact that the commissioner has no power to order a party to do anything, but also from the fact that the court is not bound to make an order in accordance with the commissioner's findings or his recommendations."

So far as this court is concerned, there is nothing to correct in the former judgment; it was, in our opinion properly based upon the record we had before us at that time, and now that the respondent has furnished us the full transcript, we are of the same opinion. If the respondent court is insistent upon putting the petitioner in jail for his derelictions, if any, it will be a simple matter to properly proceed, and if he is guilty of contempt, to act accordingly.

Respondent's motion to recall the remittitur and to correct the judgment is denied.

WHITE, P. J., and DORAN, J., concur.

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150 Cal.App.2d 594

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack James WALKER, Defendant and Appellant.

Cr. 1133.

District Court of Appeal, Fourth District, California.

April 30, 1957

Rehearing Denied May 21, 1957.

Hearing Denied June 26, 1957.

Defendant was accused of rape, kidnapping and burglary and from a judgment of the Superior Court of Orange County, John Shea, J., the defendant appealed. The District Court of Appeal, Mussell, J., held that the restraint imposed upon defendant's cross-examination of prosecutrix as to previous alleged unchastity was not harmful error; that allowing the jury to use a recording machine to replay record of defendant's confession was not reversible error; and that rulings on instructions and argument of the prosecutor were not reversible error.

Judgment affirmed.

1. Rape ⚷40(1)

Proof of unchastity of prosecutrix is admissible where charge of rape is by force and violence.

2. Criminal Law ⚷1186(4)

In rape prosecution, restraint imposed on defendant's cross-examination as to alleged prior unchastity of victim was not prejudicial, where defendant made a full and complete confession specifically admitting rape by force, court properly instructed the jury and there was no contention that the evidence was insufficient to sustain conviction. West's Ann.Const. art. 6, § 4½.

3. Criminal Law ⚷1186(4)

In rape prosecution, evidence of private conferences held by the trial court with the prosecuting attorney and the prosecutrix did not require a reversal where there was no evidence to indicate what was discussed nor that anything improper took place in such conferences, and they were held outside the presence of the jury. West's Ann.Const. art. 6, § 4½.

4. Criminal Law ⚷858(3)

In rape prosecution, where tape recording of defendant's confession was admitted in evidence, the jury were entitled to take it into the jury room with them.

5. Criminal Law ⚷1163(1)

The burden of establishing prejudice from trial incidents is upon the defendant. West's Ann.Const. art. 6, § 4½.

6. Criminal Law ⚷1186(4)

In rape prosecution, where tape recording of defendant's confession was admitted into evidence, permitting the jury to use a recording machine in jury room to replay the tape recording was not reversible error. West's Ann.Const. art. 6, § 4½.

7. Criminal Law ⚷858(1)

The statute respecting what may be taken into the jury room is not mandatory and what may be so taken is left to the sound discretion of the trial court. West's Ann.Pen.Code, § 1137.

8. Rape ⚷59(17)

In rape prosecution, instructions were proper as a correct statement of the law applicable with respect to resistance by the female.

9. Criminal Law ⚷824(4)

Where defendant offered no instructions in connection with instructions on resistance by female in rape prosecution, he was not entitled to complain of instructions given by the court on appeal.

10. Criminal Law ⚷829(1)

Refusal of defendant's instruction covered by the instructions given was proper.

11. Criminal Law ⚷1166½(12)

Alleged misconduct of a trial judge warranting a reversal should be so definite and apparent as to leave little doubt that it resulted in depriving accused of a fair and impartial trial.

12. Criminal Law ⚷655(1)

Mere statement of defense counsel that in his opinion, trial judge expressed his disbelief as to testimony of the defendant and his witnesses by his facial expression is not a sufficient showing of judicial misconduct.

13. Criminal Law ⚷730(7)

In rape prosecution, remarks of prosecutor referring to a case in another district if error, was obviated by timely admonition of the trial court and apology of the prosecutor, especially where the case was not close, so that the assailed argument did not contribute materially to the verdict. West's Ann.Pen.Code, § 261, subd. 4.

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Monroe & Chula, Santa Ana, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., Robert P. Kneeland, Dist. Atty., (Orange County) and Kenneth Williams, Deputy Dist. Atty., Santa Ana, for respondent.

MUSSELL, Justice.

Defendant was accused in an Information of two counts of rape, Pen.Code, Sec. 261, subd. 4; two counts of kidnapping, Pen. Code, Sec. 207; and one count of burglary, Pen.Code, Sec. 459. A jury trial resulted in a verdict finding the defendant guilty on all counts. His motion for a new trial and application for probation were denied and he was sentenced to State's prison. The sufficiency of the evidence to sustain the verdict is not questioned and defendant relies on claimed errors in the conduct of the trial as grounds for reversal of the judgment.

On March 26, 1955, the prosecuting witness, Donna Schurr, who was then about 18 years old, was working part-time at the snack bar of a drive-in theatre near Garden Grove in Orange county. At about 11:30 p. m., when she had finished work, and after having some difficulty in starting her car, she started to drive to her home in Garden Grove. When she was several blocks from her home, the defendant, who was hidden behind the front seat in the car, placed a knife at her throat and forced her to drive to a lonely road several miles from Garden Grove. During this drive, the defendant kept the knife at Donna's throat and told her where to drive the car. She tried unsuccessfully to attract the attention of a passing motorist. Defendant told her he had been watching her for a long time and had seen her in a beauty contest in Balboa. However, Donna did not know the defendant and had never been on a date with him. After he had forced her to drive to the lonely road, he forced her to kiss him while he fondled her body. He then ordered her to get in the back seat of the car and there accomplished an act of sexual intercourse with her. He drove back to the theatre, where he got out of the car, warned her not to try to follow him, and ran off into the darkness. She tried unsuccessfully to start her car to follow him and then jumped out and ran after him. She stopped a passing car and asked the woman driving it to help her catch the defendant. Donna told the woman (Mrs. Parker) that she had just been raped by the man in the car ahead. They tried to follow the defendant but were unable to overtake him. Mrs. Parker took Donna to the Orange county sheriff's office, where she reported the rape. At that time both Mrs. Parker and one of the officers noticed four or five marks on Donna's throat where the skin was broken and on one mark there was blood showing. One of the officers then drove Donna back to the theatre where her car was parked and found it was necessary to push it to get it started.

On or about October 17, 1955, at about 11:00 p. m., one of Donna's neighbors received a telephone call from her informing him that someone was prowling around her home and underneath her windows. The neighbor and his son, upon investigating, found that the prowler was the defendant. When he was discovered, defendant ran and they were unable to catch him.

On January 10, 1956, at about 9:30 p. m., Donna returned to her home after visiting friends. Her mother had gone out for the evening and when Donna got ready for bed, the 'phone rang and a man, calling himself Mr. Brewster, asked for her mother. Donna told him her mother was not at home. Donna then retired and a few minutes thereafter she heard a noise at the rear of the house. She got up to investigate and saw that the lock on the back door had been broken. Immediately thereafter the defendant swung the door open and ran at her with a knife in his hand. She ran for the bathroom window to escape and the defendant intercepted her. She reached for and grabbed the knife and cut her hand. She screamed and the defendant put his hand over her mouth and said "Shut up or I will kill you." Defendant then pushed her into the bedroom and told her to get her coat. He then held the knife at her throat and pushed her out of the kitchen and out of the house. As she was leaving, Donna tore the curtain on the front door and knocked a small doily off a piece of furniture in an attempt to let her mother know when she returned that she had been forcibly taken from the house.

Defendant forced Donna to get into his automobile and they drove for about 10 or 15 minutes. Donna was dressed in a flannel nightgown and a light duster. She recognized the defendant as the man who had previously attacked her and noticed that the car he was driving was a Plymouth sedan. She pleaded with him to let her go and not attack her. He warned her not to tell the police "this time" and stopped the car in what appeared to be a tract of new houses. When Donna tried to resist defendant's advances, he hit her in the stomach, and when she tried to open the door of the car to escape, he told her if she tried it again he would kill her. He then forced her to get in the back seat of the car and had sexual intercourse with her. After the attack, defendant drove his car within a short distance of Donna's home and pushed her out. She then saw her fiance, Lloyd Brett, leaving the house and screamed at him, telling him what had happened. Brett got in his car and started in pursuit of the defendant, who was then speeding away. Donna then went into the house and reported the matter to the sheriff. The two speeding cars attracted the attention of a state highway patrol officer and he followed and overtook defendant's car, forcing it to the side of the road. Brett then arrived and ran back to the defendant's car, brandishing a revolver. The officer told Brett to drop the gun, and while the officer was waiting for assistance, Brett continuously accused the defendant of raping his girl friend. Defendant denied any knowledge of what Brett was talking about. In a few minutes other officers arrived at the scene. One of them asked the defendant if Brett's accusations were true and the defendant denied them, saying that he had spent the evening with some friends at a movie and then a bar and that he was then on his way home. He denied knowing Donna and when the officers said that they would go back to the bar where he said he had just dropped off his friends and check his story, defendant said, "O.K. I did it." The officer said, "Did what?" Defendant then told them that he had just broken into Donna's house with a knife and had raped her by means of force. One of the officers then said, "Well, the last time you raped her you used rubber gloves. Where are they?" The defendant then admitted that he had forcibly raped Donna on the earlier occasion and stated that the rubber gloves were "home some place". The officers found a crude mask in the defendant's pocket and a billy club, binoculars and several other items in his car. The defendant told the officers that he used the binoculars to watch Donna's house and that the knife he had used was under the front seat of his car. The officers were unable to find the knife and defendant then stated that it might have fallen out of the car earlier. Officer Rios asked the defendant a few more questions and then returned with him to Donna's house. She there identified the defendant and he was taken to the sheriff's office where he immediately made a voluntary, full and complete confession and specifically admitted raping Donna by means of force and violence on the two occasions charged. The confession was recorded on a tape recorder by the officers, with the knowledge and consent of the defendant, and it was played to the jury during the trial.

At the trial defendant testified that he first met Donna in 1954 at an upholstery shop where he was employed and where she came to pose for photographs; that he next saw her at the drive-in theatre about March 18, 1955, and at that time they drove to a restaurant in Santa Ana; that on March 26 he met her at the theatre snack bar and she told him to wait for her in her car and to hide so that he could not be seen; that he climbed into the back seat of the car; that after they left the theatre he got in the front seat and they drove to an isolated dirt road and parked; that they engaged in an act of sexual intercourse, with Donna's consent, in the back seat of the car, and then drove back to the theatre to get his car; that he had another date with Donna in May and that in September, 1955, they drove to the beach near Corona Del Mar, where another act of sexual intercourse took place; that the next time he saw Donna was on January 10, 1956, when he called her about 10:00 p. m. and asked if he could come over to see her; that he did not arrive at her home until about 11:00 p. m.; that he knocked at the front door and when she did not answer, he went around to the back door and knocked; that he "jangled" the door and it popped open and he saw Donna there; that she suggested they sit in his car and talk for a few minutes; that they then drove to a spot a mile or so away and there had an act of sexual intercourse in the car, to which she consented, and that they then drove to her home; that as they approached her house she said, "There's Lloyd", jumped out of the car and told him (defendant) to "get out of there"; that he drove rapidly away and soon noticed that he was being followed by another car; that he tried to get away, but after several miles he saw a police car which was also following him and he slowed down and stopped.

Defendant's description of the events at the time of his arrest concerning Brett's threatening him with a gun, the arrival of the officers, and admission of his false story to the officers, was substantially the same as related by the officers and Brett. Defendant said that he admitted raping the girl because he felt that his marriage was "ruined now anyway" and he thought he would at least protect Donna's reputation by saying that he had raped her.

Defendant first contends that the trial court committed reversible error by refusing to admit evidence relating to prior specific acts of sexual immorality on the part of the complaining witness. It appears from the record in this connection that during the cross-examination of Donna relative to the events occurring on the night of March 26, 1955, the following question was asked, "Had you had intercourse before that occasion?" The prosecution interposed an objection before this question was answered and the court and counsel then retired to the chambers where the matter was discussed at length. The court overruled the objection and in the presence of the jury, the question was repeated. Donna then answered "Yes." Defense counsel then asked, "How many times", and an objection made by the prosecution to this question was sustained by the court. The complaining witness was then asked how old she was, when she had intercourse for the first time, if she had intercourse more than one time and if so, with how many men. Following objections to these questions, the court again retired to the chambers with counsel and further discussion took place. Defendant's counsel contended that the questions were material for possible impeachment and that they were relevant to the question of consent. The court stated that he was concerned with the question as to how far the inquiry about previous chastity was going to go and stated he would like to have an offer of proof from the defendant as to what he proposed in that regard. Defense counsel then stated that they offered to prove by at least three witnesses who indicated that they would testify that they had had sexual relations with the prosecutrix, but that they were afraid that they might be implicated in statutory rape and would not state whether they would claim the privilege against self-incrimination. The court then stated that he was not going to subject the prosecuting witness to the ordeal of going into all of her past life in matters of that sort; that he had reviewed the confession of the defendant and stated that he was going to limit all further proof to that which was in the record and that the prosecutrix had already admitted on the stand that she had had prior sexual relations so that her prior unchastity had been established before the jury. Defense counsel then listed certain questions which he desired to ask the complaining witness. These questions were similar to those to which objection had been sustained and the court then sustained objections to them.

[1, 2] Defendant cites and relies upon People v. Benson, 6 Cal. 221; People v. Pantages, 212 Cal. 237, 297 P. 890; and People v. Merrill, 104 Cal.App.2d 257, 231 P.2d 573, in support of his first contention. It is well settled that proof of unchastity is admissible where the charge of rape is by force and violence. Evidence of the general reputation of the prosecutrix for unchastity together with specific acts and proof thereof were competent with respect

to the two charges of rape since the defendant admitted having had sexual intercourse with the prosecutrix but asserted that she voluntarily submitted to that relationship. People v. Battilana, 52 Cal. App.2d 685, 696, 126 P.2d 923. This rule is based upon the theory that a woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating the charge that force and violence were used against her in order to accomplish the rape. The question here is whether the restraints imposed by the trial court on defendant's cross-examination were reasonable under the facts of this case. It appears that the defendant made a full and complete confession to the crimes, specifically admitted that he had raped the prosecutrix by means of force and violence, and that the prosecutrix had admitted that she had had intercourse before March 26, 1955, and it further appears that the testimony of the prosecutrix was corroborated in many respects, i. e., as to the use of a knife by defendant, the marks on the throat of the prosecutrix, defendant's flight, his use of binoculars and a mask, the manner in which the prosecutrix was dressed when she returned home on January 10, 1956, and defendant's full confession. It further appears that the court instructed the jury that they could consider the prior unchaste condition of the prosecutrix as bearing on the question of whether she consented to these acts of intercourse, since they could infer that it was more likely that an unchaste woman would consent to such acts. No contention is made herein that the evidence is insufficient to justify the verdict and the circumstances related lead us to the conclusion that although it was error to deny further examination of the prosecutrix, it was not such an error as to justify a reversal of the judgment. It does not appear reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error and no miscarriage of justice resulted. Const. Art. VI, Sec. 4½; People v. Watson, 46 Cal.2d 818, 835, 299 P.2d 243.

[3] Defendant's next contention is that during the trial the court erred in holding private conferences with the prosecuting attorney and the prosecutrix. In this connection the record shows that in chambers, outside the presence of the jury, counsel for defendant made the following statement:

> "Mr. Meyer: We want the record to show, before we answer the Court's question, that prior to our being called in here, Mr. Williams was in the Court's chambers when the Court was present, behind closed doors, for approximately five minutes.
>
> "We want the record to further show that upon Mr. Williams' leaving the Court's chambers, Donna Schurr, the complaining witness, was in the Court's chambers, the Court being present, behind closed doors, for approximately five minutes."

The court readily admitted he had conferred with the district attorney and the prosecutrix for five minutes during the noon recess. However, there is no evidence whatever to indicate what was discussed between the judge and either the prosecutrix or the deputy district attorney nor is there evidence that anything improper took place in these conferences. They were held outside of the presence of the jury and it does not appear that any prejudicial harm to the defendant resulted therefrom.

[4–7] It is next argued that the trial court improperly allowed the jury to use a recording machine to replay the record of defendant's confession. It appears that after the jurors had been deliberating for approximately six hours they desired to hear the tape recording of defendant's confession, either in the jury room or in the court room, and so informed the court. Thereupon, the bailiff in charge of the jury was instructed by the court to fix an electrical line, to enable the playing of the recording in the jury room and to instruct the jury "as to how to operate the machine from the standpoint of playing the tape in the machine, and how to make it run forwards or backwards and then leave them alone." It does not appear that the instructions given by the bailiff were given while the jury was deliberating or that anything was said by him concerning the evidence in the case. The tape recording was admitted into evidence and the jury was therefore entitled to take it into the jury room with them. People v. Horowitz, 70 Cal.App.2d 675, 703–704, 161 P.2d 833. While the recording machine was not admitted into evidence, we find no prejudicial error in its use by the jury to replay the recording. The burden of establishing prejudice was upon the defendant. Const. Art. VI, Sec. 4½; People v. Horowitz, supra, 70 Cal.App.2d 704, 161 P.2d 849. In the absence of such a showing, we hold that the procedure followed did not constitute reversible error. Section 1137 of the Penal Code, cited by appellant, is not mandatory, and what may be taken by the jury into the jury room is left to the sound discretion of the trial court. People v. Cochran, 61 Cal. 548, 551; People v. Dunlop, 27 Cal.App. 460, 469–470, 150 P. 389.

[8, 9] It is further contended that the following instructions were misleading and inadequate to express to the jury the applicable law on the subject. The criticized instructions are as follows:

> "You are instructed that when attacked by a rapist it is primarily for the woman to decide to what extent she can with safety resist."
>
> "When a woman yields in sexual intercourse to a male aggressor, if her yielding has been induced by fear that it is necessary to save her from violence or death or that it offers hope of so doing, her conduct in such circumstances does not constitute consent."

These instructions, coupled with the following instruction to the jury: "Rape is an act of sexual intercourse accomplished with a female person, not the wife of the perpetrator, where she resists but her resistance is overcome by force or violence or where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of her assailant to carry out and execute such threats." were a correct statement of the law applicable. People v. Guldbrandsen, 35 Cal.2d 514, 520, 218 P.2d 977; People v. Merrill, 104 Cal.App.2d 257, 262, 231 P.2d 573. Moreover, as is said in People v. Reed, 38 Cal.2d 423, 430, 240 P.2d 590, 594:

> " 'Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction.' People v. Carothers, 77 Cal.App.2d 252, 255, 175 P.2d 30, 32."

In the instant case, the defendant offered no such instructions in this connection and he is not now in a position to complain.

[10] Defendant complains that the court erroneously refused to give the following instruction:

> "You are further instructed that laws are made and juries called to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of the evidence, you are not satisfied to a moral certainty and beyond a reasonable doubt that the defendant Jack James Walker is guilty, you must acquit him. By so doing, the object of the law will be as fully attained as if you were to find a verdict of guilty."

However, from an examination of all the instructions given, it appears that the subject was amply covered by other instructions and that therefore, it was not necessary to give this offered instruction. People v. Nelson, 131 Cal.App.2d 571, 575, 281 P.2d 8.

[11, 12] Defendant also complains that the trial court committed prejudicial error by visibly demonstrating to the jury his disbelief of some of the testimony of the defense witnesses, especially that of the defendant himself. While it has been held that jurors are quick to observe the attitude of the court toward litigants and their counsel, whether favorable or unfavorable, and to be influenced thereby. Hays v. Viscome, 122 Cal.App.2d 135, 143, 264 P.2d 173, 39 A.L.R.2d 1435, the record does not disclose that the court conveyed to the jury his personal opinion as to the credibility of any witness. On the contrary, it appears that the actions of the trial court were fair and impartial. The jury was instructed several times in different ways that it was the fact finding body and that it was the exclusive function of the jury to judge the credibility of the various witnesses. As is said in People v. Collins, 4 Cal.App.2d 86, 88, 40 P.2d 542, 543: " 'The misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial.' " The mere statement of the defense counsel that in his opinion the trial judge expressed his disbelief as to the testimony by his facial expressions is not a sufficient showing of judicial misconduct.

[13] Finally, defendant argues that the deputy district attorney committed prejudicial error in his argument to the jury in referring to a rape case in Costa Mesa. His remarks in this connection are as follows:

> "I don't know whether the sheriff's office here, like some places in Los Angeles, subscribe to the theory that there is no rape after twelve o'clock, or not, or whether they are getting so tired of rape that they don't want to have anything to do with it, or whether they feel that most girls will back out on a rape case, anyway, because they wont subject themselves to the shame and the loss of self-respect that arises out of a trial like this. Very few women would. You are just fighting a losing battle if you report it. You get taked over the coals worse than the guy that did it. If you don't give in, you wind up like this case in Costa Mesa. How are you going to win, any way you take it?"

The remark referring to the case in Costa Mesa was assigned by defense counsel as prejudicial error. Whereupon the court instructed the jury as follows:

> "Well, you are not concerned * * first of all, ladies and gentlemen, you are to listen to the arguments of counsel, but you are not to consider them as evidence, and any statements made by counsel are to be disregarded by you in your analysis of the case, and certainly you are not to—there is no evidence in this case about anything in Costa Mesa, so you will completely disregard it."

Counsel for the prosecution then stated that he thought the point was well taken and apologized to the jury. We conclude that any harmful effect of the statement was obviated by the timely admonition of the court and the apology of the deputy district attorney. This is not a case where the evidence is closely balanced, presenting grave doubt as to the defendant's guilt, so that the assailed argument of the deputy district attorney may have contributed materially to the verdict. People v. Byrd, 42 Cal.2d 200, 208, 266 P.2d 505. No reversible error appears in the record.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

150 Cal.App.2d 584

Winnie Wafford QUINN; James Wafford Quinn; Sylvia Janice Quinn, Naomi J. Quinn and John Stanley Quinn, minors, by Winnie Wafford Quinn, their Guardian ad litem, Plaintiffs and Appellants,

v.

OIL FIELDS TRUCKING COMPANY, a corporation; and Edelmiro Martinez Gomez, Defendants and Respondents.

Civ. 22104.

District Court of Appeal, Second District, Division 1, California.

April 30, 1957.

Hearing Denied June 26, 1957.

Action against truck owner and operator for wrongful death of automobile operator, injuries sustained by minor passenger of automobile, and property damage to automobile in intersectional collision between truck, which approached intersection on through street, and automobile, which approached on stop street. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment on verdict for defendants and denied plaintiffs' motion for new trial, and plaintiffs appealed. The District Court of Appeal, Doran, J., held that evidence sustained verdict.

Judgment affirmed, and attempted appeal from order denying new trial dismissed.

1. Appeal and Error ⟹930(1), 931(1)

In ascertaining sufficiency of the evidence, reviewing court must look to the evidence which is favorable to the finding or verdict and to inferences reasonably deducible therefrom.

2. Automobiles ⟹244(11)

In action against truck owner and operator for wrongful death of automobile operator, injuries sustained by minor passenger, and property damage to automobile in intersectional collision between truck, which approached intersection on through street, and automobile, which approached intersection on stop street, evidence sustained verdict for defendants.

Arnerich, Del Valle & Sinatra, Vincent Arnerich, August J. O'Connor, George J. Hider, Los Angeles, for appellants.

John R. Allport, Los Angeles, for respondents.

DORAN, Justice.

The complaint herein seeks damages for the wrongful death of Gladys Irene Quinn, for personal injuries to decedent's minor child, and for property damage to the surviving husband's automobile. A trial before a jury resulted in a verdict in favor of the defendant trucking company and its truck driver, Edelmiro Gomez. Thereafter, a motion for new trial was granted; the defendants appealed, and the reviewing court affirmed the order granting a new trial, 130 Cal.App.2d 720, 279 P.2d 775. On May 9, 1956, a trial before a different judge and jury resulted in a verdict and judgment for the defendants; a motion for new trial was denied and plaintiffs appealed.

Appellants' sole ground for appeal is that "There is no evidence to support the verdict and judgment entered pursuant thereto; the evidence shows defendant negligent as a matter of law." There is no contention that any prejudicial error was committed. The appellants aver that "it is impossible to conceive how the jury could have rendered any verdict other than one for plaintiff; certainly there is no basis for any theory of unavoidable accident, much less a finding that the defendant was not negligent".

From the truck driver's testimony it appears that defendant's truck was proceeding north on Hawthorne Boulevard at about 25–30 miles per hour towards the intersection of Sepulveda Boulevard, at about 12:30 p. m. The truck and trailer were about 55 feet long and weighed 40,000 pounds; it was a clear, dry day, visibility was good, and the truck driver was familiar with the intersection in question. There was evidence that the intersection was in so-called open country with view unobstructed except for a signboard located just south of Sepulveda and about 100 feet west of the main traveled portion of Hawthorne.

A boulevard stop sign was posted about the same distance back, which sign controlled traffic moving east on Sepulveda. The signboard interfered with vision from the boulevard stop sign and west thereof. Plaintiff's Chevrolet was proceeding east on Sepulveda.

The evidence was to the effect that when about 200 feet south of the intersection, the truck driver looked to the left for traffic on Sepulveda and saw none. When about 150 feet south of the intersection the driver looked to the right for traffic going west on Sepulveda and noticed none at that time; there was no traffic going either north or south on Hawthorne Boulevard. The truck driver then looked forward again and observed the plaintiff's Chevrolet about 5 feet in front of the truck; the brakes were applied, a collision occurred and the driver's foot was knocked off the brake pedal. The Chevrolet was carried a distance of about 63 feet straight ahead before coming to a stop.

Appellants point to evidence that Gomez, the truck driver left San Pedro at about 12:10 p.m. and arrived at the point of collision at about 12:30 p.m., a distance of about 12 miles, stopping to eat on the way, indicating "that Gomez was traveling at a terrific speed inconsistent with prudent driving"; also, that after looking to the right about 150 feet south of the intersection, Gomez "didn't look again until he was in the intersection where the Chevrolet appeared suddenly in front of him about 3 feet east of the easterly curb line of Hawthorne Boulevard, which meant that the Chevrolet had almost negotiated the entire length of the intersection before he struck it". Moreover, continued appellants' brief, "the force of the impact was so great that the truck superimposed itself on the right side of the Chevrolet and actually pushed it sidewise 63 feet into a sand pile far off the right side of the road, which finally stopped both—the front seat of the Chevrolet being catapulted out of its left side in the process and throwing the driver out on to the highway". All this, it is asserted, "in itself indicates negligence as a matter of law".

The point now argued by appellants is factual in nature and, as said in respondents' brief, "The same factual premise was thoroughly and ably presented by appellants to two different juries under appropriate instructions as to the law applicable, and both times the jury found in favor of the respondents. It is merely contended that this court should substitute its judgment on questions of fact for the judgment of the trial court and the jury * * *. Such is not the function of the reviewing court".

[1] As stated in Guerra v. Balestrieri, 127 Cal.App.2d 511, 274 P.2d 443, 445, a case involving facts somewhat similar to those here presented, "A reviewing court must look to the evidence which is favorable to the finding or verdict and to inferences reasonably deducible therefrom, when ascertaining the sufficiency of the evidence". While it is doubtless true that some of appellants' contentions may find support in the record, the fact remains that the jury heard all of the evidence offered on the respective theories of plaintiffs and defendants, and saw fit to credit the defendants' version.

[2] The jury evidently concluded, as stated in respondents' brief, that "evidence disclosed that he (the truck driver) was operating his trucking equipment at a lawful speed on a through highway with the legal right of way. Mr. Gomez made the usual and customary observation of the intersection as he approached and when suddenly confronted with a situation created by the careless and illegal acts of the driver of the Chevrolet he did all that was reasonably required of him to avoid the action, particularly in light of the rule that he had the right to assume that the Chevrolet would not be operated in violation of law". This the jury had a right to do, and since the record discloses substantial evidence in support of the verdict and judgment, there should be no appellate interference.

The judgment is affirmed, and the attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.

150 Cal.App.2d 428

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jack HOWARD, Defendant and Appellant.

Cr. 2692.

District Court of Appeal, Third District, California.

April 23, 1957.

Defendant was convicted of unlawful possession of narcotics. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment, and defendant appealed from the judgment of conviction and from alleged order denying motion for new trial. The District Court of Appeal, Van Dyke, P. J., held that alleged reference by District Attorney to defendant as an "assassin of youth" did not cause a miscarriage of justice within meaning of constitution, and that therefore defendant was not entitled to reversal in absence of objection or request for admonition at time of alleged reference.

Judgment affirmed, and purported appeal from alleged order denying motion for new trial dismissed.

1. Criminal Law 🔑1131(2)

Purported appeal from alleged order denying a motion for new trial was required to be dismissed, where no motion for new trial was made.

2. Criminal Law 🔑1144(13)

On appeal by defendant, conflict in the evidence was required to be resolved against defendant.

3. Criminal Law 🔑1036(1)

Objection to admission in evidence of marijuana found in defendant's apartment, in prosecution for unlawful possession of narcotics, could not be raised by defendant for the first time on appeal.

4. Criminal Law 🔑1166½(1)

Where there was nothing in record to indicate that making of motion by public defender for new trial for defendant would have been more than a matter of form, defendant was not prejudiced by public defender's failure to make motion for new trial.

5. Criminal Law 🔑641

Right of defendant to counsel did not include the right to be represented by any particular public defender.

6. Witnesses 🔑337(6)

In prosecution for unlawful possession of narcotics, wherein defendant testified that he did not know exactly what marijuana was and that he did not use it himself, it was proper to introduce into evidence the fact that 18 years before defendant had served one year in the county jail for illegal possession of marijuana.

7. Criminal Law 🔑1037(1, 2), 1186(4)

In prosecution for unlawful possession of narcotics, alleged reference by district attorney to defendant as an "assassin of youth" did not cause a miscarriage of justice, and, in absence of any objection by defendant or request for admonition, at time when reference was allegedly made, defendant was not entitled to reversal on appeal. West's Ann.Const. art. 6, § 4½.

◆

James A. Gualco, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputies Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

[1] This is an appeal from a judgment of conviction of unlawful possession of narcotics. Appellant also noticed an appeal from an order denying a motion for a new trial but this purported appeal must be dismissed as no motion for a new trial was made.

At appellant's request, this court appointed James A. Gualco, Esq., an experienced member of the bar, to represent appellant upon this appeal. Mr. Gualco has reported that a careful review and study of the record disclosed no meritorious ground of appeal. However, appellant, being dissatisfied with the advice of counsel, has filed a brief wherein he asserts that the evidence upon which he was convicted was illegally obtained, that the district attorney was guilty of prejudicial misconduct, and that he was deprived of the effective aid of counsel. We have made an independent study of the record to determine the validity of appellant's contentions.

[2, 3] In the early morning hours of February 2, 1956, two officers of the Stockton Police Department went to appellant's apartment where they had been informed an illegal sale of narcotics had been made on the preceding evening, presumably by one Salvador Meza. Appellant answered the door. When the officers inquired for Mr. Meza, appellant either denied knowing him or advised that he was not there. In any event, the officers departed but returned within a short time with a photograph of Mr. Meza which they showed to appellant, who acknowledged that he recognized it as a picture of his friend "Sal" or "Sol". The officers then entered and searched the apartment. There, they found marijuana. It is admitted that the officers had no search warrant, and there is a conflict in the evidence as to whether they "walked" in without objection on the part of appellant or whether he "invited" them to enter and search. On appeal this conflict must be resolved against appellant. In any event, no objection was made at the trial to the admission into evidence of the marijuana found in appellant's apartment. The objection thereto cannot be raised for the first time on appeal. People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17; People v. Kelsey, 140 Cal.App.2d 722, 723, 295 P.2d 462.

[4, 5] Appellant complains because at the time of sentencing the public defender himself appeared on his behalf, whereas at the trial appellant had been represented by a deputy public defender. Appellant contends that this accounts for the fact that a motion for a new trial was not made. We do not so view the matter. We must assume that the public defender familiarized himself with the case, and that if grounds for a new trial had existed, the deputy who conducted the trial would have so advised his superior. He had ample time to do so. The jury returned its verdict on March 21st, and judgment was pronounced on April 6th. There is nothing in the record to indicate that making a motion for a new trial would have been more than a matter of form. Appellant was not prejudiced by the public defender's failure to do so nor by his appearing, instead of his deputy, at the time of sentencing. Appellant's right to counsel did not include the right to be represented by any particular public defender. People v. Stroble, 36 Cal.2d 615, 629, 226 P.2d 330.

[6] Appellant assigns as error the introduction into evidence of the fact that 18 years before he had served one year in a county jail for illegal possession of marijuana. This fact was relevant to appellant's knowledge of marijuana. Clothing taken from appellant's apartment had been found to contain leaves and seeds of marijuana. He had on direct examination identified the clothing as his and said he had no knowledge the clothes contained marijuana, and that he often loaned his clothes to others. Upon cross-examination, he had given an equivocal answer to the question as to whether he knew what marijuana was. He replied, "Well, I have seen it, but I don't know exactly, I don't use it myself." It was proper for the prosecution to establish that he knew what marijuana was. His conviction of possession of that narcotic evidenced his knowledge thereof. People v. Torres, 98 Cal.App.2d 189, 192, 219 P.2d 480. The court ruled that the evidence was admissible for purposes of impeachment only and to show appellant's familiarity with marijuana. The ruling was correct and affords no basis for reversal of the judgment.

[7] Neither does the alleged misconduct of the district attorney constitute a ground for reversal. Appellant complains that in argument the district attorney prejudicially referred to him as an "assassin of youth". No objection was made at the time. No admonition was asked. There is also some doubt as to whether the reference

was to appellant or to marijuana, but in either case, in light of the evidence and for lack of objection, the use of the epithet cannot be said to have caused a miscarriage of justice. Calif.Const. Art. VI, sec. 4½.

Our review of the record leads to the conclusion that the appellant was accorded a fair and impartial trial, and that his contentions to the contrary are without merit.

The purported appeal from an order denying a motion for a new trial is dismissed. The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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150 Cal.App.2d 546

Esther I. McEACHEN, Plaintiff and Appellant,

v.

Robert RICHMOND and Elizabeth Richmond, Defendants and Respondents.

Civ. 8997.

District Court of Appeal, Third District, California.

April 29, 1957.

Rehearing Denied May 23, 1957.

Hearing Denied June 26, 1957.

Action for injuries to one driving an automobile making left turn at highway intersection when struck in rear by defendants' following automobile. From a judgment of the Superior Court Mendocino County, Hale McCowen, J., on a jury's verdict for defendants, plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that instructions that mere fact that accident happened does not support inference that some party or any party to action was negligent, that no case against defendant was established, if jury found it just as probable that defendants were not negligent or that their negligence was not a proximate cause of accident as that some negligence on their part was such a cause, and that presumption arising from party's violation of law is not conclusive, but can be overcome by evidence that such conduct was excusable, justifiable, and reasonably to be expected of person of ordinary prudence, and that, in such connection, jury may assume that such a person will reasonably endeavor to obey law, unless causes, not of his intended making, induce him, without moral fault, to do otherwise, were not erroneous.

Judgment affirmed.

1. Automobiles 🔑246(60)

In action for injuries to driver of automobile making left turn at highway intersection when struck in rear by defendants' following automobile, instruction that mere fact that accident happened does not support inference that some party or any party to action was negligent was not erroneous, as case was not a res ipsa loquitur case, though defendant automobile driver admitted her violation of statute by driving to left side of roadway within 100 feet from intersection. West's Ann. Vehicle Code, § 530.

2. Automobiles 🔑246(48, 57)

In action for injuries to driver of automobile making left turn at unilluminated highway intersection, not indicated by any sign, when struck in rear by defendants' following automobile during hours of darkness, instruction that no case against defendants was established, if jury found it just as probable that defendants were not negligent or that their negligence was not a proximate cause of accident as that some negligence on their part was such a cause, was not erroneous, though defendant automobile driver admitted her violation of statute by driving to left side of roadway within 100 feet from intersection of which she did not know, such negligence not being a proximate cause of plaintiff's injuries as matter of law. West's Ann. Vehicle Code, § 530.

3. Negligence 🔑6

Ignorance of facts rendering a statute applicable may justify or excuse violation thereof so far as civil liability is concerned.

4. Negligence ⊂⊃138(2)

In personal injury suit, instruction that presumption arising from party's violation of law is not conclusive, but may be overcome by evidence that conduct was excusable, justifiable, and reasonably to be expected of person of ordinary prudence under circumstances, and that in such connection, jury may assume that such a person will reasonably endeavor to obey law, unless causes, not of his intended making, induce him, without moral fault, to do otherwise, was not erroneous, though defendant admitted that she violated statute, as such assumption concerned only jury's determination of whether evidence showed excuse disposing of presumption of negligence.

◆

Burke & Rawles, by Wayne P. Burke, Ukiah, for appellant.

Mannon, Brazier & Bell, by Charles R. Bell, Ukiah, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff, in the trial court, has appealed from a judgment entered upon a defense verdict in a personal injury action. Respondents did not take a cross appeal from that portion of the judgment entered upon an adverse verdict on their cross-complaint.

The accident out of which this action arose occurred at night at an intersection of a two-laned state highway and a county road. Both appellant and respondents were proceeding north on the state highway. Respondents' vehicle was being driven by Elizabeth Richmond, who will hereinafter be referred to as the respondent. She was following a truck and trailer, which in turn was following appellant's automobile. As all three vehicles approached the intersection, respondent pulled out to pass, and while still alongside the truck and trailer and about 90 feet distant from the intersection, she saw the blinker lights on appellant's automobile signaling for a left turn. Prior to that time she had not seen appellant's vehicle, since it was traveling in front of the truck and trailer. Respondent applied her brakes, but was unable to avoid striking the rear of appellant's automobile as it was leaving the intersection. There was evidence that appellant, while approaching the intersection, had driven away from the center line and toward the edge of the highway, from which position she made her left turn, thus violating Section 540(b) of the Vehicle Code, which requires the driver of a vehicle intending to turn left at any intersection to approach the intersection in the extreme left hand lane lawfully available to traffic moving in the direction of travel of such vehicle and after entering the intersection to make the left turn so as to leave the intersection in a lane lawfully available to traffic moving in such direction upon the roadway being entered. There was also evidence that appellant did not violate said section. However, there was no conflict as to the violation by respondent of Section 530 of the Vehicle Code, which provides: "No vehicle shall at any time be driven to the left side of the roadway * * * when approaching within 100 feet of or when traversing any intersection." By her own testimony, respondent was guilty of violating that section.

In support of her appeal, appellant contends that in the situation presented here, including the admitted violation by respondent of Section 530 of the Vehicle Code, it was error for the trial court to instruct the jury that: "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." The instruction was taken from California Jury Instructions, Civil, No. 131. It has often been given and approved, and in the form used here has not been condemned save in those cases wherein res ipsa loquitur is applicable. Appellant cites these cases and earnestly argues that they are applicable here where respondent's negligence is presumed from her conceded violation of the applicable rule of the road. Appellant cites and relies upon Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929; Radisich v. Franco-Italian Packing Co., 68 Cal.App.2d 825, 158 P.2d 435; and Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7. In Brown v. Pepperdine, etc., a res ipsa case, the court had instructed the jury that "The inference of the negligence which you may draw in this case from the fact of the happening of the accident itself shifts the burden to the defendants of explaining the manner in which the accident happened * * *." [23 Cal.2d 256, 143 P.2d 931.] The court also instructed the jury in the same language used in this case that the mere fact that an accident happened considered alone, would not support an inference that some party or any party to the action had been negligent. The court held that giving both instructions may have confused the jury since the instructions contained inconsistent ideas. In Radisich v. Franco-Italian Packing Company, again a res ipsa case, where the jury had been told that the happening of the accident as established by the evidence gave rise to an inference of negligence on the part of the defendant and were also told that the mere fact that an accident happened, considered alone, did not support such an inference with respect to either party, the same conflict was noted. But it was there held that no prejudice had resulted. In Jensen v. Minard, also a res ipsa case, but one in which the jury had not been given the res ipsa instruction, the Supreme Court said:

> "The trial court committed prejudicial error, however, in giving certain instructions requested by defendant. The jury were instructed that 'The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.' Since it was conceded that the fatal bullet was fired by defendant, this instruction in effect told the jury that the fact that Bonnie was killed by a bullet from defendant's gun afforded no evidence of negligence. Ordinarily, however, accidents of this sort do not occur if those using firearms use due care. Even though instructions on the doctrine of res ipsa loquitur were not requested, the jury should not have been foreclosed from considering the evidence provided by the happening of the accident itself in determining whether defendant was negligent." [44 Cal.2d 325, 282 P.2d 8.]

[1] Appellant's argument is that the conduct of respondent in driving on the wrong side of the road as she approached the intersection and as she traversed the intersection to the point where her car collided with that of appellant is as much a part of the happening of the accident as was the conduct of the defendant in Jensen v. Minard in firing his gun, and equally gave rise to an inference of negligence. But the instant case is not a res ipsa case, and it is unnecessary to discuss the res ipsa cases upon the point involved. They are not applicable here. They form an exception to the general rule that in a case such as this, it is proper to instruct the jury that the mere fact that an accident happened, considered alone, does not support an inference that some party or any party to the action was negligent. Appellant cites other cases in support of her contention that it was error to give the challenged instruction, such as Sullivan v. Market Street Railway Company, 136 Cal. 479, 69 P. 143. But in those cases the instruction given was not in the form used here.

[2, 3] Appellant next contends that in view of respondent's conceded statutory violation, the court erred in instructing the jury as follows: "if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or if she—if they were, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then

a case against the defendant has not been established." This instruction simply requires a finding of both negligence and proximate cause before a case can be made against the defendant. Appellant does not contend that in the abstract it is incorrect but argues that if the jury found the respondent to have been guilty of negligence, then as a matter of law such negligence was a proximate cause of appellant's injury. The accident occurred during the hours of darkness. The intersection was not illuminated, and there was no sign south of the intersection to indicate its presence. Respondent testified that she did not know she was approaching an intersection. Ignorance of facts which make a statute applicable may serve as justification or excuse for a violation thereof in so far as civil liability is concerned. Nevis v. Pacific Gas & Elec. Co., 43 Cal.2d 626, 633, 275 P.2d 761. The facts here are analogous to those presented in Graf v. Garcia, 117 Cal.App.2d 792, 798–799, 256 P.2d 995, 998, where it was held that the presumption of negligence arising from failure to stop at a stop sign could be found to be justified under the following circumstances: The stop sign was located at such an angle that the headlights of an approaching vehicle might not fall upon it. There was affirmative evidence that the night was very dark that a mist was falling and the intersection was unlighted. Said the court:

> "* * * Under the evidence a jury might reasonably conclude that decedent did not see the stop signs and that his failure to do so 'might reasonably have been expected from a person of ordinary prudence'. Under not dissimilar conditions of weather and darkness the Supreme Court recently held that the violation of the statutory duty to yield the right of way to a pedestrian in a crosswalk was excusable or justifiable. Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531. The court said, 35 Cal.2d at page 480, 218 P.2d at page 535: 'Certainly, the weather, the darkness and plaintiff's attire were all matters beyond the control of defendant. It was held in the Satterlee case [Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279] that "the issue as to whether the circumstances were such as to excuse violation" should be left to the trier of the fact.' Under similar conditions of weather and darkness whether the partially obliterated 'stop' marks on the pavement and the unusually situated stop sign were, and in the exercise of ordinary care should have been, observed by decedent equally presents a question for the trier of fact."

[4] Appellant contends that the court erred in giving B.A.J.I. instruction, number 149.1, to the effect that the presumption arising from a party's violation of law was not conclusive and could be overcome by other evidence showing that under all the circumstances the conduct in question was excusable, justifiable and such as might reasonably have been expected of a person of ordinary prudence. The court added: "In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise." Appellant argues that in view of respondent's statutory violation she was not entitled to the benefit of the assumption declared in the quoted sentence. We see no error here. The assumption had only to do with the jury's determination of whether or not the evidence showed such excuse as might dispose of the presumption of negligence, and in that connection was properly applicable. We find no error in the record.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

150 Cal.App.2d 296

L. W. HARRISON, Plaintiff and Appellant,

v.

BUTTE STEEL BUILDINGS, Inc., a corporation, Butte Steel Buildings, Inc., a copartnership, Butte Steel & Construction Co., Inc., a corporation, and New Amsterdam Casualty Company, a corporation, Defendants and Respondents.

Civ. 9011.

District Court of Appeal, Third District, California.

April 18, 1957.

Action to recover balance due on oral contract to furnish labor and material in construction of a grandstand, wherein defendants filed a cross-complaint. The Superior Court, Trinity County, C. A. Paulsen, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that since part of labor and material was furnished by plaintiff under contract during period of suspension of his contractor's license, West's Ann.Bus. & Prof.Code, § 7031 precluded maintenance of any action to collect compensation for performance of contract.

Judgment affirmed.

1. Licenses 🔑39.43

Subcontractor was precluded by statute from maintaining any action against contractor or surety on its labor and material bond to collect compensation for performance of oral contract to furnish labor and material in construction of a grandstand, regardless of any unjust enrichment of contractor, where part of such labor and material had been furnished by subcontractor during period of suspension of his contractor's license. West's Ann.Bus. & Prof. Code, § 7031.

2. Trial 🔑66

Where unenforceability of contract appeared from facts stipulated to in open court, refusal to reopen case to permit the taking of testimony was not error.

3. Contracts 🔑138(1)

Disclosure of illegality of contract is fatal to action thereon, regardless of whether such illegality appears from evidence of plaintiff or defendant.

◆

Leander W. Pitman, Redding, Cal., for appellant.

Dally & Saulque, Richard E. Saulque, Los Angeles, Cal., for respondents.

SCHOTTKY, Justice.

Plaintiff, L. W. Harrison, commenced an action to recover the balance due on oral contract between plaintiff and defendants Butte Steel Buildings, Inc., a corporation, Butte Steel Buildings, Inc., a copartnership, and Butte Steel & Construction Co., a corporation, for the furnishing of labor and material in the construction of a grandstand, for payment of which defendant New Amsterdam Casualty Company obligated itself by the execution of a labor and material bond.

On April 2, 1953, defendant Butte Steel Building, Inc., entered into a contract with the county of Trinity for the construction of a grandstand at the Trinity County Fairgrounds, Hayfork, California.

Defendants filed an answer denying the material allegation of the complaint, and also setting up the separate defense that the General Building Contractor License issued to plaintiff was suspended for a period commencing January 19, 1953, and ending May 19, 1953. Defendant Butte Steel Buildings, Inc., also set up a counterclaim alleging damages by reason of plaintiff's failure to perform the contract, and asking for attorney's fees for defending the action commenced by plaintiff.

At the opening of the trial the following occurred:

> "The Court: At the thresh*h*old of this proceeding, we have a preliminary problem which I have already discussed informally with counsel, concerning the factual and legal situation growing out of this contractor license problem. As I understand it, the con-

tract involved in this case was entered into about the 3rd of April 1953. It is alleged in the answer and cross-complaint that work started on April 15, 1953 and it is further alleged that the plaintiff's license as a contractor was suspended from January 1953 to the 19th day of May 1953. Is there a dispute as to those allegations?

"Mr. Pitman [attorney for plaintiff]: The only dispute would be the date of 18th, would be April 19th, your honor.

"The Court: Well, if that is true, then we have a period of about five weeks when the contract was being performed when the plaintiff had no license. Is that an admitted fact?

"Mr. Pitman: It is admitted, your honor, that from the time, April 3, 1953, until May 19th, 1953, the plaintiff's license was suspended.

"The Court: Then if I understand your statement, there was a period of about five weeks when the work was being carried on and labor and materials were being furnished when the plaintiff was operating under a contract and had no license.

"Mr. Pitman: It is true that his license was suspended. As having no license, that is correct, your honor.

"The Court: Well, if it was suspended, he had no license. There is no question about those facts?

"Mr. Pitman: No question whatsoever."

It was stipulated that plaintiff finished the concrete work on the grandstand on May 18, 1953, and received $3,300 in payment from respondent. From May 19, 1953, to August 26, 1953, while plaintiff possessed a valid contractor's license, he furnished labor and materials for the construction of said grandstand for respondents and completed same on August 26, 1953.

Upon this statement of fact, the trial court called for argument upon the proposition of whether or not the appellant had any standing in court under such circumstances, and refused to take testimony. Before the trial court reached a decision, the appellant moved for an order to reopen the cause to permit the taking of testimony, but this motion was denied. Thereafter, the court rendered judgment for the respondents upon the ground that appellant had no power to enter into a contract, that appellant had not proved that he was a duly licensed contractor at all times during the performance of the contract, and that the contract sued upon was an illegal contract under section 7031 of the Business and Professions Code which provides:

> "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

The judgment also awarded defendants $500 attorney's fees upon their cross-complaint, said cross-complaint having been dismissed by defendants as to damages.

Appellant has appealed from the judgment and the principal question involved in the appeal is whether or not appellant is precluded by the provisions of section 7031 of the Business and Professions Code from maintaining the instant action against respondents.

Appellant makes a vigorous and able attack on the judgment, and contends that the contract involved in the instant case is valid and enforceable. He argues that appellant was not in pari delicto with respondents, that appellant has substantially complied with the state licensing requirements and that he was licensed as a contractor at the time the contract was performed and the cause of action arose; and that public policy will not be served by allowing respondents to retain for themselves the benefits of the services supplied them by appellant.

Respondents in reply contend that the clear and unambiguous language of said section 7031 applies to the facts of the instant case and that said section clearly bars any recovery by appellant.

Appellant has cited a number of cases which he argues support his contention, and respondents have also cited a number of cases in support of their position. It must be admitted that it is difficult to reconcile all of the authorities cited and that there seems to be some confusion in the authorities, but it would serve no useful purpose to review these authorities because since the trial of the instant case, and, indeed, since the oral argument in this court, our Supreme Court has rendered a decision in the case of Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 308 P.2d 713, 715, which we believe determines the issues involved upon this appeal. The facts as stated in the opinion were as follows:

> "Plaintiffs George W. Lewis and Paul C. Queen are engaged in the contracting business as the partnership of Lewis and Queen, hereinafter referred to as plaintiff. Defendant Ball Sons, hereinafter referred to as defendant, is also in the contracting business.
>
> "In June, 1949, defendant was awarded two contracts by the state, each contract for the construction of a separate section of the Hollywood Parkway. Defendant then entered into four contracts with plaintiff. With respect to the work to be done on each section of the parkway, there were two contracts between plaintiff and defendant. The first was entitled a 'subcontract,' and under it plaintiff agreed to remove concrete encountered during excavation of the roadway and apply water needed in the process of compacting the ground. The second was entitled an 'equipment rental agreement,' and under it plaintiff agreed to provide defendant with construction equipment for road excavation, 'overhaul,' and compacting.
>
> "Plaintiff brought this action for damages for breach of the equipment rental agreements and for the reasonable rental value of equipment alleged to have been held beyond the agreed rental term. * * * Defendant answered denying that it had breached the rental agreements, and filed a cross-complaint in which it alleged a breach of the agreements by plaintiff and sought to recover overpayments made to plaintiff.
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> * * * * * *
>
> "The trial court concluded that plaintiff had agreed to act and had in fact acted as a contractor within the meaning of section 7026 of the Business and Professions Code, and that because it had done so without the license required by section 7028, it was barred by section 7030 from maintaining any action for compensation. Lewis had an individual license, but neither Queen nor the partnership of Lewis and Queen had licenses. The court held, in the alternative, that the rental agreements were unenforceable because they violated the provisions in the state contracts against subcontracting more than a certain amount of the total work. Since we have concluded that plaintiff's failure to obtain a license prevented it from maintaining any action for compensation, we have no cause to consider this alternative ground. The court entered judgment for defendant on the complaint and for plaintiff on the cross-complaint. Plaintiff appeals from the judgment against it."

In affirming the judgment the Supreme Court, in the course of an exhaustive opinion in which earlier cases were reviewed, distinguished and in some instances disapproved, said in 48 Cal.2d 150, 308 P.2d 719:

> "Since plaintiff did not comply with the statute, it cannot 'bring or main-

tain any action in any court of this State for the collection of compensation * * *.' § 7031; Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23. Plaintiff contends, nevertheless, that because defendant has been paid in full by the state for all work done on the parkway, justice requires that it be compelled to turn over to plaintiff the proceeds from the state contracts attributable to plaintiff's labor.

"One answer to this contention is that, even in the absence of a provision such as section 7031, the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place. See Takeuchi v. Schmuck, 206 Cal. 782, 786–787, 276 P. 345; May v. Herron, 127 Cal.App. 2d 707, 712, 274 P.2d 484; Orlinoff v. Campbell, 91 Cal.App.2d 382, 388, 205 P.2d 67; Wise v. Radis, 74 Cal.App. 765, 778, 242 P. 90; Grodecki, in Pari Delicto Potior Est Conditio Defendentis, 71 L.Q.Rev. 254, 266–268.

"In some cases, on the other hand, the statute making the conduct illegal, in providing for a fine or administrative discipline excludes by implication the additional penalty involved in holding the illegal contract unenforceable; or effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit; or the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality. In each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved. See Wilson v. Stearns, 123 Cal.App.2d 472, 481–482, 267 P.2d 59; John E. Rosasco Creameries, Inc. v. Cohen, 276 N.Y. 274, 278–280, 11 N.E. 2d 908, 118 A.L.R. 641; 6 Corbin, Contracts 964–967, (1951); 2 Pomeroy, Equity Jurisprudence 137 (5th ed. 1941); Grodecki, in Pari Delicto Potior Est Conditio Defendentis, 71 L.Q.Rev. 254, 268. But we are not free to weigh these considerations in the present case. Sec. 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state. Kirman v. Borzage, 65 Cal. App.2d 156, 158, 150 P.2d 3."

The court said further, 48 Cal.2d at page 153, 308 P.2d at page 720:

"It is true that when the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he has shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff to maintain his action against a defendant within the class primarily to be deterred. In this situation it is said that the plaintiff is not in pari delicto. Carter v. Seaboard Finance Co., 33 Cal.2d 564, 574, 203 P.2d 758; McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Pollak v. Staunton, 210 Cal. 656, 662–663, 293 P. 26; Elmers v. Shapiro, 91 Cal.App.2d 741, 754, 205 P.2d 1052; see Grodecki, In

Pari Delicto Potior Est Conditio Defendentis, 71 L.Q.Rev. 254, 265; Wade, Restitution of Benefits Acquired Through Illegal Transactions, 95 U. Pa.L.Rev. 261, 268–270.

"But subcontractors are not always in the class to be protected simply because they are subcontractors, and we did not suggest otherwise in Fraenkel v. Bank of America, 40 Cal.2d 845, 848, 256 P.2d 569. See Albaugh v. Moss Constr. Co., 125 Cal.App.2d 126, 132, 269 P.2d 936; Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114. The class protected by the statute includes those who deal with a person required by the statute to have a license. When the person required to have a license is a general contractor, then the protected class includes subcontractors, materialmen, employees, and owners dealing with the general contractor. However, when the person who was required to have a license but did not have one is himself a subcontractor, such as plaintiff in the present case, he of course is not to be protected from his own unlicensed activities. To allow him to recover would in fact destroy the protection of those who dealt with him, and they are in the class the Legislature intended to protect whether they are owners or general contractors. Cf. Hedlund v. Sutter Medical Service Co., 51 Cal.App.2d 327, 333, 124 P.2d 878; 2 Pomeroy, Equity Jurisprudence 142, (5th ed. 1941). To the extent that it is contrary, the reasoning of Matchett v. Gould, 131 Cal. App.2d 821, 281 P.2d 524, is erroneous and is disapproved. Under the facts of the present case plaintiff is not in the class to be protected, and therefore, is not relieved from the imputation of being in pari delicto. Its failure to obtain a license, and not any fault of defendant in this regard, made the transaction illegal."

[1] As hereinbefore set forth the appellant entered into the contract with respondent for the furnishing of certain labor and materials for the building of the grandstand on April 3, 1953, and began work on April 15, 1953. It was stipulated that appellant's license to act as a general building contractor was suspended from January 19, 1953, to May 19, 1953. Therefore, appellant did not and could not prove that he "was a duly licensed contractor at all times during the performance of such act or contract" as required by section 7031 of the Business and Professions Code hereinbefore quoted, and as a consequence appellant was precluded by the express terms of the section from maintaining any action for the collection of compensation for the performance of the contract.

The arguments advanced by appellant that respondents will be unjustly enriched and that public policy will not be served by allowing respondents to retain for themselves the benefits of the services supplied them by appellant, are all answered by the decision in Lewis & Queen v. N. M. Ball Sons, supra, which stated that: "Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state." The plaintiff in that case was a subcontractor and the defendant was the contractor just as in the instant case appellant was the subcontractor and the respondent was the contractor. We are convinced that under the decision in the above-cited case the trial court correctly determined that appellant was not entitled to recover.

[2, 3] The court did not err in refusing to reopen the case, as from the facts stipulated to in open court the unenforceability of the contract was apparent and no amount of further evidence could change the result. As the court said in Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P.2d 23, 25: " 'whenever the illegality ap-

pears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' [Citations.]"

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 587

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Lee BRIGHT, Defendant and Appellant.

Cr. 5843.

District Court of Appeal, Second District, Division 1, California.

April 30, 1957.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., for burglary, and he appealed. The District Court of Appeal, Fourt, J., held that the appeal should, in all probability, be dismissed, since Bar Association had reported that defendant had no valid grounds of appeal and since defendant had thereafter failed to file briefs with time allowed; but nevertheless reviewed the evidence and found it amply sufficient to sustain the conviction.

Affirmed.

Burglary ⚷41(1)

Burglary conviction was sustained by evidence. West's Ann.Pen. Code, § 459.

◆

James Lee Bright, in pro. per.

Edmund G. Brown, Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction for a violation of the provisions of section 459 of the Penal Code (Burglary).

In an information filed in Los Angeles county, the defendant was charged with two counts of burglary, and further, in each count it was set forth that the defendant had been previously convicted of the crime of burglary and served a term in the state prison therefor. From the judgment of conviction of count I the defendant appeals.

The defendant was represented by counsel at the preliminary hearing. At the trial in the superior court, where the defendant was also represented by counsel, it was stipulated in substance that a trial by jury was waived and the matter was to be heard by the court without a jury, and the plaintiff's case in chief to be submitted upon the transcript of the testimony taken at the preliminary hearing and further that each side reserved the right to produce additional evidence if either so desired.

The facts as elicited from the record are substantially as follows: On or about May 15, 1956, a Lawrence G. Robinson resided in a room of a hotel located on Wall Street in Los Angeles. The room Robinson occupied was on the second floor and had one outside window which could be entered from a ledge on the outside of the building. The same ledge apparently projected to a point below the bathroom window. When Robinson would leave his room it was locked by means of a hasp and padlock from the outside, and on the day in question, when Robinson left his facility to go to work he locked the door in the usual fashion. That morning, after Robinson had left for work, one of the roomers in the hotel heard a noise in Robinson's room and noticing that the door was padlocked, went to the bathroom close by Robinson's room to attempt to see into that room from the bathroom window for the purposes of ascertaining what the cause of the noise was, and finding the bathroom locked, the roomer went to the porter of the hotel and advised him of what he had heard and found. The porter and the roomer returned to the bathroom and "pushed the door open and caught the guy with the clothes", referring to the defendant. Robinson identified a suitcase and a considerable number of pieces of wearing apparel, found in the possession of the defendant under the circumstances related, as belonging to him and which were in his room when he left for work earlier in the day. The defendant, upon being confronted in the bathroom with the suitcase and the wearing apparel of Robinson, took flight, but was caught by the porter.

The defendant filed what purports to be a notice of appeal in his own proper person. When the matter was lodged in this court the defendant directed a letter to the court wherein the defendant, in substance, requests counsel to represent him in the cause. The matter was referred to the chairman of the Committee on Criminal Appeals of the Bar Association. The chairman of that Committee, in turn, pursuant to the rules of the Committee, submitted the matter to Frederick W. Mahl, Jr., an attorney and member of the panel on criminal appeals, who examined into the facts and the record and communicated with the defendant and thereafter directed a letter to the clerk of this court wherein it was stated: "After a complete study of the record in this case, and ascertaining from the defendant the particulars in which he felt his conviction was improper, it has been concluded that the defendant has no valid grounds of appeal." The defendant was then notified of the contents of the Mahl letter, and further was advised that he might file briefs on his own behalf, or might obtain private counsel, and he was also informed that, in any event, under Rule 17(a) of Rules on Appeal, unless a brief was filed within thirty days of the date of the letter, the appeal would be dismissed unless good cause were shown. More than thirty days have elapsed, no brief has been filed and no good cause has been shown why it should not have been filed.

The matter should, in all probability, be dismissed, even so, we have carefully examined the record in this case. The facts as heretofore related speak for themselves and are amply sufficient to sustain the conviction. True it is that the defendant testified in his own behalf and denied entering Robinson's room, and denied taking the items referred to, but that simply made a conflict in the testimony which the trial court resolved against the defendant. Under the circumstances here presented, we are not authorized to determine the credibility of witnesses, that being the duty of the trial court. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; C.C.P. §§ 1847, 2061.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

George BUTIGAN and Bobbette Butigan,
husband and wife, Plaintiffs and
Appellants,
v.
YELLOW CAB COMPANY, a corporation,
Jack E. Bland, Fred Wurm, et al.,
Defendants.

Yellow Cab Company, a corporation, Jack E.
Bland, Fred Wurm, Respondents.*
Civ. 21989.

District Court of Appeal, Second District,
Division 3, California.
April 22, 1957.

Rehearing Denied May 17, 1957.
Hearing Granted June 19, 1957.

Action by taxicab passenger against taxicab company and another motorist for injuries which occurred when taxicab was struck by other motorist as taxicab driver turned into left lane of traffic while attempting to turn around in center of block. From adverse judgment of the Superior

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* Opinion vacated 320 P.2d 500.

Court, Los Angeles County, William B. McKesson, J., the passenger appealed. The District Court of Appeal, Shinn, P. J., held that giving of instruction on unavoidable or inevitable accident was prejudicial error when there was no evidence of an extraneous cause that could have been sole proximate cause of accident and when instruction limited duty of taxicab company to exercise of only ordinary care.

Judgment affirmed as to motorist and reversed to taxicab company and attempted appeal from order denying new trial dismissed.

1. Carriers ⚷280(1)

Taxicab company has duty to exercise highest degree of care for safety of its passengers.

2. Automobiles ⚷146

Driver of automobile which was involved in collision with taxicab was required to exercise only ordinary care.

3. Appeal and Error ⚷1064(1), 1066
Carriers ⚷321(3)
Trial ⚷252(8)

In action by taxicab passenger against taxicab company and another motorist for injuries sustained in collision which occurred when taxicab was struck as driver thereof turned into lane of oncoming traffic while attempting to turn around in middle of block, giving of instruction on unavoidable or inevitable accident was prejudicial error when there was no evidence of an extraneous cause that could have been sole proximate cause of accident and when instruction limited duty of taxicab company to exercise of only ordinary care.

4. Appeal and Error ⚷882(12)

In action by taxicab passenger against taxicab company and another motorist for injuries sustained in collision which occurred when taxicab was struck by other automobile while attempting to turn around in middle of block, passenger was not precluded from asserting error in giving instruction on unavoidable accident stating that taxicab company had duty of exercising only ordinary care on ground that some instructions requested by passenger were susceptible of construction that taxicab company had only that duty.

5. Negligence ⚷63

As generally understood, term "unavoidable accident" denotes a cause of accident consisting of some conduct, condition or occurrence operating independently of conduct of parties and which could not have been forseen in exercise of ordinary care.

See publication Words and Phrases, for other judicial constructions and definitions of "Unavoidable Accident".

6. Negligence ⚷56(1), 62(1)

Question of negligence encompasses all causes of an accident, acts of parties and also those causes which operate independently of acts of party or parties charged with negligence.

7. Negligence ⚷59, 140

An unforeseeable cause cannot exonerate a party charged with negligence unless it is shown to have been sole proximate cause of accident, and there is no justification for giving an unavoidable accident instruction unless jury could reasonably conclude that sole proximate cause of accident was one that was beyond reasonable anticipation and control of parties.

8. Automobiles ⚷169

Taxicab driver, whose taxicab was struck by oncoming automobile as it stalled while driver was attempting to turn around in middle of block, was guilty of negligence in absence of circumstances which would render such action excusable, justifiable and reasonably prudent. West's Ann.Vehicle Code, §§ 541, 544.

◆

Raoul D. Magana, Victor E. Kaplan and Monta W. Shirley, Los Angeles, for appellants.

H. T. Ellerby, Henry F. Walker, Los Angeles, for respondent Wurm.

Kenneth J. Murphy, Henry E. Kappler, Los Angeles, for respondent Yellow Cab Co.

SHINN, Presiding Justice.

This is a simple case of a collision in a business district between a taxicab of Yellow Cab Company in which plaintiff Bobbette Butigan was riding as a passenger and a passenger car being operated by Fred Wurm. On motion of George Butigan the action was dismissed as to him. Verdict and judgment were against Bobbette (to be referred to as plaintiff and appellant) and after denial of her motion for new trial, she appeals from the judgment.

[1, 2] The sole ground of the appeal is claimed error in instructions given. The court read 81 instructions, 30 requested by plaintiff, 39 requested by defendants and 12 requested by plaintiff and defendants. In issue were questions of negligence of either of the drivers, proximate cause and damages. The cab company had the duty to exercise the highest degree of care; Wurm was required to exercise only ordinary care.

The essential facts are the following. Bobbette, who resided on the east side of Silverlake Boulevard, called a cab, which appeared and parked at the curb headed north; she entered the cab, which proceeded north toward the intersection of Silverlake and Effie Streets, where there were traffic signals. Jack Bland, driver of the cab, decided to turn around on Silverlake Boulevard. He testified that he was intending to turn around by going into a driveway on the west side of the street, backing out and turning south, but that when the cab was part way across the center of the street his motor stopped; he endeavored for some one and a half to three seconds to start it but was unsuccessful; he saw no traffic approaching from the north. Wurm coming south ran into the right-hand side of the cab and Bobbette was injured. Bland testified that he had had the cab in the shop on the previous day because the motor had been stalling due to the fact that it was running on a thin mixture to save gas. Wurm testified that as he came south the cab pulled out in front of him and that he had no chance to turn or stop before running into it.

[3] The first point made by plaintiff is that the court erred in giving an instruction on "unavoidable or inevitable accident."[1] The giving of this instruction was error for two reasons, first, because it effectively stated that the cab company had only a duty of ordinary care and, second, because the evidence did not warrant an instruction on unavoidable accident.

[4] The jury was instructed that the cab company was required to exercise the highest degree of care. The criticized instruction told the jury in effect that if the defendants exercised ordinary care the accident would be considered unavoidable even though it could have been avoided "by the exercise of exceptional foresight, skill or caution," and further that the accident was not unavoidable if *any* defendant failed to exercise ordinary care. The practical effect of this instruction was to inform the jury that the accident could be found to have been unavoidable if the cab company exercised ordinary care. Although the duty of the cab company was properly defined in another instruction, it will appear from our further discussion that the jury, in all probability, followed the erroneous instruction. See Finley v. City & County of San Francisco, 115 Cal. App.2d 116, 251 P.2d 687. Defendants do

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[1] "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

"Bear in mind, however, that if any defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by that defendant."

not deny that it was error to give it but they say that some of the other instructions requested by plaintiff were susceptible of a construction that the cab company had only a duty to use ordinary care and that, therefore, plaintiff may not complain of error in the defendants' instruction. Different degrees of care were demanded of the defendants and it was necessary that that distinction be observed throughout the instructions. In order to accomplish this, special instructions should have been prepared by counsel. It could not be accomplished by taking at random standard instructions on negligence from a book which, though applicable to Wurm, were inapplicable to the cab company. Our attention is called to several instructions given at the request of plaintiff which it is said stated the duty of the cab company to be substantially the same as that stated in the erroneous instruction on unavoidable accident. Defendants argue that if the statements were of the same tenor plaintiff cannot complain of the error. At the request of plaintiff and defendant Wurm the court defined negligence as the failure to exercise ordinary care, and in another instruction requested by plaintiff and defendant Wurm the jury was informed that negligence was one of the issue in the case. Although the court instructed at plaintiff's request that the cab company was required to use the utmost care and diligence, the abstract instructions on negligence did not state that those instructions applied only to the conduct of Wurm. The instructions, of course, should have made it clear that the duty of ordinary care was applicable only to him, and that the rule of utmost care was applicable to the cab company. This would have required more effort on the part of the plaintiff than was involved in pursuing the easy method of taking abstract instructions from a form book. Certainly plaintiff's instructions on ordinary care were not intended to relieve the cab company of any part of its duty. Notwithstanding the lack of clarity in the instructions, we are far from convinced that, when considered as a whole, they would have been understood by the jury as placing the two defendants under the same duty. We are of the opinion that plaintiff is not precluded from asserting error in the giving of the instruction on unavoidable accident. We are further of the opinion that the error was prejudicial.

The next question is whether, regardless of the form of the instruction, it was error to give it. The contentions of the parties have led us to an inquiry into the case law in California upon the subject of unavoidable accident with respect to both the meaning of the doctrine of unavoidability and also to the matter of instructions upon that phase of nonliability.

[5] As generally understood, the term "unavoidable accident" denotes a cause of an accident consisting of some conduct, condition or occurrence operating independently of the conduct of the parties and which would not have been foreseen in the exercise of ordinary care. The question is whether California follows this rule or another one, namely, that the so-called rule of "unavoidable accident" is applicable to every case of an accident where the question of negligence is one of fact, even in cases where there is no evidence of a proximate cause, unforeseeable and uncontrollable by the parties. If the latter rule is the correct one, instructions on unavoidable accident are properly given even in accident cases where the question of negligence must be determined solely from the conduct of the parties. It is a serious question.

[6] Absence of negligence and unavoidability are one and the same thing. Prosser (Second Edition, p. 167) says that an unavoidable accident is one caused by some event or happening that was not reasonably to be anticipated. It is a universal rule. 65 C.J.S., Negligence, § 244, p. 1096. The question of negligence encompasses all the causes of an accident, the acts of the parties and also those causes which operate independently of the acts of the party or parties charged with negligence. To litigants who seek to prove neg-

ligence and are confronted with the claim of unavoidability of the accident, the term "unavoidable accident" has a limited connotation; it has relation to those causes which are distinct from and operate independently of the actions of the parties, but it has no relevancy where the question of negligence must be decided on the basis of their actions alone, and, although in the absence of evidence of negligence, the accident is unavoidable in the sense that it occurred without fault of the party charged, that is not the unavoidability that justifies special instructions. In practice the rule of unavoidability is regarded as a special theory or rule of nonliability. If this were not so the label "unavoidable" or "inevitable" would not have been given to the type of accidents that comprise the "unavoidable accident" category.

With the exception of some cases of comparatively recent origin to be hereafter discussed, there will not be found in the reported cases any departure from the rule that unavoidability is a false quantity unless there has entered into the case evidence of some cause, operating independently of the conduct of the parties, and which would not have been foreseen in the exercise of ordinary care. We refer to a few cases that are typical of the entire class. Graham v. Consolidated Motor Transport Co., 112 Cal.App. 648, 297 P. 617 (child ran into street); Creamer v. Cerrato, 1 Cal.App.2d 441, 36 P.2d 1094 (same); Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51 (horse suddenly appeared on highway); Zaferis v. Bradley, 28 Cal.App.2d 188, 82 P.2d 70 (driver's foot became wedged between pedals); Smith v. Harger, 84 Cal.App.2d 361, 191 P.2d 25 (small boy pushing on back of dump truck); Merry v. Knudsen Creamery Co., 94 Cal.App.2d 715, 211 P.2d 905 (brake failure); La Porte v. Houston, 33 Cal.2d 167, 199 P.2d 665; Barber v. Gordon, 111 Cal.App. 279, 295 P. 377; Doggett v. Lacey, 121 Cal.App. 395, 9 P.2d 257 (cases of defective automobile mechanism not due to driver's negligence); Yates v. J. H. Krumlinde & Co., 22 Cal.App.2d 387, 71 P.2d 298 (gust of wind caused gate to slam shut). Prosser (Second Edition, p. 167) mentions Hester v. Hall, 17 Ala.App. 25, 81 So. 361 (hogs darting in front of a car); Rainwater v. Boatright, La.App., 61 So.2d 212 (child darting in front of a car); Holland v. Bartch, 120 Ind. 46, 22 N.E. 83 (boy on bicycle who frightens horse); Kelly v. Gagnon, 121 Neb. 113, 236 N.W. 160 (automobile driver whose tire blows out). Such cases could be listed at great length, 65 C.J.S.Negligence, § 21, pp. 430–433, but it is sufficient to say that in every jurisdiction the doctrine of unavoidable accident is so understood and applied in the above class of cases.

[7] Under the true concept of the rule, an unforeseeable cause cannot exonerate a party charged with negligence unless it is shown to have been the sole proximate cause of the accident, and there is no justification for giving an unavoidable accident instruction unless the jury could reasonably conclude that the sole proximate cause of the accident was one that was beyond the reasonable anticipation and control of the parties.

The cab company ignores this settled rule and contends that independently of the existence of any evidence of a cause of the accident beyond the control of the parties it was proper to give the instruction on unavoidable accident because the instruction is properly given in any case where the question of negligence is one of fact. For this proposition the company cites Parker v. Womack, 37 Cal.2d 116, 230 P.2d 823, 827. That was an ordinary case of a collision at an intersection in which the only evidence of negligence was to be found in the conduct of one or both of the parties. There was no outside cause. But the court said: "Upon the evidence it was the duty of the jury to decide which, if either, of the drivers failed to use due care in entering the intersection and the Womacks were entitled to have the jury instructed in regard to the rule of unavoidable accident." This statement was based upon one which preceded it reading as follows: "But the application of the rule allowing the defense of unavoidable accident has not been limited to cases where the defendant relies upon evidence of a proximate cause beyond his control. An instruction stating the law regarding the right of a defendant from exemption from liability because the accident could not have been avoided has also been approved where there was no evidence that it was caused by any factor other than the lack of care." The court cited as authority Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51 and Pearce v. Elbe, 98 Cal.App. 101, 276 P. 389.

In Pearce v. Elbe, it was held that a defendant charged with negligence could properly defend upon the ground that the accident was unavoidable under a general denial of negligence and the court added that it was therefore proper for the court to give an instruction on unavoidable accident. This holding related entirely to the matter of pleading. The court did not decide, nor even consider, whether the instruction was improperly given for the reason that there was no evidence that the accident was unavoidable. Jolley v. Clemens was a case in which Clemens, who was driving an automobile, and Joseph Melvin Jolley, the son of plaintiffs Jolley, while riding a motorcycle, ran into a horse that had strayed onto the highway. That was a typical unavoidable accident situation. The only holding in the case that is of any interest was that it was error to instruct that the burden of proof was upon the defendant to establish as a defense the unavoidability of the accident. The cases cited by the court in Parker furnish no support for the statements we have quoted, and we think no supporting authority can be found in the reports of our state or in any other jurisdiction.

Pearce v. Elbe, supra, has been cited and relied upon in some cases as if it held that an instruction on unavoidable accident is proper without regard to evidence of the existence of some possible cause of the accident operating independently of the actions of the parties. Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 77 P.2d 311 and Schubkegel v. Dunn, 31 Cal.App.2d 312, 87 P.2d 875, are such cases. In Stevenson v. Fleming, 47 Cal.App.2d 225, 117 P.2d 717, 721, an instruction on unavoidable accident was given and it was contended that this was error for the reason that there was no evidence that the accident was unavoidable. The court, after stating that it was generally true that such an instruction should not be given unless there was some evidence that the accident was unavoidable (citing cases) added: "However, the following rule announced in Pearce v. Elbe, 98 Cal.App. 101, 276 P. 389, 391, should be controlling here" (quoting from the cited case). Obviously the court was reluctant to follow that decision. Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App.2d 400, 201 P.2d 48, followed the decision in Stevenson and for identical reasons.

In the following cases subsequent to the decision in Parker it was held that there was no error in giving the instruction for one of two reasons, namely, upon authority of the statements in Parker we have previously quoted, or upon the ground that absence of negligence and existence of an unavoidable cause are one and the same thing, that the jury had been adequately instructed in the law of negligence, and that the unavoidable accident instructions merely stated absence of negligence in another manner. Sherrillo v. Stone & Webster Eng. Corp., 110 Cal.App.2d 785, 244 P.2d 70; Smith v. City & County of San Francisco, 117 Cal.App.2d 749, 256 P.2d 999; Hooper v. Bronson, 123 Cal.App.2d 243, 266 P.2d 590; Carroll v. Beavers, 126 Cal.App.2d 828, 273 P.2d 56; Squillante v. Barr, 131 Cal.App.2d 175, 280 P.2d 216; Hughes v. MacDonald, 133 Cal.App.2d 74, 283 P.2d 360.

In the following cases decided since Parker v. Womack it was held that refusal to give the instruction was not prejudicial error, the reason being that it is unnecessary when the jury has been sufficiently instructed in the principles of negligence. McMahon v. Marshall, 111 Cal.App.2d 248, 244 P.2d 481; Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 245 P.2d 583; Taylor v. Luxor Cab Co., 112 Cal.App.2d

46, 246 P.2d 45; Johnston v. Orlando, 131 Cal.App.2d 705, 281 P.2d 357; Goodwin v. Braden, 134 Cal.App.2d 34, 285 P.2d 330; Lilley v. Key System Transit Lines, 136 Cal.App.2d 737, 289 P.2d 517; Slovick v. James I. Barnes Constr. Co., 142 Cal.App. 2d 618, 298 P.2d 923. The earlier cases were to the same effect. In Guay v. American President Lines, 81 Cal.App.2d 495, 513, 184 P.2d 539, 549, the court stated: "Objection is made to the trial court's failure to give a proffered instruction that defendant was not liable if the injuries were the result of unavoidable accident. In Stein v. United Railroads, 159 Cal. 368, at page 373, 113 P. 663, 665, it was held not error to refuse to instruct on unavoidable accident, because 'A juror would know that such was the rule without instruction and it would seem absurd to burden the record with a formal statement of a truth so self-evident.' In Gunter v. Claggett, 65 Cal.App.2d 636, at page 642, 151 P.2d 271, 274, the court said that '* * * unavoidable accident is simply another way of urging that defendant was not negligent. The jury has found, and the finding is supported, that defendant was negligent. No prejudicial error occurred in failing to instruct on this issue.' The jury was fully and fairly instructed on the general rules of liability for negligence. It has impliedly found that defendant's negligence solely and proximately caused the accident. Such finding is supported by the evidence, and the permissible inferences therefrom. Under these circumstances no error was committed in failing to instruct on unavoidable accident."

The cases decided by the district courts of appeal subsequent to Parker v. Womack have held that it is not error to give an instruction on unavoidable accident and that it is not error to refuse it. This poses the obvious question "Why give it at all?" We think the answer is that it should not be given. In unbroken sequence the cases have held that instructions on negligence are sufficient. That has been the reason for holding that it is not error to give the instruction, or to refuse it. Ever since Parker v. Womack the courts have not considered whether there was evidence of an unavoidable cause which could be found to have been the sole proximate cause of the accident. In that case and in the cases we have listed in which the giving of the instruction was held not to be error there was no evidence of an extraneous cause that would have justified a finding that it was the sole proximate cause of the accident. To merely hold that giving the instruction was not error because absence of negligence and unavoidability are the same does not fully answer the problem. How can the courts be sure that the instruction does a plaintiff no harm and gives the defendant no advantage when there is no evidence of an outside, unavoidable cause to which the instruction could relate? Is there not an implication that unavoidable accident is something different from negligence when the court, after instructing on negligence, gives another instruction commencing: "In law we recognize what is termed an unavoidable or inevitable accident"? The only possible negative answer to this question is that the instruction is not deceptive because it proceeds to explain that the rule of "unavoidable or inevitable accident" really means nothing at all and should not have been mentioned in the first place.

Litigants charged with negligence have good reason to believe there is some advantage in having the jury instructed on unavoidability. No one knows whether the defendants who have prevailed in actions in which the instruction was given derived some undeserved benefit from it. We do not see how our courts can feel assured that all jurors can comprehend the meaning and proper application of the rule of unavoidability, nor can we see any virtue in giving an instruction which, admittedly, can do no good and may cause harm. While it may not be questioned that the instruction need not be given when the jury is fully instructed on negligence, a better reason for declining to give it would be that there is no evidence of unavoidability, if that be the fact. See Riley v. Berkeley Motors, Inc., 1 Cal.App.2d 217, 36 P.2d 398;

Jaques v. Southern Pac. Co., 8 Cal.App.2d 738, 48 P.2d 63; Barr v. Hall, 12 Cal.App. 2d 489, 55 P.2d 1246; Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 58 P.2d 200; D'Avanzo v. Manno, 16 Cal.App. 2d 346, 60 P.2d 524; Fraser v. Stellinger, 52 Cal.App.2d 564, 126 P.2d 653; Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271; Noble v. Cavalier Restaurant, 106 Cal.App.2d 518, 235 P.2d 396; Huyck v. Merritt, 108 Cal.App.2d 775, 240 P.2d 1.

We think the only serious ground of complaint appears when the instruction is given and there is no evidence of any independent cause that could have been the sole proximate cause of the accident. A jury casting about for some reason for the instruction would necessarily become confused. In our opinion it would be clear error to give the instruction when there was no supporting evidence. Whether giving it would be seriously prejudicial would, of course, depend upon the facts of the particular case.

One cannot read the cases we have cited without being impressed with the fact that the courts in several instances have been reluctant to excuse the giving of the instruction where there was no supporting evidence. In Bender v. Schneider, 149 Cal.App.2d 195, 308 P.2d 527, 530, the court stated "This Court is opposed to the giving of an instruction on unavoidable accident when the accident could not have happened except for the negligence of either party or both. See McMillen v. Southern Pac. Co., 146 Cal.App.2d 216, 303 P.2d 788, where this court felt bound to follow the majority opinion in Parker v. Womack, supra. * * * Where the trial court does give the instruction, however, the majority and not the dissenting opinion in Parker v. Womack, supra, is controlling on us." We agree with the statement of the court in Jaeger v. Chapman, 95 Cal.App. 2d 520, 523, 213 P.2d 404, 406, in holding that it was not error to refuse the instruction, "While it would not have been error to have given such an instruction, it was not error to refuse to give it where all elements of defendant's liability were covered by other instructions. The defendant is not entitled to have his defense overemphasized and cannot complain that his defense is not stated in a particular way, as long as the defense is adequately and fairly covered." It was held not to be error to give the instruction in Shiya v. Reviea, 122 Cal.App.2d 155, 264 P.2d 190, 197. The court excused the giving of the instruction, saying "in the face of the majority opinion in the Parker case, we are unable to hold that it was prejudicial error to give such an instruction." In Carroll v. Beavers, 126 Cal.App.2d 828, 273 P.2d 56, complaint was made of the giving of the instruction because there was nothing in the evidence to indicate anything that happened which the drivers could not control. Referring to Parker the court said, 126 Cal.App.2d at page 839, 273 P.2d at page 63 "* * * but as we read that case it holds that even though the evidence is confined to matters which fail to show circumstances beyond the control of an ordinarily prudent person, yet an instruction on unavoidable accident is not error. On the authority of that case the contention here advanced cannot be sustained." In Astone v. Oldfield, 67 Cal.App.2d 702, 155 P.2d 398, the court held the instruction should not have been given when there was no evidence to justify it but that the error was not sufficiently prejudicial to require a reversal of the judgment. While the sufficiency of the evidence of an independent cause of the accident was questioned in Freedman v. Willeford, 121 Cal.App.2d 145, 148, 262 P.2d 642, the giving of the instruction was held not prejudicial error on authority of Parker v. Womack and Astone v. Oldfield.

In our opinion the rule of unavoidability was correctly applied in Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545 and Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485, 486. In each case the court recognized that the rule does not apply unless the evidence would justify a finding that a cause existed, apart from the act of the parties, which was the sole proximate cause of the accident. Judgment for defendants were reversed for error in giving instructions on unavoidable accident. In Scandalis the defendant's car struck a child who was playing in the street. Defendant saw the child ahead of him, looking down; he did not slow down his car or alter his course; the boy suddenly turned and ran into the car. The court stated that the case would have been entirely different if the child had been concealed and had suddenly appeared, but that defendant could not deny that he had been negligent in taking no precautions to avoid an accident. It was held that the instruction was misleading and prejudicial. It was a case in which the child's action was a proximate cause of the accident but clearly not the sole proximate cause. The rule of unavoidability does not apply in such cases. Hyman was a case in which two streetcars came together. Each defendant offered evidence that its car was at a standstill. The court stated "Obviously, the motorman of at least one of the two streetcars was negligent. There was no evidence that the collision occurred as the result of unavoidable accident. Both cars obviously were not at a standstill when the accident occurred. * * * The instruction, under the facts, was clearly misleading to the jury, and the giving of it was error prejudicial to appellant."

It was conceded in Parker that these decisions were correct, but only for the reason that in each case the defendant's negligence appeared as a matter of law. It is immaterial whether this was the fact. That is not the question. Of course, where the negligence of a party is established as a proximate cause as a matter of law, no other cause can be the sole proximate cause. But unless there is evidence from which the jury could reasonably conclude that there was a cause not foreseeable and controllable by either party in the exercise of due care it is error to give the instruction. Even if there is such evidence there is no need for the instruction. In any case it would be a mere duplication of instructions on negligence and would tend to confuse and mislead the jury. The instructions should be confined to the principles of negligence and proximate cause without the use of the words "unavoidable or inevitable accident." They not only imply some theory of nonliability aside from questions of negligence, but carry a suggestion of a type of occurrences that are fatalistic and which have to be endured.

The purpose of our extended discussion is to call attention to the desirability of a reconsideration by the Supreme Court of the majority holding in Parker v. Womack. It has been the cause of the injection into negligence cases of a chimerical theory of nonresponsibility and has created unnecessary problems for the trial and the reviewing courts. The underlying principle of unavoidability is a simple one, namely, whether the evidence establishes a proximate cause of an accident, not reasonably foreseeable by the parties, or, in other words, one which could be found to have been the sole proximate cause of the accident. When that is stated, there is nothing more to be said. All the cases hold that instructions on unavoidability or inevitability are superfluous when adequate instructions on negligence are given. Jurors do not know this. We think that in the interest of simplicity and clarity the courts should discontinue the use of instructions on "unavoidability" and "inevitability", which do not serve to enlighten juries but only tend to confuse them. Especially confusing is the word "inevitable," as applied to accidents. We would be surprised if it did not suggest to the average juror, in a case like this one, that it means something that is bound to happen, in any event, to anyone who ventures upon the highway.

It was prejudicial error to give the cab company the benefit of the instruction on unavoidable accident. The only evidence to which it could have applied was the testimony of Bland that his motor stalled as he was crossing the middle line. The instruction inevitably centered the minds of the jurors upon that testimony. It could not have applied to Bland's attempt to turn in the middle of the block, or to his failure to observe the approach of Wurm's car, or to driving a cab, the motor of which he knew might possibly stall. The theory of the cab company was that Bland was not responsible for the stalling of the motor nor for his inability to start it and, therefore, the accident was unavoidable. It is argued on the appeal that the jurors no doubt believed the stalling of the motor to have been a fact, and that it was the sole proximate cause of the accident. This is the company's defense.

[8] It was negligence as a matter of law for Bland to turn around in the street except at an intersection, in the absence of circumstances which would render such action excusable, justifiable and reasonably prudent, Veh.Code § 541. There was no evidence of any such circumstances. It was negligence for him to turn into the other lane of traffic unless it could be done with reasonable safety, Veh.Code § 544. The questioned instruction was improper for these reasons alone. No other cause could have been the sole proximate cause. But we do not place our holding of error upon the narrow basis of violation of law. There were other aspects of the failure to exercise a high degree of care which precluded the jury from finding that the stalling of the motor was the sole proximate cause of the accident. Bland testified that he did not see the Wurm car until it was within two or three car lengths of him, and then only because his passenger screamed. The time was between 8 and 9 o'clock in the morning; there was no car or other obstruction between Bland and the approaching Wurm car. We do not see how the jury, in the exercise of reasonable judgment, could have believed that Bland exercised a high degree of care in looking for approaching traffic before encroaching upon the left-hand side of the road. Also, Wurm testified that when the cab entered his path there was insufficient time for him to stop or turn aside. The jury evidently believed his testimony, as otherwise he would not have been found free from fault. Moreover, there was evidence from which it could have been inferred that the motor of the cab was not functioning properly. It had been stalling the day before, had been in the shop, and Bland explained that the reason it stalled was that it was being operated on a thin mixture in order to save gas. If that was the fact it might have been considered a circumstance which Bland could not have avoided, but could scarcely have been deemed unavoidable as to the cab company. We do not say that the stalling of an automobile motor might not in some circumstances be legally unavoidable by the operator of the car. It might occur without any negligence upon his part, and he could be held blameless if his conduct in all other respects was free from negligence. But on no conceivable theory could Bland's freedom from responsibility for the stalling of the motor have been an excuse for using the car with a motor in the described condition or for Bland's turning in the middle of the block and into an opposite lane, and a perilous position, or for his failure to observe and keep out of the way of the Wurm car.

We do not believe plaintiff would have lost her case if the court had not given the instruction on unavoidable or inevitable accident.

We find no error that would warrant interference with the judgment in favor of Wurm. Other points discussed in the briefs need not be mentioned.

The judgment is affirmed as to Wurm and reversed as to Yellow Cab Company of California; costs to Wurm and costs to appellant against Yellow Cab Company; the attempted appeal from the order denying motion for new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

150 Cal.App.2d 518

Virginia SAVARESE, Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Defendant and Respondent.

Civ. 17213.

District Court of Appeal, First District, Division 2, California.

April 29, 1957.

Action by judgment holder to recover on policy insuring debtor's automobile. From judgment for insurer entered in Superior Court, Contra Costa County, Harold Jacoby, J., judgment holder appealed. The District Court of Appeal, Draper, J., held that evidence was sufficient to establish that the cancellation notice which cancelled policy prior to automobile accident was delivered to the insured.

Judgment affirmed.

1. Evidence 🔑53

A presumption is recognized as evidence.

2. Evidence 🔑54

An inference may be based on another inference if the first inference is a reasonably probable one.

3. Insurance 🔑235

In action by judgment holder on policy insuring debtor's automobile where insurer's underwriting superintendent identified copy of letter mailed to the insured notifying him of policy's cancellation and lien holder's copy was received, evidence was sufficient to sustain trial court's finding that letter had, in fact, been delivered to the insured.

4. Evidence 🔑139

In action by judgment holder on policy insuring debtor's automobile, where insured contended that he had not received the notice of cancellation sent by the insurer, evidence that copy sent to lien holder was received in due course was admissible on issue of insurer's compliance with usual practice in mailing notices of cancellation.

5. Appeal and Error 🔑994(3)

The determination of conflicts within testimony of witness is for trial court in non-jury trial.

6. Insurance 🔑228

Where policy insuring automobile required distinct cancellation notice to lien holder as well as insured, insurer had liability to lien holder independent of that to insured and policy could be cancelled as to insured even though it remained in effect as to lienholder.

7. Insurance 🔑371

Insurer was not estopped to deny liability on cancelled policy to holder of judgment against insured for alleged misrepresentation where claim of estoppel was made by judgment holder and not by insured.

◆

Robert L. Condon, David A. Dolgin, Martinez, for appellant.

Berry, Davis & Channell, Oakland, for respondent.

DRAPER, Justice.

Plaintiff first recovered judgment against Floyd J. Dickerson for injuries to person and property sustained in an automobile collision which occurred at about 2 o'clock a. m., June 15, 1954. She then brought this action, alleging that defendant was, at the time of the accident, the insurer of Dickerson against liability arising from his operation of his automobile, and seeking recovery from the insurer of the amount of the earlier judgment. Defendant contended that the policy had in fact been cancelled at 12:01 a. m. on the day of the accident. The case was tried to the court without a jury. Judgment was for defendant, and plaintiff appeals.

Respondent's underwriting superintendent identified a copy of a letter, properly addressed to Dickerson, dated June 3, 1954. This letter notified him that his insurance was "cancelled as of June 15, 1954, at 12:01 A.M.". This witness testified that the established practice of the company is to type an original and copies of this letter, together with original and copy of cancellation notice to the lien holder, 10 days before the date they bear. Upon typing, a copy of the letter to the owner is sent to the company's agent, to give him advance notice of the action. The remaining letters are clipped together and placed in a suspense file. On the date they bear, the letters (to owner and lien holder) are mailed. If any such letter is returned, efforts are made to effect delivery, and the original envelope is retained in the file. In the case at bar, the letter to Dickerson was not returned.

Dickerson testified that he did not receive the notice of cancellation, but the trial court found that it had in fact been delivered to him. Appellant contends that the insurer must show actual delivery of the notice to Dickerson. Appellant then argues that, in the absence of testimony by the party who deposited the letter with the post office, its mailing is shown only by the presumption that "the ordinary course of business has been followed", Code of Civil Procedure, § 1963, subd. 20. There is no direct evidence of receipt of the letter by Dickerson and, says appellant, such receipt is evidenced only by another presumption, Code of Civil Procedure, § 1963, subd. 24. This, says appellant, amounts to basing a presumption upon a presumption, and thus results in inadequate proof of receipt.

[1, 2] Appellant cites no decision for the claimed rule that a presumption cannot be based upon a presumption. We have found a few California cases which make that statement, but, in all these, the statement is wholly dicta. Typical is Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480. In that case, there was no evidence whatever to support the verdict, and it is difficult to find any factual basis for even one presumption. In this State, where a presumption is recognized as evidence, Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, there seems no reason to proscribe a presumption upon a presumption. The dictum relied upon by appellant apparently finds its basis in the more often quoted denunciation of "an inference upon an inference". But that dictum, too, has been exposed as an overly broad statement. The true rule has been stated to be that an inference may be based on another inference if the first inference is a reasonably probable one. Ybarra v. Spangard, 93 Cal. App.2d 43, 47, 208 P.2d 445; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 163 P.2d 470; West Coast Life Insurance Co. v. Crawford, 58 Cal.App.2d 771, 138 P.2d 384 (hearing in all these cases denied by Supreme Court). See also I Wigmore on Evidence, 3d Ed., 435. Of course, the building of inference upon inference may often result in a progressive weakening of logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven. When an ultimate inference is thus remote from the evidence, it should be rejected.

[3] As already pointed out, the presumption is itself deemed evidence in California. In jurisdictions where this rule is not followed, the presumption, in the sense that it is a rule of law requiring the fact finder to reach a particular conclusion upon established facts, disappears when contradictory evidence is introduced. In such jurisdictions, however, the evidence upon which the presumption was based remains before the trier of fact, who may (although he no longer must) find the fact of mailing from the evidence of custom and habit of the particular business concern, and such other evidence as is produced. Thus, the finding here involved would find support, not as a conclusion following the dictate of the presumption, but rather as a fact inferred from the evidence. We find no objection to a presumption based upon a fact logically deduced or inferred from the evidence.

[4] In the case at bar, the strong inference of mailing based upon the detailed evidence as to established practice of respondent is buttressed by evidence that the lien holder's letter, which was clipped with that to Dickerson in respondent's suspense file, was in fact received by the addressee in due course. Appellant contends that this evidence was improperly admitted, arguing

that Dickerson's policy could be cancelled only by notice to him. This, of course, is true, and the testimony could not have been received on the theory that notice to the lien holder was notice to the owner. But the evidence did have probative value as to the company's compliance, in the case of this notice, with the usual practice in mailing. Whether the process be described as presumption, inference or "presumption of fact", it is logically permissible to deduce that the notice was mailed. Thus, there is an adequate basis for the application of the presumption that it was received. See 1 Wigmore on Evidence, 3d Ed., supra, § 95.

There is no question that Dickerson's denial of receipt of the notice created a conflict in the evidence sufficient to sustain a finding in accordance with his testimony. Jensen v. Traders & General Insurance Co., 141 Cal.App.2d 162, 296 P.2d 434. But here the court found against the insured, and upon the conflicting evidence that finding must be sustained.

[5] Appellant bases much of her argument upon her view of the testimony of respondent's agent. But that testimony is conflicting within itself, and determination of the conflicts within this witness' testimony is for the trial court.

The policy provided that insurer could cancel "by mailing to the named insured * * * written notice stating when not less than five days thereafter such cancellation shall be effective", and also provided that "the mailing of notice as aforesaid shall be sufficient proof of notice". Under this language, it would seem that mailing of the notice, without direct proof of its receipt, would be sufficient to effect cancellation. We find nothing to the contrary in Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 76 P.2d 663, 115 A.L.R. 476, or Jensen v. Traders & General Ins. Co., supra, 141 Cal. App.2d 162, 296 P.2d 434, cited by appellant. However, the principal point argued by appellant is the sufficiency of the evidence to support the finding of receipt. In the light of our conclusion upon that proposition, it is unnecessary to pass upon this issue.

[6] Cancellation of the policy as to Dickerson was specified to be effective at 12:01 a. m., June 15, whereas the notice to the lien holder merely stated the date, and not the hour, of cancellation. The result is that the policy remained in effect as to the lien holder after its cancellation as to the owner. The evidence shows that this is the established practice of respondent. Appellant contends that the policy cannot be cancelled as to the owner so long as it remains in effect as to the lien holder. But the courts have treated the rights of the owner and the "loss payee" as independent. Protex-A-Kar Co. v. Hartford Acc. & Indem. Co., 102 Cal.App.2d 408, 227 P.2d 509; Lauman v. Springfield Fire & Marine Ins. Co., 184 Cal. 650, 195 P. 50. Here, the policy clearly requires distinct cancellation notice to the lien holder, and clearly establishes a liability to that loss payee independent of that to the owner.

[7] Appellant's final contention is that respondent is estopped to deny liability to her. The argument is that the lien holder notified Dickerson of cancellation of its coverage, thus inducing Dickerson to believe that he was covered for the full day of June 15. But the argument is advanced by plaintiff, not Dickerson. Appellant does not show how any action by her in connection with the collision could have been induced by any reliance upon Dickerson's insurance. If she voluntarily chose to collide with his car, she could not recover from him. But if she had no choice as to the occurrence, she cannot claim to have relied upon the alleged misleading representation. As to Dickerson, the finding that he received notice of cancellation specifying its precise time would defeat any claim of estoppel made in his behalf.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

William (Bill) ATKINSON, Jack Barsby, Alfred E. Brain, Clarence (Pete) Carpenter, Russell A. Cheever, Harriet Crawford, Individually and on behalf of all other instrumental musicians similarly situated, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

John H. ANDERSON, Jr., Burnett F. Atkinson, Robert Bain, Edwin Vance Beach, Roland E. Bundock, Lawrence B. Bunker, George Callender, Individually and on behalf of all other instrumental musicians similarly situated, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.*

Civ. 22272, 22273.

District Court of Appeal, Second District, Division 2, California.

April 24, 1957.

As Modified on Denial of Rehearing May 21, 1957.

Hearing Granted June 19, 1957.

Mandamus proceeding. The District Court of Appeal, Ashburn, J., held that obligation owed by corporate employer under collective bargaining agreement constituted a res within jurisdiction sufficient to support action brought by resident union members for adjudication that they, rather than nonresident trustee of fund set up by union, were entitled to sums owed, even though only substituted service was had on nonresident trustee, especially since convenience of all of real parties in interest would be promoted by completion of litigation in California (where they resided and where most of witnesses and documentary evidence were available).

Order accordingly.

1. Mandamus 🔑163

Where returns to petitions for mandate were demurrers, court would have to accept as true all allegations of petitions.

2. Labor Relations 🔑218

Bargaining representative is responsible to, and owes complete loyalty to, interests of all whom it represents.

3. Mandamus 🔑31

Mandamus was appropriate remedy for petitioners seeking to have superior court compelled to assume and exercise jurisdiction with respect to their applications for preliminary injunction and appointment of receiver.

4. Constitutional Law 🔑305

Fundamental requisite of due process of law in judicial proceeding is opportunity to be heard.

5. Judgment 🔑17(3)

Jurisdiction acquired through substituted service on nonresident whose property, situated within forum, has been seized by court, extends only to property thus seized in the forum rei sitae.

6. Action 🔑36

If action is originally in personam, seizure, such as an attachment, converts it into one quasi in rem upon failure of nonresident defendant to appear and narrows proceeding to one directed at disposition of property so drawn into custody of court.

7. Judgment 🔑812(1)

Where property of nonresident defendant has been seized by court, it is subject to judgment and owner is bound by it, so far as disposition of that property is concerned; and fact that he is indispensable party or that he has been served constructively becomes inconsequential.

8. Courts 🔑19

Situs attributed to intangible, for jurisdiction purposes, depends on what action is to be taken with reference to it.

9. Constitutional Law 🔑309(2)

Adequacy of substituted service, so far as due process is concerned, is dependent on whether or not form of substituted service employed was reasonably calculated to give defendant actual notice of proceeding and opportunity to be heard; and if it was traditional notions of fair play and substantial justice implicit in due process are satisfied. U.S.C.A.Const. Amend. 14.

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* Opinion vacated 316 P.2d 960.

10. Attachment ⚷73
Courts ⚷19
Garnishment ⚷81(1)

Presence of a special or segregated fund may be an aid, but is not a sine qua non, to recognition of situs of debt at domicile of debtor for purpose of attachment or garnishment or as a jurisdictional predicate in any other situation where requirements of substantial justice demand recognition of local situs.

11. Property ⚷6

Being incorporeal, a debt is intrinsically incapable of situs in fact, but obligation to pay debt and right to collect it are equivalents and reside at place of available process upon debtor, and it is immaterial whether such right and obligation are disputed or recognized.

12. Judgment ⚷17(3)

A debt owing by a resident and payable to a nonresident who refuses to appear is a res within jurisdiction of such substantiality as to support judgment disposing of that debt upon basis of constructive service.

13. Process ⚷71

Obligation owed by corporate employer under collective bargaining agreement constituted a res within jurisdiction sufficient to support action brought by resident union members for adjudication that they, rather than nonresident trustee of fund set up by union, were entitled to sums owed, even though only substituted service was had on nonresident trustee; especially where convenience of all real parties in interest would be promoted by completion of litigation in jurisdiction (where they resided and where most of witnesses and documentary evidence were available).

◆

John W. Preston, Los Angeles, Harold A. Fendler, Daniel A. Weber, Beverly Hills, for petitioners.

O'Melveny & Myers, Homer I. Mitchell, Charles G. Bakaly, Jr., Bodkin, Breslin & Luddy, Mitchell, Silberberg & Knupp, Loeb & Loeb, Averill C. Pasarow, Los Angeles, for real parties in interest.

ASHBURN, Justice.

These petitions for writ of mandate present the same legal questions and were heard together, as were the actions in the superior court from which the present applications stem.

They deal with the elastic fictional concept of a jurisdictional res consisting of a debt or contract obligation, and require the determination of the situs to be imputed to it.

The claim of plaintiffs in each action is that defendant American Federation of Musicians of the United States and Canada, an international labor union, acting as their exclusive bargaining agent, defrauded them by making agreements with their employers which divert to one Samuel R. Rosenbaum, as trustee, moneys earned and owing to plaintiffs as wages for services rendered. The trial court held that Rosenbaum, as trustee, is an indispensable party to each action and, as he has not been served personally in this State, the court has no jurisdiction to grant a preliminary injunction or appoint a receiver as a means of sequestering and ultimately determining title to certain moneys confessedly owing by defendant employers and under their agreements payable to said Rosenbaum as trustee.

Atkinson Complaint

The Atkinson case is a representative action brought by 22 instrumental musicians on behalf of all such employees (about 2400 in number) presently or previously hired by defendant motion picture companies. Defendants comprise four classes, (1) American Federation of Musicians of the United States and Canada (hereinafter designated as Federation), (2) numerous motion picture producing companies, e. g., Paramount Pictures Corporation, Loew's, Incorporated, Republic Productions, Inc., Republic Pictures Corporation, (3) numerous corporations engaged in telecasting motion pictures, and (4) Samuel R. Rosenbaum, as trustee.

It is alleged that defendant Federation is an international labor union, that plaintiffs are members of same and of its local known as Musicians' Mutual Protective Association Local No. 47, A. F. of M.; that plaintiffs and those whom they represent are and were employed by defendant motion picture companies as musicians in production of pictures; that Federation is and was their exclusive bargaining agent and as such negotiated with employers the agreements involved in the action. Such agreements were made in 1952 and 1954 and provided that in the event of re-use of any motion pictures on television the employer should make certain "re-use payments" (as the pleader designates them) directly to the employee musicians of various classes, viz., $25 to a musician, $50 to a leader, $50 to a contractor, $75 to an arranger, and $25 to a copyist. Such re-use payments were intended and understood to be "additional wages or compensation to the musicians involved."

Contemporaneously with said 1952 and 1954 agreements the defendant motion picture companies were required by Federation to enter into trust agreements with said Rosenbaum, as trustee, which required them to pay to him in that capacity five per cent of the gross revenues from the use of motion pictures on television (designated in the complaint as "royalty payments"), which said moneys were to constitute a "Music Performance Trust Fund" and be used in arranging the presentation of personal performances by instrumental musicians in such areas throughout the United States and Canada as in the judgment of the trustee would contribute to public knowledge and appreciation of music.

[1] Re-use payments were made to the individual employees until June, 1955, when an amendatory agreement was made by Federation with the employer companies. This was done pursuant to resolution of the International Executive Board of Federation authorizing the president, James C. Petrillo, "to take such measures as he might deem fit to cause to be diverted from the plaintiffs to said trust fund the re-use payments aforesaid, upon the ostensible or alleged ground that the musicians who rendered their services in such motion pictures could not be located, well knowing that in truth and in fact said excuse was untrue and a sham, pretense and contrivance adopted by the Federation to effectuate their aims, purposes and intentions aforesaid and hereinafter alleged."[1] The 1955 agreement thus procured worked a diversion of all accrued and future re-use payments into the trust fund held by Rosenbaum and above described. It is alleged that "Petrillo and the International Executive Board were actuated by the selfish aim and purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation; and in furtherance thereof, used the medium of such trust fund payments to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber the plaintiffs and who were not and are not employed by the motion picture companies, and who make little or no contribution whatever to said trust fund, but who nevertheless benefit as recipients of the trust fund payments made or to be made by the defendant trustee, and whose continued support was and is courted and coveted by Petrillo and the International Executive Board at plaintiffs' expense in the manner aforesaid." Approximately $1,495,000 in re-use payments have been diverted from plaintiffs

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1. The returns to the petitions for mandate in this court are demurrers; hence we must accept as true for present purposes all allegations of each petition; this is also true of each complaint below, for the presence or absence of a res in this jurisdiction must be determined from an inspection of plaintiffs' pleading. 13 Cal.Jur.2d, § 52, p. 538.

into said trust fund since June 15, 1955, and another $5,000,000 will be so diverted unless injunctive relief is granted, so it is alleged. The re-use payments received by the trustee average $175,000 a month. The trust instrument requires that 90 per cent of the existing fund, not already budgeted for expenditure, be disbursed during each period of 12 months. The number of musicians entitled to said re-use payments is approximately 2,400, and they comprise less than one per cent of the total Federation membership. "The entire membership of the Federation consists of approximately 260,000 members. Of this number, not more than 53,000 or less than 21% of the membership of the Federation depend for a livelihood solely upon musical employment, and more than 50% of the total membership are not dependent, wholly or in part, upon such employment; 35% or 88,000 depend for a livelihood entirely on non-musical activities; and 15.4% or 39,000 are fully retired."

[2] Plaintiffs complain that a fraud has been committed upon them by their agent and a constructive trust in their favor exists with respect to moneys now due from defendant companies and remaining unpaid.[2] The petition avers that various companies stipulated at the hearing below that substantial sums of money owing by them had accrued prior to December 31, 1956, and remained unpaid. Also, that Republic Productions, Inc. and Republic Pictures Corporation, conceded that the sum of $67,000 for re-use payments had accrued under their agreements, together with another $126,000 under the trust agreement, assuming its validity (apparently referring to "royalty payments"). All such moneys are payable under the agreement to trustee Rosenbaum who maintains his office in New York City and deposits all receipts in eastern and Canadian banks, none of it in California. The first cause of action[3] seeks declaratory judgment: "Declaring that the provisions thereof requiring the making of such re-use payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee to be invalid and unlawful, including any and all proceedings and measures taken by the defendants in pursuance thereof; * * * Enjoining the defendant motion picture companies and television users from making any further wage increase payments or royalty payments to said trust fund or the defendant trustee; and requiring that the same be paid to those of the plaintiffs who are entitled thereto, or in the case of any deceased musician, to his widow or estate; * * * Requiring that during the pendency of this action any and all such re-use payments or royalty payments in the possession, custody or control of the defendant trustee, or any which may be due or accrue hereafter be impounded; and that the defendant trustee and defendant motion picture companies and television users transmit the same to a receiver to be appointed by the Court for such purposes, or to pay the same directly into Court." Forty-seven defendant California corporations, 24 corporate defendants doing business in California but organized elsewhere, and five partnerships were personally served in this state. Rosenbaum, being resident in New York, was served pursuant to court order by delivery of summons and complaint and motion papers within the State of New York. He has not appeared.

Plaintiffs immediately sought a preliminary injunction against defendant motion picture companies making any payments, then or thereafter payable, to defendant Rosenbaum and moved for the appointment of a receiver to take into possession and control all funds and moneys then payable or thereafter payable to defendant Rosenbaum, as trustee, under any or all of the above mentioned agreements, and for other injunctive relief.

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[2] "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048. See also Upholsterers' Inter. Union of North America v. Leathercraft Furn. Co., D.C., 82 F. Supp. 570, 574.

[3] Other counts seeking recovery under §§ 222 and 224, Labor Code, recovery of money on common counts and the like, do not enter into the problem presented by the first cause of action.

As previously stated, the trial judge held that Rosenbaum is an indispensable party, without whose presence (in the absence of personal service) an injunction or receivership cannot be granted. This for the reason that the obligation owing from a defendant company, under its agreement, for accrued re-use payments does not constitute a res within this jurisdiction sufficient to support an action *in rem,* or *quasi in rem.*

Anderson Complaint

The Anderson complaint presents the same problems. Its averments closely parallel those of Atkinson. Some 91 instrumental musicians, employed by defendant recording companies in the producing of phonograph records, bring a representative action on behalf of about 6,000 fellow workmen similarly situated. Defendants are Federation, some 87 recording companies doing business in California, and said Rosenbaum as trustee. Plaintiffs' membership in Federation and its Local No. 47 is alleged. It is also averred that Federation, as exclusive bargaining agent for musicians engaged in making recordings, effectuated in December, 1948, an agreement with defendant recording companies for a term ending December 31, 1953, which governed wages, hours and other conditions of employment and had a specific wage scale attached thereto. As a part of said 1948 negotiation the employers were required to enter into a trust agreement with Rosenbaum which bound them to pay to him, as trustee, for use as a Music Performance Trust Fund, certain percentages of their gross revenues derived from sales of recordings ("royalty payments"), said fund to be expended in the manner described in the above resume of the Atkinson complaint.

In January, 1954, Federation, as such exclusive bargaining agent, negotiated with the employers for the grant of wage increases for the musicians (plaintiffs and those represented by them), urging that they were entitled to increases over the existing 1948 scale; the recording companies agreed to make wage increases of ten per cent above the existing scale for the first two years of the new agreement, plus further increases aggregating 21 per cent above the existing scale for the last three years, i. e., from January 1, 1956 until December 31, 1958. It was orally agreed that these increases be paid directly to the musicians, but when the arrangement was reduced to writing Federation required the companies to enter into a trust agreement with defendant Rosenbaum bearing date of January 1, 1954, and providing for payment of moneys representing said increased wages into a fund which was substantially the equivalent of the Music Performance Trust Fund of the Atkinson case, to be disbursed in the same manner and for the same purposes. The petition for mandate alleges: "During the negotiations for the 1954 phonograph record labor agreement, Mr. Conkling [then Vice President of Capitol Records] testified that the employers 'recognized the need for some increase to their musician employees'; that the defendant phonograph recording companies recognized the 'need to both reward them and maintain their morale in the studio' and to provide them with incentive 'but that under no circumstances could we consider any additional contributions to the fund' (Conkling Deposition, pages 48–50), but that Petrillo, as President of the defendant Federation 'more or less laid it on the line to us' and required as a condition to not calling a strike that the same amount of money which the defendant recording companies were willing to pay to their musician-employees as wage increases 'be paid to the trust fund instead of paying it directly to the musicians' (Conkling Deposition, pages 53–55); and that solely by reason of Petrillo's demand the defendant recording companies finally agreed to the 'application to the trust fund' of the musicians' wage increases, although the amounts paid to the trust fund are still reflected on the recording companies' books as 'cost for musicians' paid out in connection with the accompaniment of recording artists (Conkling Deposition, page 61)."

Since January, 1954, said moneys have been paid to the trustee and disbursed by him, and the employers have paid the musicians under the 1948 wage scale and nothing more. Approximately $1,737,900 of "wage increase payments" have been paid to said trustee and unless enjoined the companies will pay an additional $2,250,000 of such moneys to the trustee during the term of the 1954 contract. The petition further says it was stipulated below that various defendant recording companies owed substantial sums which were then payable; Fidelity and Specialty Records, Inc. conceded that it owed $9,000 which would be payable on February 15, 1957; Liberty Records, Inc. stated that $10,661.64 plus $6,731.98 had accrued under the agreements for the six months' period ending December 31, 1956. Plaintiffs and the musicians represented by them in the action comprise only 2½ per cent of the membership of Federation, and receive only a minimal indirect benefit from expenditure of said funds. It is alleged that all this was an abuse of the bargaining power by Federation, a fraud upon plaintiffs. Also, that "Federation so acted with the aim and purpose of, and it pursued a plan and scheme of, utilizing and bargaining power of the class or unit for whom the Federation was bargaining, i. e., the plaintiffs in this action, and of trading away the just wage and property interests of the plaintiffs for services actually rendered and to be rendered by them, for the purpose of benefiting others than the plaintiffs through the device of such trust fund payments; and the Federation abused its said duties and responsibilities and its said fiduciary relationship toward the plaintiffs in that all of the acts, omissions, measures and conduct on the part of the Federation hereinbefore and hereinafter alleged were motivated by the Federation's hostility and opposition to the plaintiffs and their interests. * * * The Federation arbitrarily decided and decides whether or when wage increments or increases which the defendant recording companies were and are prepared to pay for the plaintiffs' services shall actually be paid to the plaintiffs or to the trust fund at the plaintiffs' expense, with virtually no corresponding benefits to the plaintiffs for such losses, either in the form of trust fund payments or otherwise."

The labor agreement, paragraph 14(a), provides that a breach of the trust instrument shall at the option of Federation render "of no further force and effect for the duration of your failure to perform such obligations," any of the provisions of the labor agreement. It is also provided in the same paragraph that the Federation shall have the right at all reasonable times to "examine and audit your records and accounts concerning all transactions involving your sale of phonograph records which you shall keep pursuant to said Trust Agreement, and such other records and accounts as may be necessary;" all to the end of verifying and "determining the amount of payments due by you thereunder."

The course of this case was the same as Atkinson. It appears that 32 defendant California corporations, 32 defendants doing business in California as individuals or partnerships, and 23 defendant corporations organized elsewhere but doing business in California, have been served or can be served in this jurisdiction. The prayer of the complaint seeks judgment: "Declaring that the provisions of said 1954 phonograph record labor agreement and 1954 phonograph record trust agreement requiring the making of such wage increase payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee are invalid and unlawful; * * * Adjudging that any and all of such wage increase payments hereafter accruing in connection with, or deriving from, the rendition of any services by the plaintiffs, are and shall be the property of, and shall belong to, those of the plaintiffs who have rendered such services in connection with such phonograph recordings made pursuant to said 1954 phonograph record labor agreement, and adjudged that the plaintiffs have a property right therein." Plaintiffs sought a preliminary injunction and the appointment of a receiver, both of which were denied by the trial judge solely because of his conclusion that jurisdiction is lacking due to failure to serve defendant Rosenbaum within the State of California. In so ruling the court said that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver."

The Law

[3] The instant petitions seek mandate commanding the superior court to assume and exercise jurisdiction with respect to the applications for preliminary injunction and appointment of a receiver. Mandamus is the appropriate remedy, Financial Indem. Co. v. Superior Court, 45 Cal.2d 395, 399, 289 P.2d 233, and we therefore proceed to the merits.

[4–6] Since Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, was decided in 1878, and indeed before that time, see Cooper v. Reynolds, 1870, 10 Wall. 308, 19 L.Ed. 931, it was and has been recognized that due process (as reflected in the Fourteenth Amendment and independently thereof) has been accorded a nonresident defendant whose property, situated within the forum of suit, has been seized by the court, actually or constructively, either as the object of the action or in a proceeding such as attachment ancillary thereto, when he has been served by publication in such manner as to be calculated to give him reasonable notice of the opportunity and necessity of appearing and defending. "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." Baker v. Baker, Eccles & Co., 242 U.S. 394, 403, 37 S.Ct. 152, 155, 61 L.Ed. 386. But the jurisdiction so acquired through substituted service extends only to property thus seized in the *forum rei sitae*. If the action is originally in personam, a seizure such as an attachment converts it into one *quasi in rem* upon failure of the nonresident defendant to appear, and narrows the proceeding to one directed at disposition of the property so drawn into the custody of the court. Quoting from the Cooper case, supra, Pennoyer v. Neff, supra, says, 95 U.S. at page 725: "'If the defendant appears, the cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court.

"But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached, to the payment of the demand which the court may find to be due to the plaintiff.'"

[7] The property within the jurisdiction and so seized is subject to the judgment and the owner is bound by it so far as disposition of that property is concerned. The fact that he is an indispensable party or that he has been served constructively becomes inconsequential.

In the instant cases the res which will sustain constructive service on defendant Rosenbaum must be found, if at all, in the contractual obligation of the employer defendants and accrued payments due and to become due thereunder. It is admitted that there are substantial sums now owing by employer defendants who are within this jurisdiction, able and ready to pay the same. Witness the stipulation that the Republic defendants are holding $67,000 and $126,000 which will be paid to the trustee if the agreement so to do is held valid. The problem at bar reduces itself to the question whether a debt owing by a resident and payable to a non-resident who refuses to appear is a res within this jurisdiction of such substantiality as to support a judgment disposing of that debt upon the basis of constructive service. Defendants assert that it is not, because plaintiffs seek to establish a right to same which resides in themselves as a result of the fraud practiced upon them and do not claim under or through the absent trustee. They assert that an attachment of the debt in an action against the absentee claimant would be valid and to the extent of that property would sustain a judgment based upon the constructive seizure. They argue that this is so because the attaching creditor claims under and through the absentee and admits he is the owner of the debt. They say that the rule does not apply when the plaintiff asserts a right in himself adverse to the non-resident claimant and seeks an adjudication that he, the plaintiff, is the true owner of the debt. The basis of the distinction is not clear on principle and rests upon a ruling of the United States Supreme Court in an interpleader suit later discussed herein. New York L. Ins. Co. v. Dunlevy, 241 U.S. 518, 36 S.Ct. 613, 60 L.Ed. 1140. According to defendants we have a res within this jurisdiction in the one instance and no res in the other.

Being incorporeal, a debt is intrinsically incapable of a situs in fact. This is generally recognized in the authorities, which by a process of inclusion and exclusion have attributed a fictional situs to the debt or refused to do so according to the demands of practical justice in specific factual situations. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." In re Estate of Waits, 23 Cal. 2d 676, 680, 146 P.2d 5, 8. This last sentence explains the disparity in the decided cases.

The fictional nature of the situs of a debt has been recognized repeatedly by decisions of the United States Supreme Court which pass upon the presence or absence of due process.

Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023, holds that a debt may be attached not only at the domicile of the debtor but also in any jurisdiction where effective personal service of process may be made upon him. At page 223 of 198 U.S., at page 627 of 25 S.Ct., the court said: "In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid."

Chicago, R. I. & P. R. Co. v. Sturm, 174 U.S. 710, 715, 19 S.Ct. 797, 799, 43 L. Ed. 1144: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it you must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res,* and gives character to the action as one in the nature of a proceeding *in rem.*"

Propper v. Clark, 337 U.S. 472, 488, 69 S.Ct. 1333, 1342, 93 L.Ed. 1480. Discussing a receivership of certain royalties owed by a resident of New York to a nonresident, the court said: "Pennoyer v. Neff merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at page 733 of 95 U.S., that for an *in rem* action it is sufficient that the property be within the state subject to the control of the Court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. [Citations.] The first requirement can be met in other ways than seizure of title, e.g., by an injunction against transfer of the property [citations]; by an attachment [citation]; or by personal service on the party holding the property within the state [citation]. We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service."

In Standard Oil Co. v. New Jersey, 341 U.S. 428, 71 S.Ct. 822, 95 L.Ed. 1078, it appeared that certain shares of stock in Standard Oil Company, a New Jersey corporation, and certain unpaid dividends declared thereon, had been adjudged escheated to the State because the owners and their addresses were unknown for 14 successive years. The company appealed, claiming among other things that the property had no situs in New Jersey for purpose of escheat; that since the property could not be seized or escheated the company would remain liable to its stockholders (creditors) and a requirement of payment of the dividends to the State would deny due process. The court said, 341 U.S. at page 438, 71 S.Ct. at page 828: "Appellant is a corporation of New Jersey, amenable to process through its designated agent at its registered office. [Citations.] This gave New Jersey power to seize the res here involved, to wit, the 'debts or demands due to the escheated estate'. * * * That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor. [Citation.] It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction, however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property. Whether such property has its situs with the obligor or the obligee or for some purposes with both has given rise to diverse views in this Court.

"We see no reason to doubt that where the debtor and creditor are within the jurisdiction of a court, that court has consitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can 'only arise from control or power over the persons whose relationships are the source of the rights and obligations.' [Citations.] Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible. Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found. The rights of the owners of the stock and dividends come within the reach of the court by the notice, i. e., service by publication; the rights of the appellant by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends."

Security Sav. Bank v. People of State of California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301. Escheat of unclaimed bank deposits. The court said, 263 U.S. at page 285, 44 S.Ct. at page 110: "Over this intangible property the state has the same dominion that it has over tangible property." Also, 263 U.S. at page 287, 44 S.Ct. at page 110: "These are generally considered proceedings strictly in rem. But whether the proceedings should be described as being in rem or as being quasi in rem is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. [Citations.] These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as parties defendant is supplemented by the notice directed to all claimants whomsoever. Moreover, there is no constitutional objection to considering the proceeding as in personam, so far as concerns the bank; as quasi in rem, so far as concerns the depositors; and as strictly in rem, so far as concerns other claimants."

[8, 9] It must be recognized that the situs attributed to an intangible "depends on what action is to be taken with reference to it", In re Estate of Waits, supra, 23 Cal.2d 676, 680, 146 P.2d 5, 8, and that the adequacy of substituted service "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him [defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [citation] implicit in due process are satisfied." Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278.

In conformity with these basic principles California statutes and cases have recognized the propriety of substituted service in cases in which plaintiff seeks to establish his right to a local asset which will be paid or delivered to a non-resident claimant unless an injunction is granted or a receiver appointed.

Section 17, subdivision 3, Code of Civil Procedure, provides: "The words 'personal property' include money, goods, chattels, *things in action,* and evidences of debt." Section 412 of the same code authorizes substituted service upon a non-resident in an action "which relates to or the subject of which is real *or personal property* in this State, in which such person * * * *has or claims* a lien or *interest,* actual or contingent, therein, or in which the relief demanded consist wholly or in part in *excluding such person * * * from any interest therein* * * *." (Emphasis added.)

Loaiza v. Superior Court, 85 Cal. 11, 24 P. 707, 9 L.R.A. 376, dealt with money and securities held in California by Loaiza as agent of two persons named Aguayos who were residents of Mexico. Two English corporations sued in the California superior court to effect a rescission of a purchase from the Aguayos of certain mining properties situate in Mexico, the rescission being based upon alleged fraud. Loaiza and the two Aguayos were made defendants. The Aguayos being non-residents and not served in person or appearing, an order was made enjoining the transfer of the money and securities to them by Loaiza and appointing a receiver of said property. The order was challenged on certiorari as one made without jurisdiction. After discussion of Pennoyer v. Neff, supra, 95 U.S. 714, 24 L.Ed. 565, and various other authorities, the court denied the writ and said, 85 Cal. at page 34, 24 P. at page 712: "And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud.

"Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civ.Code, § 2224. This being so, it cannot be that the arm of equity is so short or so weak that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust.*" This case was not concerned with a mere debt owing by a domiciliary because "[m]ost of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction and are now within the possession, of the court in which the action was brought." 85 Cal. at page 31, 24 P. at page 711. The decision supports the proposition that determination of adverse claims to any res having situs within the jurisdiction affords proper occasion for substituted service upon an absentee claimant.

Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, was an action for maintenance without divorce; plaintiff also sought to set aside as fraudulent certain transfers made by defendant Owen Murray to his brother James Murray who was also made a defendant. Both of them being absent from the jurisdiction, service was made by publication. The property involved consisted of mortgage notes and real estate. A receiver was appointed. The transfers were adjudged to be fraudulent and were set aside. Upon appeal the jurisdiction was attacked but the court upheld it upon the theory that the receiver's possession of the property was a seizure which formed valid basis for constructive service and a judgment binding that specific property. To that end the receivership was analogized to an attachment. 115 Cal. at page 276, 47 P. 37. Here again the Supreme Court committed itself to the doctrine that determination of conflicting claims to a res found within the jurisdiction is proper though based on constructive service of the absent claimant. Nichols v. Superior Court, 1 Cal.2d 589, 36 P.2d 380, 95 A.L.R. 894, makes substantially the same holding, relying upon Murray v. Murray, supra, as good precedent.

Although the foregoing decisions had no occasion to apply their doctrine to a mere chose in action, a debt owing by a resident, that step was taken by the district court of appeal in Standard Dredging Co. v. Title Ins. & Trust Co., 96 Cal.App. 93, 273 P. 871. Title Insurance and Trust Company was trustee under an agreement securing certain collateral trust notes; the funds for redemption had been deposited with it and the land reconveyed. Plaintiff sued the title company, Mrs. Kendall Morgan and George C. Morgan, Jr., alleging that it owned certain of the notes and that they had been delivered to Morgan, Jr., as its agent; that he disobeyed his instructions and never returned the notes which came into possession of Mrs. Kendall Morgan. Plaintiff sought judgment against the title company for the amount of the funds alleged to be owing to it (offering to give the company adequate indemnity), and served the two Morgans by publication under court order. Mrs. Kendall Morgan appeared and claimed ownership of the note and a right to the funds in the hands of the trustee. The trustee took the position that George C. Morgan, Jr., was a necessary party; "that he is not within the state of California and therefore the court has no jurisdiction of any property or any choses in action belonging to such defendant." 96 Cal.App. at page 96, 273 P. at page 872. On this ground the court granted a nonsuit, which was reversed on appeal. The reviewing court relied upon Pennington v. Fourth Nat. Bank, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713, among others,—a case discussed *infra*. The title company had control over an intangible, a debt owing to the owner of the notes, and the case held that that was a res within this State sufficient to sustain a valid judgment determining ownership of the same after service of the non-resident claimant by publication. At page 97 of 96 Cal.App., at page 872 of 273 P. the court quotes from Cooper v. Reynolds, supra, 10 Wall. 317, 77 U.S. 317: "'So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court * * *. The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem.*'" It also quotes Security Sav. Bank v. People of State of California, supra, 263 U.S. 282, 44 S.Ct. 108, as follows: "'Seizure of the deposit is effected by the personal service made upon the bank. Provident Inst. for Saving in Town of Boston v. Malone, 221 U.S. 660, 31 S.Ct. 661, 55 L.Ed. 899, 34 L.R.A., N.S., 1129. Thereby the *res* is subjected to the jurisdiction of the court.'" See also, McElroy v. McElroy, 32 Cal.2d 828, 831–832, 198 P.2d 683.

Pennington v. Fourth Nat. Bank, supra, 243 U.S. 269, 37 S.Ct. 282, was a divorce action in which the wife, in order to insure payment of alimony, joined the bank in which defendant had an account; the court made a preliminary injunction against the bank paying out any portion of the deposit; finally it was ordered to pay the whole thereof to plaintiff wife, and that was done. The husband later presented his check for payment, it was dishonored, and he sued the bank claiming that the orders of the divorce court were void for want of jurisdiction because he was a non-resident and had been served by publication only. This contention was rejected, the court saying, in part: "The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. * * * The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is *an admitted indebtedness or a contested claim.* It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized." 243 U.S. at page 271, 37 S.Ct. at page 282. (Emphasis added.)

Omaha Nat. Bank of Omaha, Neb. v. Federal Reserve Bank, 8 Cir., 26 F.2d 884, 885. The trail court dismissed the action for want of jurisdiction, the Circuit Court of Appeals reversed and the Supreme Court denied certiorari in [Wyoming Nat. Bank of Casper, Wyo. v. Omaha Nat. Bank] 278 U.S. 615, 49 S.Ct. 19, 73 L.Ed. 539. The action was brought under § 57 of the Judicial Code, § 118, Title 28, U.S.C.A., by Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri; Wyoming National Bank of Casper, Wyoming; First National Bank of Cheyenne, Wyoming, and T. E. McClintock as receiver of the last named bank. The said section deals with local actions and, as stated by the court, requires not only diversity of citizenship but another indispensable showing, namely, "that the subject-matter, the res, is within the territorial jurisdiction of the court." The court said that the purpose of the suit was to enable plaintiff "to obtain a judgment or decree that will bind the res, though the defendants are all nonresidents and cannot be personally bound unless they enter general appearance or should be served within the district." 26 F.2d at page 885. Plaintiff, claiming to have been defrauded by Wyoming National Bank of Casper, and having given notice of rescission, 26 F.2d at page 887, sought to enforce an equitable title to funds on deposit with Omaha Branch of Federal

Reserve Bank of Kansas City, Missouri. The action was brought in the District of Nebraska wherein defendant Federal Reserve Bank was doing business. Plaintiff sought an injunction against payment of said deposit to the Wyoming National Bank and prayed judgment to the effect that the deposit should be paid to it. The court held that there was a constructive trust of the deposit due to the fraud in its acquisition, 26 F.2d at page 887. It was contended that there was no res within the jurisdiction of the court. At page 888 of 26 F.2d the opinion says: "In every practical and business sense the $60,000 is there, and it is a sacrifice of substance to form to say it is not. For remedial purposes on plaintiff's bill we think the situs of any property interest in the transferred deposit was at Omaha." This language is followed by citation and quotation of various cases, including Chicago R. I. & P. Ry. Co. v. Sturm, supra, 174 U.S. 710, 19 S.Ct. 797, and Pennington v. Fourth Nat. Bank, supra, 243 U.S. 269, 37 S.Ct. 282. The case is essentially four-square with the one at bar, for it recognizes a debt owing by a resident company as a res within the jurisdiction of his residence, a res which will support substituted service in an action brought and maintained for the purpose of adjudicating adverse interests thereto, one of the claimants being a non-resident.

Respondents rely principally upon New York L. Ins. Co. v. Dunlevy, supra, 241 U.S. 518, 36 S.Ct. 613. Effie J. Gould Dunlevy recovered from New York Life Insurance Company the surrender value of a life insurance policy which she claimed to have been assigned to her; the judgment was rendered by the California superior court. The insurance company claimed res judicata on the basis of a judgment rendered by a state court of Pennsylvania. The policy was a tontine which had matured and the company recognized an obligation to pay the sum of $2,479.70 to one of two adverse claimants, either Mrs. Dunlevy or her father, Joseph W. Gould. So it brought an interpleader action in Pennsylvania, deposited the money in court, personally served Gould who lived in the state, and served Mrs. Dunlevy by publication, as she resided in California. She defaulted and judgment was rendered in favor of Gould. On appeal from the later California judgment it was held that there was no res judicata because the Pennsylvania judgment was void as to Mrs. Dunlevy for want of personal jurisdiction over her. Speaking of a certain judgment which Boggs & Buhl had recovered against Mrs. Dunlevy, based on valid personal service, the court, through Mr. Justice McReynolds, said, 241 U.S. at page 520, 36 S.Ct. at page 613: "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the court of common pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company, and, if found to exist, then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. * * * But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Shinn, Attachment & Garnishment, § 674. See Cross v. Armstrong, 44 Ohio St. 613, 623, 625, 10 N.E. 160. * * * The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." It was not held that there was no res in Pennsylvania; that question was not discussed. The citation of the Ohio case of Cross v. Armstrong, 10 N.E. 160, indicates that what Mr. Justice McReynolds had in mind was the proposition that an interpleader action is essentially in personam and cannot be converted into a proceeding in rem by deposit of the disputed money in court. In the Cross case, supra, it is said at page 165: "The proceeding was clearly one of interpleader, and that only. We do not understand that an action *in personam,* simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action *in rem,* or that an interpleader suit is, in its nature, a proceeding *in rem.* In the Philadelphia case the company could have begun the action by original bill, and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly, the action thus begun would not have been *in rem.* Then, does the mere fact that the company, (the debtor,) being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem?* We think not."

The Dunlevy case has been cited from time to time as support for a rule that the presence of an intangible within the forum does not authorize a determination of the rights of the creditor thereto unless personal service is had upon him within the jurisdiction. This is exemplified by Estin v. Estin, 334 U.S. 541, at page 548, 68 S.Ct. 1213, at page 1218, 92 L.Ed. 1561, which considered the effect of a Nevada default divorce upon a previous New York decree for separation and maintenance: "Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. It can, for example, levy a tax on its transfer by will [citations], appropriate it through garnishment or attachment [citations], collect it and administer it for the benefit of creditors. [Citations.] But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; Hart v. Sansom, 110 U.S. 151, 3 S.Ct. 586, 28 L.Ed. 101; New York L. Ins. Co. v. Dunlevy, 241 U.S. 518, 36 S.Ct. 613, 60 L.Ed. 1140." But general statements such as this, divorced from the actual ruling, do not advance the inquiry very far. The holding in Estin is that the husband, by taking up residence in Nevada, could not serve the wife by publication and there rid himself of his existing obligation to her through a default judgment. That is but an expression of the self-evident truth that a debtor cannot select a remote forum, effect substituted service upon his creditor and terminate his obligation through a judgment rendered at a place where the creditor is not able to assert his rights. In such a proceeding there is no res at the forum because the ends of practical justice forbid, rather than promote, extension of the fictional intangible res to the jurisdiction so selected by the plaintiff. The basic difficulty faced by the insurance company in the Dunlevy case, supra, was that it was attempting to select its own jurisdiction for an elimination of claims of remote non-residents to the debt owing by it.

The actual effect of the Dunlevy holding is that a debtor cannot pick his own forum for determination of conflicting claims to the debt owed by him. The case does not hold (and the question seems not to have been presented) that one claimant cannot sequester such property at the domicile of the debtor and there determine the validity of his claim as against another claimant who is a non-resident and served by publication only. Nor does it hold that it is essential to the existence of a jurisdictional res at the domicile of the debtor that the claimant who has sequestered the debt must claim under the nominal creditor (as in attachment), rather than assert a claim in his own right.

So far as it was able to do so, and as a practical matter, Congress reversed the policy of the Dunlevy ruling of 1916 by passage of the Federal Interpleader Act in 1917, Chap. 113, 39 Stat. 929, which provided a remedy for insurance companies and fraternal societies enabling them to maintain in the federal courts interpleader actions where one or more citizens, resident in the territorial jurisdiction of the court, claim adversely to one or more citizens of another state insurance moneys which the company or society concedes to be payable. The statute was amended in 1925, 1926, 1936, 1948 and 1949. In its present form, 28 U.S.C.A. §§ 1335, 1397, 2361, it is available to any person, firm or corporation having money or property of $500 or more payable to adverse claimants who are citizens of different states. See Annos. in 106 A.L.R. 626 and 17 A.L.R.2d 741.[4]

The Dunlevy case, supra, has not been applied to a situation such as that presented at bar. Although it was not cited in the opinion in Omaha Nat. Bank of Omaha, Neb. v. Federal Reserve Bank, supra, 8 Cir., 26 F.2d 884, that ruling made in 1928, impliedly supports the view that Dunlevy does not control a controversy such as we have here.

It is interesting to note that some of the state courts have had no difficulty in finding a res within the court's jurisdiction in an action brought against a resident insurance company to determine the right to proceeds of a policy where the adverse claimant is a non-resident who has been served by publication only. See State ex rel. Richardson v. Mueller, 230 Mo.App. 962, 90 S.W.2d 171, 174; Oishei v. Pennsylvania Railroad Co. 117 App.Div. 110, 102 N.Y.S. 368, 371; Id., 191 N.Y. 544, 85 N.E. 1113; Morgan v. Mutual Benefit Life Ins. Co., 189 N.Y. 447, 82 N.E. 438, 440; Kumor v. Scottish Union & National Ins. Co., 47 Wyo. 174, 33 P.2d 916, 920–921; Taylor v. Security Mut. Life Ins. Co., 38 Misc. 575, 77 N.Y.S. 1012.

Respondents place considerable reliance upon Bank of Jasper v. First Nat. Bank, 258 U.S. 112, 42 S.Ct. 202, 66 L.Ed. 490. Bank of Jasper, incorporated and doing business in Florida, had received certain funds in a general deposit but had immediately issued against same certificates of deposit which absorbed the entire credit; the certificates became the property of First National Bank of Rome, Georgia. It sued the Jasper bank on these obligations and was met by the plea of res judicata based upon judgments obtained against that bank in Florida in suits brought by persons who claimed to have been defrauded and sought to impress a trust upon the debts represented by the certificates; there had been no personal service upon the Georgia bank in the State of Florida, merely constructive service followed by nonappearance of this non-resident defendant. It was held that there was no res judicata because there was no jurisdiction over the defendant or any of its property. At page 119 of 258 U.S., at page 204 of 42 S.Ct. the court said: "The contention that the proceeds of the discounts of the notes constitute a res within the state, of which the certificates of deposit were merely evidence, rests upon a misapprehension. No specific fund was ever set apart by the Jasper bank. Its discounts resulted in general credits by the bank to the makers of the notes. * * * The credits—called deposits—so transferred, became an indebtedness of the Jasper bank to the American Company. That indebtedness, if it had rested in open account, would have been property of the creditor within the state of Florida. In an appropriate proceeding it might have been reached to satisfy a claim against its owner. Pennington v. Fourth Nat. Bank, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713, L.R.A.1917F, 1159. But the suits in the state court were not proceedings of that character. In them the complainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its co-respondents, but to the complainant. Moreover, there was no indebtedness on open account to any of the Georgia corporations; for this account had been closed by giving certificates of deposit; and these had been transferred to the First National Bank. * * * As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not, in the absence of consent, acquire jurisdiction to determine the liability of maker to holder."

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[4] The fear expressed by defendant employers that they will be subjected to double payment, as in the Dunlevy case, probably could have been obviated by invoking this Federal Interpleader Act.

We apprehend that the reference to a specific fund, found in this and certain other cases, does not point to a controlling factor in the problem of presence or absence of a res. The court did not hold that a specific fund in Florida was essential to a res; it merely remarked upon the absence of one in taking the step to its further statement (probably dictum) that the indebtedness "if it had rested in open account, would have been property of the creditor within the state of Florida." The credit having been converted into a negotiable instrument which had an actual situs in Georgia, the court held that there was no res and hence no basis for a Florida judgment *in rem* or *quasi in rem.*

[10] Once it is recognized that the doctrine which gives a particular situs to an intangible is a fiction created to meet the needs of practical justice it must be further conceded that the recognition of a special or segregated fund as a res is but one of the steps in the process of transition from corporeal to incorporeal property in the field of situs; that the presence of a special or segregated fund may be an aid but it is not a *sine qua non* to the recognition of situs of a debt at the domicile of the debtor,—not only for the purpose of attachment or garnishment, but also as a jurisdictional predicate in any other situation where the requirements of substantial justice demand the recognition of such local situs.

That a special or segregated fund is not of the essence of situs of an intangible is recognized in State v. Security Savings Bank, 186 Cal. 419, 199 P. 791, affirmed in 263 U.S. 282, 44 S.Ct. 108, supra. Considering the question of due process in a proceeding for escheat of bank deposits, the court, after quoting the statute, said: "This language, if taken literally according to its legal significance, would be appropriate to describe money in the custody of the bank as bailee of its depositors. It is evident, however, from the context and from the purpose and object to be accomplished, that it was not intended to apply exclusively to moneys held by the bank as such custodian or bailee, although possibly it might include such special deposits. It is not an accurate use of language to speak of the general deposits in an ordinary bank as the money of the depositors. When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank. The relation thereby established between the bank and the depositor is that of debtor and creditor and not that of bailee and bailor. The bank is the debtor and the depositor the creditor to the amount of the deposit. It is of some importance, in view of the argument presented, to note that the statutes in question do not provide for an actual seizure of any money, either before or after the judgment, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes to the depositor." 186 Cal. at page 423, 199 P. at page 792. "The argument of the appellant on this subject is mainly based on the proposition that the proceeding authorized by section 1273 is an action *in personam,* and that the judgment therein to be rendered is a personal judgment against the bank and the several depositors made defendants therein. This proposition is not maintainable. The judgment does not seek to declare or enforce any obligation of the depositors or any of them to any other person or persons. Its sole object with respect to them is to act upon the obligations they respectively hold against the bank, to effect a substitution of the state for the bank with respect to such obligation, and to transfer the title of that particular property of the depositors, respectively, to the state. Such proceedings are not proceedings strictly *in rem;* but they are proceedings *quasi in rem.* The proceeding is not in that respect distinguishable from an ordinary garnishee process against a debtor of a defendant to appropriate the debt to the payment of the plaintiff's demand. In such cases the defendant in the action may be a non-resident or not within reach of the process of the state court. But if service is made on the garnishee, the court has jurisdiction to dispose of that asset of the defendant and apply it to the payment of the plaintiff's debt." 186 Cal. at pages 425–426, 199 P. at page 794. "The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank, and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem.*" 186 Cal. at page 427, 199 P. at page 794.

[11–13] Counsel for respondents argue that defendant Rosenbaum can have no property in a debt within this state unless it is conceded that the money is owed to him rather than someone else; that the obligation owed by the debtor is not property, for the chose in action consists of the right of the creditor to enforce the debtor's obligation; that unless that right be conceded there can be no property of the non-resident creditor, no res, within the jurisdiction. The argument proves too much. The word "debt," when used in discussion of situs, necessarily includes the right of enforcement of the obligation, which can occur only at the domicile of the debtor or in such other place as service of process may be had upon him. But it does not follow that it must be a recognized right; a disputed claim properly may fall in the same category. The definition of personal property in subdivision 3 of § 17, Code of Civil Procedure, includes "things in action," as does § 14, subdivision 3, Civil Code. See Finley v. Winkler, 99 Cal.App.2d Supp. 887, 890, 222 P.2d 345. The right to recover a debt is commonly termed a chose in action, and that term is defined in Bouv. Law Dict., Rawle's Third Revision, p. 483, as "a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action." Where situs is concerned the obligation to pay and the right to collect are equivalents and they reside at the place of available process upon the debtor.

Inasmuch as our present task is to determine whether the doctrine of intangible res shall be recognized as applying to a controversy over ownership of a debt, considerations of practical justice may not be ignored. The only impediment to the exercise of jurisdiction in the instant cases appears to be the unwillingness of defendant Rosenbaum to appear therein. The convenience of real parties in interest would be promoted by completion of the litigation in this jurisdiction where most of them reside and where most of the witnesses and documentary evidence seem to be available. We are persuaded that the debt owing by any respondent company constitutes a sufficient res in this jurisdiction to sustain an order or judgment based upon substituted service in a controversy over ownership of that debt, and that petitioners should prevail in these proceedings.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein.

FOX, Acting P. J., and RICHARDS, J. pro tem., concur.

150 Cal.App.2d 119

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest DEWSON, Defendant and Appellant.

Cr. 3329.

District Court of Appeal, First District, Division 2, California.

April 15, 1957.

Hearing Denied June 12, 1957.

Defendant was convicted of possession of heroin, transportation of heroin, and assault. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., entered judgment of conviction, order denying motion to dismiss, and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law 🔑1134(10)

Denial of motion of defendant to set aside information was reviewable on appeal from judgment of conviction. West's Ann.Pen.Code, §§ 995, 1237.

2. Criminal Law 🔑1104(1)

Where record disclosed that motion to set aside information was properly made by defendant but did not indicate grounds for motion, and transcript of preliminary examination was not brought up on appeal, error could not be assumed by District Court of Appeal, in absence of such transcript. West's Ann.Pen.Code, §§ 995, 1237.

3. Criminal Law 🔑1128(1)

Matters outside record cannot be considered on appeal.

4. Criminal Law 🔑1119(1)

Where record disclosed presence of counsel at preliminary hearing and trial of defendant, there was no basis for contention of defendant that he was deprived of due process of law and effective aid of counsel in violation of federal and state constitutions. West's Ann.Const. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

5. Witnesses 🔑216

Generally, if disclosure by police officer of identity of informer will supply useful evidence to vindicate innocence of defendant or lessen risk of false testimony or is essential to proper disposition of the case, disclosure by police officer will be compelled. West's Ann.Code Civ.Proc., § 1881, subd. 5.

6. Witnesses 🔑216

Where informants of police officer did not appear as witnesses against defendant in prosecution for possession of heroin, transportation of heroin, and assault, and defendant did not show how identity of informers was essential to his defense, and the trial court did not find that identity of informers was essential to disposition of the case, refusal to require police officer to disclose identity of informants was not error. West's Ann.Pen.Code, §§ 245, 686; West's Ann.Code Civ.Proc., § 1881, subd. 5; West's Ann.Health and Safety Code, § 11500.

7. Criminal Law 🔑736(1)

Admissibility of evidence is a matter for the court.

8. Criminal Law 🔑736(1)

Trial court did not err in determining issue of reasonableness of search and seizure as a matter of law out of hearing of jury.

9. Criminal Law 🔑394

Where defendant was arrested and his automobile was searched without a warrant, defendant established a prima facie case that evidence against him was obtained by an unlawful search and seizure, and burden rested on the State to show proper justification. West's Ann.Pen.Code, § 836.

10. Arrest 🔑63(4)

"Reasonable cause" within meaning of section of the Penal Code providing that an officer may make an arrest without a warrant when a felony has in fact been committed, and he has "reasonable cause" for believing person arrested to have committed it, is such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that person arrested is guilty. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

11. Arrest 🔑63(4)

A "reliable informant" on whose information a police officer may arrest without a warrant, means a person whose information has in the past led the police to valid suspects. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reliable Informant".

12. Arrest 🔑63(4)

Conduct of defendant in driving his automobile away from police officers, who sought to question him, created probable cause for lawful arrest of defendant, without a warrant. West's Ann.Pen.Code, § 836.

13. Criminal Law 🔑1158(1)

Determination of trial court that there was probable cause for arrest of defendant without a warrant should be accepted by reviewing court. West's Ann.Pen.Code, § 836.

14. Criminal Law 🔑260(11), 1159(3)

Conflicts and even testimony, which is subject to justifiable suspicion, do not justify reversal of judgment of conviction, since it is the exclusive province of the trial judge or jury to determine credibility of a witness and truth or falsity of facts on which a determination depends.

15. Arrest 🔑71

A search incident to a lawful arrest extends to the person as well as the premises under his control.

16. Arrest 🔑71

Criminal Law 🔑395

Where defendant was lawfully arrested on suspicion of dealing in narcotics, narcotics found in automobile, which defendant was driving at time of arrest, were the product of a lawful search and seizure and were admissible in evidence.

17. Poisons 🔑9

Evidence sustained conviction for possession of heroin. West's Ann.Health & Safety Code, § 11500.

18. Poisons 🔑9

Evidence sustained conviction for transportation of heroin. West's Ann. Health & Safety Code, § 11500.

19. Assault and Battery 🔑55

Gist of offense of assault by means of force likely to produce great bodily injury is the likelihood of bodily injury as result of force used, and degree of force used is not as significant as the manner of the use, and it is not necessary that injuries be serious.

20. Criminal Law 🔑260(11)

In prosecution for assault by means of force likely to produce great bodily injury, what kind of force is likely to produce great bodily injury is a question of fact for trial court. West's Ann.Pen.Code, § 245.

21. Assault and Battery 🔑92

Evidence sustained conviction for assault by means of force likely to produce great bodily injury. West's Ann.Pen.Code, § 245.

22. Criminal Law 🔑419(12)

In prosecution for possession of heroin, for transportation of heroin, and for assault, trial court did not abuse its discretion in refusing to admit in evidence an anonymous letter, which was received by defendant's attorney, and which stated that the heroin found in defendant's automobile belonged to the writer of the letter. West's Ann.Pen.Code, § 245; West's Ann. Code Civ.Proc., § 1954; West's Ann.Health & Safety Code, § 11500.

23. Constitutional Law 🔑266

In prosecution for possession of heroin, for transportation of heroin, and for assault, trial court's refusal to admit in evidence an anonymous letter, which was received by defendant's attorney, and which stated that the heroin found in defendant's automobile belonged to the writer of the letter, did not constitute a denial of due process. West's Ann.Pen.Code, § 245;

West's Ann.Code Civ.Proc., § 1954; West's Ann.Health & Safety Code, § 11500.

24. Criminal Law ⇐448(2)

In prosecution for possession of heroin, which was found in defendant's automobile, for transportation of heroin, and for assault, statement of witness that he had heard about defendant's automobile from a confidential informant was not a statement of opinion as maintained by defendant but one of fact. West's Ann.Pen.Code, § 245; West's Ann.Health & Safety Code, § 11500.

25. Criminal Law ⇐1166½(1)

Statement made by witness outside presence of jury was not prejudicial to defendant's cause.

26. Witnesses ⇐77

Trial court did not err in allowing District Attorney to reopen her questioning of witness for the prosecution on voir dire, since the matter was properly within the discretion of the trial court.

27. Criminal Law ⇐412(1)

In prosecution for possession of heroin, transportation of heroin, and assault, trial court did not err in admitting as accusatory statements, testimony of police officer that defendant stated that he did not know anything about narcotics. West's Ann.Pen. Code, § 245; West's Ann.Health & Safety Code, § 11500.

28. Criminal Law ⇐369(1)

In prosecution for possession of heroin, for transportation of heroin, and for assault, introduction in evidence of switch blade knife found by officers in automobile of defendant and testimony relating thereto was not error on ground that it was evidence of another crime, because possession of a switch blade knife was a misdemeanor under city ordinance, where ordinance was not in effect at time of arrest of defendant. West's Ann.Pen.Code, § 245; West's Ann. Health & Safety Code, § 11500.

29. Criminal Law ⇐706, 713

In prosecution for possession of heroin, for transportation of heroin, and for assault, District Attorney was not guilty of misconduct in offering switch blade knife, which was found in defendant's automobile, in evidence and in making certain comments to the jury. West's Ann.Pen.Code, § 245; West's Ann.Health & Safety Code, § 11500.

30. Criminal Law ⇐911

Motion for new trial was addressed to sound discretion of trial court.

31. Criminal Law ⇐911

In prosecution for possession of heroin, for transportation of heroin, and for assault, trial court did not abuse its discretion in denying defendant's motion for new trial. West's Ann.Pen.Code, § 245; West's Ann.Health & Safety Code, § 11500.

◆

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

This appeal is taken from the judgment of conviction and sentence; the order denying the motion to dismiss under Penal Code Section 995; and the order denying defendant's motion for a new trial.

By information, the defendant was charged with the following:

(1) Possession of a quantity of heroin in violation of Health & Safety Code, Section 11500.

(2) Transportation of the same quantity of heroin in violation of Health & Safety Code, Section 11500.

(3) Assault by means of a force likely to produce great bodily injury in violation of Penal Code Section 245.

The defendant's motion to dismiss under Penal Code Section 995 was denied. The jury found the defendant guilty of the three offenses charged in the information.

The defendant has urged numerous grounds of appeal which required a rather detailed statement of facts to provide proper background for a discussion of the questions presented.

Approximately one week before June 11, 1956, Clarence Coster, an inspector of the State Bureau of Narcotic Enforcement was told by a paid informant that a negro known as "Bozo", driving a 1953 Oldsmobile "98" Convertible with a black top and light colored body was selling dolophine, a synthetic morphine. Information which Coster received from this informant had led to the arrest of narcotic dealers on three other occasions. No attempt was made by Inspector Coster to further check the credibility or qualifications of the first informant. Substantially similar information was given to Coster by a second informant, except that neither the name of the individual involved nor the particular narcotic was given. Coster had received information from the second informant on other occasions, but no arrest resulted. At about 7:30 p. m. on June 11, 1956, Inspector Coster and Inspector Shoemaker, also of the Bureau of Narcotic Enforcement, were in the vicinity of Lyon Street between Hayes and Grove Streets in San Francisco. They were in a 1956 Ford Sedan owned by the State but not marked as a State or law enforcement vehicle. They were both wearing ordinary clothing. Neither inspector had seen or heard of the defendant before June 11, 1956, or had any information as to the defendant's name or nickname. Coster saw the defendant driving north on Lyon Street in a 1953 Oldsmobile "98" Convertible with a black top and light blue or green body. The inspectors observed the defendant park on the east side of the street, get out of his automobile and walk across the street to a small grocery store on the corner of Lyon and Hayes. About half an hour later, the defendant returned to his automobile. At this time the inspectors observed that there were no license plates on the defendant's automobile. The defendant testified that he had a temporary license sticker on the window. Inspector Coster drove the State automobile and stopped it about three feet diagonally in front of the defendant's vehicle. Coster testified that he turned on the red spot light on the left front corner of the State automobile. The defendant testified that there was no red spot light. Coster got out of the State automobile and started to go around to the front of the defendant's automobile with his badge in his hand, while Shoemaker approached the driver's side of the defendant's automobile. Shoemaker testified that he identified himself as a police officer, displayed his badge, and asked the defendant to open the door. The windows of the defendant's car were closed. Both inspectors were armed but they testified that they did not display their guns. The defendant testified that the inspectors approached his car with guns in their hands and beat on the windows with their guns; that the motor of his car was running so that he could not hear anything, and that he was frightened of an attack or robbery. The defendant backed up his automobile a few feet and then drove forward at a high rate of speed down Lyon Street. As the defendant drove forward, his left front fender threw Coster who was standing between the defendant's car and the State vehicle, against the State vehicle. Coster received minor scratches on his leg as a result. Both inspectors fired shots at the fleeing automobile. One of the bullets went into the left front driver's window of the defendant's automobile and slightly wounded the defendant. Two other bullets entered the rear window and went out the front windshield. The inspectors then pursued the defendant with a red light and siren. They lost sight of the defendant for several blocks, but then saw him again on Geary Street near Sears and Roebuck, traveling at a very slow rate of speed. The inspectors pulled their automobile in front of the defendant, forcing him to stop. Coster approached the defendant and asked, "What is the big idea?" The defendant replied, "I thought you wanted me for traffic tickets." Coster asked, "How about narcotics?" the defendant replied, "I don't know anything about narcotics." Neither of the inspectors asked the defendant for his name or any identification. Without further questioning the defendant was handcuffed and placed in the State automobile. Inspector Shoemaker drove the defendant's automobile back to the scene of the shooting. Inspector Shoemaker testified that the transmission of the defendant's car was broken. The defendant testified that his car was in excellent condition and that he had slowed down because he heard the police siren, not because he was having motor trouble. When other police units arrived, Coster asked Shoemaker to take the State vehicle and search the route of the chase for any narcotics the defendant might have thrown from the vehicle. Meanwhile, Coster searched the defendant's automobile with a flashlight. On the front floor board under the ledge of the right seat, in a position not visible to the driver, Coster found a small white packet, and under the floor mat a four inch snap blade knife. (People's Exhibit No. 2) The defendant was taken to the Park Emergency Hospital for treatment of his wound. Then he was taken back to the police station, booked and questioned. The defendant denied any knowledge of the packet and the knife, or of how these objects came to be in his automobile. He stated that other people frequently rode with him and had done so, earlier on the evening of June 11, 1956. A subsequent chemical analysis of the contents of the packet disclosed that it contained a grain and a half of heroin.

The defendant made appropriate and timely objections to the introduction of the packet and the knife and the testimony of the inspectors at the preliminary hearing and at the trial.

The defendant raises numerous grounds of appeal which will be taken up in order:

[1-3] (1) That his motion to set aside the information under section 995 of the Penal Code was improperly denied. Under Penal Code, Sec. 1237 this motion is reviewable on appeal from the judgment of conviction. People v. Costa, 141 Cal.App.2d 795, 297 P.2d 667; People v. Simmons, 119 Cal. 1, 50 P. 844; People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766. The record before us discloses that such a motion was properly made, but does not indicate the grounds for the motion. As the transcript of the preliminary examination was not brought up on appeal, error cannot be assumed in its absence. People v. Scott, 24 Cal.2d 774, 151 P.2d 517. Matters outside the record cannot be considered on appeal. People v. Villarico, 140 Cal.App.2d 233, 295 P.2d 76; People v. Croft, 134 Cal.App.2d 800, 286 P.2d 479; People v. Levine, 114 Cal.App.2d 616, 250 P.2d 645.

[4] (2) That he was deprived of due process of law and effective aid of counsel in violation of Amendment XIV of the United States Constitution, and Article I, Secs. 1 & 13 of the State Constitution. As the record discloses the presence of counsel at the preliminary hearing and the trial there is no basis for this contention.

(3) That he was denied the right to ascertain the identity of the informants against him or any information about them. Defendant maintains that his case presents an exception to Code of Civil Procedure, Sec. 1881, Subd. 5, which provides as follows: "A public officer can not be examined as to communications made to him in official confidence, when the public interest would suffer from the disclosure."

[5, 6] It has not been determined by our Supreme Court whether a defendant has the right to ascertain the identity of the informers against him. In People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50, where the defendant was charged with the possession of narcotics, the privilege to refuse to disclose the identity of the informer was upheld. The general rule was well stated in Wilson v. United States, 5 Cir., 59 F.2d 390 at page 392: "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled." (Wigmore, Evidence, 3d Ed., Vol. VIII, p. 751, § 2374; Regina v. Richardson, (1863) 176 Eng.Rep. 318.) In the federal courts it has been held (in cases

where the officers are in possession of other information) that the name of the informer need not be revealed unless it is essential to the defense, as for example, where the legality of the arrest turns on the officer's good faith. Scher v. United States, 305 U.S. 251 at pages 253–254, 59 S.Ct. 174, 83 L.Ed. 151; United States v. One 1941 Oldsmobile Sedan, 10 Cir., 158 F.2d 818, 820. In some states it has been held (in cases where only informer information was relied upon) that the identity of the informer must be disclosed to test the officers' justification in making the arrest. Hill v. State, 151 Miss. 518, 118 So. 539, 540; Smith v. State, 169 Tenn. 633, 90 S.W. 2d 523, 524. The federal courts also recognize a distinction between the cases where the informer is that and nothing more, in which case the defendant is not entitled to have his identity disclosed and cases where the informer is a participant in the offense. Sorrentino v. United States, 9 Cir., 163 F.2d 267. This view was followed by this court in People v. Lawrence, Cal.App., 308 P.2d 821. The informants in this case did not appear as witnesses against the defendant. There would therefore seem to be no violation of Penal Code, Section 686 which guarantees the right of confrontation in California. People v. Beatty, 132 Cal.App. 376, 22 P.2d 757. The instant case seems to fall within the rule of People v. Gonzales. Furthermore, the defendant has not shown how the identity of the informers is essential to his defense. The trial court also did not find this information essential to the disposition of the case.

[7,8] (4) That he was denied trial by jury because the issue of the reasonableness of the search and seizure was determined by the court as a matter of law out of the hearing of the jury. It is well settled that the admissibility of evidence is a matter for the court. Defendant concedes this point, but maintains that the jury must not necessarily be excluded and that the hearing of such evidence would not be prejudicial to the prosecution. The procedure to determine the admissibility of evidence when the question of reasonableness or legality of an arrest for search or seizure is an issue, was prescribed by People v. Gorg, 45 Cal.2d 776, 291 P.2d 469. The defendant does not present any valid reasons for departing from this procedure.

[9,10] (5) That the evidence against him was obtained by an unlawful search and seizure. As the defendant was arrested and his car searched without a warrant, he has established a prima facie case, and the burden rests on the State to show proper justification. Badillo v. Superior Court, 46 Cal.2d 294, 294 P.2d 23. Under Penal Code, Section 836 an officer may make an arrest without a warrant when a felony has in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it. Reasonable cause has been defined as: "* * * such a state of facts * * * as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." People v. Kilvington, 104 Cal. 86 at page 92, 37 P. 799 at page 801. The first question is whether the inspectors had reasonable cause to arrest the defendant. The trial court, in relying on People v. Thymiakas, 140 Cal. App.2d 940, 296 P.2d 4, held that there was reasonable cause. In People v. Thymiakas, the arrest of the defendant was based solely on the report of an informant with whom the police had had no prior dealings and the recollection of one of the police officers that the defendant had been a narcotics addict. The appellate court affirmed the granting of the defendant's motion for setting aside the information for want of reasonable cause under Penal Code, Section 995. The court relied on Willson v. Superior Court, 46 Cal.2d 291 at page 294, 294 P.2d 36, at page 38, in which it was said: "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information [citations], and evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable."

[11-14] In the Willson case, however, there was not only the information provided by an informant not previously used, but also the suspicious conduct of the defendant in the presence of an officer. The present case presents the question of whether the officer's reliance on the information provided by the anonymous reliable informant was reasonable cause for arrest. In People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50, it as held that if an officer received information from a reliable source and acted in good faith, there was reasonable ground for justifying the arrest. The court relied on the statement in People v. Boyles, 45 Cal.2d 652, at page 656, 290 P.2d 535 at page 537 (which however, did not involve an informant) that "* * * reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt," and distinguished People v. Thymiakas on the basis of the reliability of the informant. A reliable informant apparently means a person whose information has in the past led the police to valid suspects. People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24. The Gonzales case was followed in People v. Montes, 146 Cal.App.2d 530, 303 P.2d 1064; People v. Vice, 147 Cal.App.2d 269, 305 P.2d 270, and People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24. In Trowbridge v. Superior Court of Los Angeles County, 144 Cal.App.2d 13, 300 P.2d 222, the court reached the same result but relied on the Boyles and Willson cases. In all of the above cases, the information provided by the informant was much more specific than in the instant case. In the Gonzales case the defendant was identified by name and address. The police went to the address indicated, knocked on the defendant's door and asked to see him. When Gonzales appeared and identified himself he was searched and arrested. In the Trowbridge case, besides providing an accurate description of the defendant and her address, the informant stated he had seen marijuana in her apartment. In the Montes case the informant provided the name and address of the defendant and the police also watched the defendant giving packages to people who were found to possess narcotics. In the Vice case the defendant had been known to a narcotic inspector for a period of two years as an associate of narcotic dealers and the informant also stated that the defendant was in possession of narcotics in a certain hotel room. In the Penson case the police were advised that the bookmaking activities were taking place at a specific address. In the instant case the officers knew only that a negro known as "Bozo" who drove a certain type of automobile was dealing in narcotics. No specific information relating to Bozo's description or his address was given, nor was it indicated that his activities were confined to any particular location in the city of San Francisco. The trial court took judicial notice of the fact that an automobile like the defendant's was a common sight in San Francisco. If the officers in the instant case had sufficient probable cause solely on the basis of the data provided by the information, they would also have sufficient cause to arrest any negro anywhere in San Francisco driving a car similar to the one described. However, it is not necessary to determine this issue here, as the defendant's conduct in driving away from the inspectors is sufficient conduct to create probable cause for a lawful arrest. It is well settled that an officer may question a person at night. People v. Simon, 45 Cal.2d 645, 290 P.2d 531. On the issue of whether the defendant here was escaping from the officers or fleeing in fright from robbers, the evidence is completely contradictory. Although it has been held that an appellate court is not bound by the trial judge's determination as to the existence of probable cause, Murphy v. Murray, 74 Cal.App. 726, 731, 241 P. 938; Michel v. Smith, 188 Cal. 199, 205 P. 113, the better view is that the determination of the trial court should be accepted by the reviewing court. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. Here, in finding the probable cause, the trial court apparently chose to believe the inspectors that they had their red light on and identified themselves to the defend-

ant as police officers and that he fled from them. As said by our Supreme Court in People v. Lyons, 47 Cal.2d 311, 303 P.2d 329, 334: "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." The defendant relies on People v. Harvey, 142 Cal.App.2d 728, 299 P.2d 310, and People v. Gale, 46 Cal.2d 253, 294 P.2d 13. In the former, however, the defendant was arrested before he made any suspicious movement, while in the latter, the only suspicious conduct on the part of the defendant was that he was driving a car with a smashed front; he explained to the questioning officer that the vehicle had been in an accident the week before; the court held that as his answer was consistent with innocence there was no basis for the arrest and search. In the instant case, the defendant's conduct in fleeing from the officers was not consistent with innocence. In People v. Martin, 46 Cal.2d 106, at page 108, 293 P.2d 52, at page 53, in upholding the legality of an arrest and subsequent search without a warrant the court said: "Although the presence of two men in a parked automobile on a lover's lane at night was itself reasonable cause for police investigation [citations], their sudden flight from the officers and the inference that could reasonably be drawn therefrom that they were guilty of some crime [citation], left no doubt not only as to the reasonableness but as to the necessity for an investigation."

People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57, where the defendant made a furtive gesture after being ordered to get out of the taxicab by police officers at 3 a. m. and the court held that in view of the hour and the defendant's unusual conduct, there was reasonable cause. In People v. Garnett, 148 Cal.App.2d 280, 306 P.2d 571, a police officer was told by a reliable informant that there was a certain quantity of narcotics in the defendant's hotel room. The court held that the defendant's act in running after he saw the officer was sufficient reason in itself for believing some crime had been committed and for authorizing a search. In the instant case an inference of guilt could reasonably be drawn from the defendant's unusual conduct after the approach of Coster and Shoemaker.

[15, 16] (6) That the packet containing narcotics found in his car was the product of an unlawful search and seizure and therefore inadmissible evidence under the rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. The legality of an arrest is not necessarily determinative of the lawfulness of the search incident thereto. The issue is the reasonableness of the search under the particular circumstances. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. People v. Brown, 45 Cal.2d 640, 290 P.2d 528. The next question here presented is whether although the arrest of the defendant was a lawful one based on probable cause, the search of the defendant's automobile was a reasonable search incident to a lawful arrest. It is well settled that a search incident to a lawful arrest extends to the person as well as the premises under his control. In re Dixon, 41 Cal.2d 756, 264 P.2d 513; People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582. Defendant relies on People v. Yet Ning Yee, 145 Cal.App.2d 513, 302 P.2d 616, which held that a warrant to search the premises is not sufficient for a search of the defendant's person, and United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210, in which it was held that the search of the automobile did not justify a search of the person of the defendant. In People v. Molarius, Cal.App., 303 P.2d 350, and People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974, also cited by the defendant, the arrests were for vagrancy; the search of the automobile revealed bookmaking paraphernalia and the court reversed the bookmaking convictions as based on an illegal arrest and search. In the instant case, however, the defendant was arrested on a suspicion of dealing in narcotics and narcotics were found in his vehicle. A number of recent cases upheld the search of automobile as an incident to a lawful arrest without warrant. People v. Martin, 46 Cal.2d 106, 293 P.2d 52; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; People v. Lujan, 141 Cal.App.2d 143, 296 P.2d 93; People v. Jiminez, 143 Cal. App.2d 671, 300 P.2d 68; People v. Johnson, 139 Cal.App.2d 663, 294 P.2d 189; People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24; People v. Garnett, 148 Cal.App.2d 280, 306 P.2d 571. In McDonald v. United States, 335 U.S. 451, 455, 69 S.Ct. 191, 93 L.Ed. 153, also relied upon by the defendant, the crucial factor was the absence of search warrant where the defendant had been under observation for two weeks. People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505, involved dictograph installations by police officers and People v. Berger, 44 Cal.2d 459, 282 P.2d 509, also cited by the defendant, involved photostats of evidence obtained under an invalid search warrant, and seemed to have no relevance in this connection to the instant case. The same is true in Badillo v. Superior Court, 46 Cal. 2d 269, 272, 294 P.2d 23, where the officers broke into the house without a search warrant and also had no reasonable cause to arrest the defendant. Nor is this a situation where there can be no consent to the search because the defendant is in custody.

[17] (7) That the evidence was insufficient to support the judgments. As to count one for the possession of heroin, the defendant maintains that he did not know that the narcotic was in his automobile and that therefore he did not have knowledge of the fact which brought his act within the provisions of the pertinent statute under the rule of People v. Gory, 28 Cal.2d 450, 170 P.2d 433, and People v. Cole, 113 Cal.App.2d 253, 248 P.2d 141. The defendant correctly cites People v. Antista, 129 Cal.App.2d 47, 276 P.2d 177, for the proposition that the burden was on the state to prove facts from which defendant's knowledge thereof could be fairly inferred. However, in People v. Brown, 102 Cal.App. 2d 60, at page 62, 226 P.2d 609, at page 610, the court said: "The record shows that defendant owned the automobile in which morphine was found; that the morphine was concealed under a rubber mat in the automobile in front of the seat which she had just been occupying. Whether she was aware of the presence of the drug was a question of fact for the determination of the trial court." Furthermore, in the Antista case, the court quoted from People v. One 1940 Chrysler, 77 Cal.App.2d 306, at page 314, 175 P.2d 585, at page 590: "We think the true rule is that when narcotics are found concealed in or about an automobile, at least where such automobile is in the possession of the owner or his entrustee, the trial court may infer knowledge on the part of the owner. Such facts are sufficient to cast the burden of going forward with an explanation on the owner." It cannot be said here that on the face of the evidence sufficient facts could not have been found to substantiate the finding of the trial court. People v. Lawson, 114 Cal.App.2d 217, 249 P.2d 850.

[18] As to count two for the transportation of heroin, defendant's flight from the officers in the instant case is sufficient evidence to support the charge of transportation. People v. Watkins, 96 Cal.App.2d 74, 214 P.2d 414.

[19-21] As to count three for the assault by means of force likely to produce great bodily harm, the defendant maintains that as he was only driving away from the officers in fright, he cannot be found guilty of this offense. However, the gist of the offense charged in this count is the likelihood of bodily injury as the result of force used and the degree of force used is not as significant as the manner of use. People v. McIllvain, 55 Cal.App.2d 322, 130 P.2d 131. Nor is it required that the injuries be serious. People v. Bumbaugh, 48 Cal.App. 2d 791, 120 P.2d 703. What kind of force is likely to produce great bodily injury is a question of fact for the trial court. People v. Carnavacci, 119 Cal.App.2d 14, 258 P.2d 1121; People v. Nudo, 38 Cal.App.2d 381, 101 P.2d 162. In the instant case the jury

resolved this issue against the defendant. The case of People v. Fox, 82 Cal.App.2d 913, 187 P.2d 924, in which it was held that one who accelerates his automobile at a high speed and then applies his brakes to skid the car in order to dislodge a passenger in the automobile, is guilty of an assault by means of force likely to produce great bodily injury, supports the state's contention rather than the defendant's. The defendant attempted to distinguish the Fox case on the grounds that there the defendant knew his victim was an officer. In this case, the issue of whether or not the officer identified himself was also resolved against the defendant by the jury.

(8) That the trial court erred in its refusal to admit into evidence the following typewritten anonymous letter received by the defendant's attorney: "You know me cause I had a case with you *w*once. I wanted to tell you that the stuff in Ernie*s* car was probably mine. I was with him the week before he got busted, but I did not know for *sh*ure where I lost the l*o* dollar paper I had. If I come up with this do I have to take the beef. I won*t* take the beef but I don*t* want Ernie to either. Te*l* Ernie and the word will hit the street." Under Code of Civil Procedure, Section 1954, the admission of such matter is regulated by the discretion of the trial court. It is a well recognized rule that the hearsay rule applies generally to writings which do not fall within its exceptions. (19 Cal. Jur.2d 113) In the cases cited by the defendant the evidence admitted was of a much more reliable nature than the letter here.

[22] In People v. Erno, 195 Cal. 272, at page 279, 232 P. 710, at page 713, the court said that it was always proper to show that some other person committed the crime: "But we do not understand the rule to extend farther than to mean that such showing should be made in the proper manner, and in accord with the ordinary rules of evidence." Furthermore, in the above case, as well as in People v. Mitchell, 100 Cal. 328, 34 P. 698; People v. Myers, 70 Cal. 582, 12 P. 719; People v. Wong Loung, 159 Cal. 520, 522, 114 P. 829, there were several defendants involved and the court was faced with the issue of which of the defendants had committed the crime in question. In People v. Peete, 28 Cal.2d 306, 169 P.2d 924, certiorari denied 329 U.S. 790, 67 S.Ct. 356, 91 L.Ed. 677, and 331 U.S. 783, 67 S.Ct. 1185, 91 L.Ed. 1815, rehearing denied 329 U.S. 832, 67 S.Ct. 490, 91 L.Ed. 705, the court held inadmissible a verified petition of the decedent [executed in connection with the commitment of her husband to an institution for the insane], which recited that her husband had threatened to kill the decedent and himself and had struck the decedent, offered by the defendant to show that the decedent was killed by her husband. It does not appear that the trial court has abused its discretion here.

[23] The defendant further contends that the refusal of the trial court to admit the letter constitutes a denial of due process, citing Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914; McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691, and In re Cunha, 123 Cal.App. 625, 11 P.2d 902, 18 P.2d 979, and People v. Tucker, 142 Cal.App.2d 549, 298 P.2d 558. In Hovey v. Elliott, supra, the judgment was reversed because the defendant's answer which disproved the fact that he was a rebel in confederate territory, was stricken. In Windsor v. McVeigh, supra, the judgment was reversed because the defendant's answer was stricken because he was in contempt for failure to deposit property in court. In McClatchy v. Superior Court, supra, the trial court excluded all evidence except the notes of the court reporter. In re Cunha, 123 Cal. App. 625, 11 P.2d 902, 18 P.2d 979, this court held that the petitioner was denied a fair trial on a contempt charge because he was denied the opportunity of proving the truth of the allegations of an affidavit seeking disqualification of a trial judge. In People v. Tucker, 142 Cal.App.2d 549, 298 P.2d 558, it was held error to refuse to permit the defendant witness an answer

which might support the defendant's alibi. The evidence erroneously rejected by the trial court in all of the above cases was of such a kind that its reliability could be examined by the trial court. It is not in any way analogous to the unsigned anonymous typewritten letter received by the defendant's attorney. It does not appear here that the defendant presented any evidence as to the writer of the letter.

[24-28] (9) That the incorrect rulings of the trial court set forth below amounted to an unfair trial. (a) Inspector Coster was asked on voir dire, "From what source have you heard about the automobile (the defendant's Oldsmobile)?" and replied, "A confidential informant." This was not a statement of opinion as maintained by the defendant but one of fact. As the statement was made outside of the presence of the jury it was not prejudicial to the defendant's cause. (b) It was not error for the trial court to allow the District Attorney to reopen her questioning of Inspector Coster on voir dire, as this matter was properly within the discretion of the trial court. (c) The court erred in admitting as accusatory statements Inspector Coster's testimony and that the defendant said, "I don't know anything about narcotics." In testifying on his own behalf, the defendant admitted making this statement. In People v. Teshara, 134 Cal. 542, 66 P. 372; People v. Wong Loung, 159 Cal. 520, 114 P. 829; People v. Vogel, 36 Cal.App. 216, 171 P. 978, the type of accusatory statement excluded was that of a murder victim in attempting to identify his assassin. As pointed out by the court in People v. Teshara, it is the conduct of the accused and not the accusation itself which is the evidence, and the only reason for admitting the accusation is to explain the conduct. The case of People v. McCoy cited by the defendant indicates that if the conduct of the accused is not that of an innocent man, the admission of the accusatory statement is not prejudicial. People v. Amaya, 134 Cal. 531, 538, 66 P. 794, rejected the view that the mere fact of arrest is sufficient ground in all cases to exclude statements affecting the accused. (d) The defendant maintains that the introduction of the switch blade knife found by the officers in the defendant's car and testimony relating thereto is inadmissible as evidence of another crime, that is violation of Sections 1291 and 1292 of the San Francisco Police Code (Ordinances 9938 and 9939). As the state correctly points out, Section 1292 of the San Francisco Police Code which provides that the possession of a switch blade knife is a misdemeanor, did not become effective until thirty days after October 17, 1956, the date the ordinance was signed by the Mayor. The defendant was arrested on June 11, 1956. Section 1291 of the San Francisco Police Code which was in effect on the date of the defendant's arrest referred only to loitering while carrying a concealed weapon. There is therefore no merit in this contention.

In People v. Jennings, 142 Cal.App.2d 160, 298 P.2d 56, cited by the defendant, the hack saw was excluded because the court found that under the circumstances in that case the officers had plenty of time to obtain a search warrant. Although the admission of the knife here as a part of the res gestae was error, it cannot be said to have resulted in a "miscarriage of justice" within the meaning of Article VI, Sec. 4½ of the State Constitution. In People v. Borbon, 146 Cal.App.2d 315, 303 P.2d 560, cited by the defendant, the evidence the court rejected was photostats made from the documents obtained as the result of an unlawful search and seizure.

[29] (10) That the District Attorney was guilty of misconduct in offering the knife in evidence and making certain comments to the jury. There is not merit in this contention.

[30, 31] (11) That the trial court abused its discretion in denying the defendant's motion for a new trial. The trial court stated that it could conceive of no grounds upon which to grant a new trial. The motion was addressed to the sound discretion of the trial court, and there appears no abuse of such discretion here.

No prejudicial error appearing in the record before us, the judgment must be affirmed.

Judgment affirmed.

DRAPER, J., concurs.

DOOLING, Justice (concurring).

I concur in the Judgment. However, I want to make perfectly clear my views on the subject of disclosure of the identity of the confidential informant. I agree with the very recent opinion of the United States Supreme Court in Roviaro v. United States, 77 S.Ct. 623, 628. Justice Burton, speaking for that court, laid down the general principle in one clear and unequivocal sentence: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Following this rule we recently held in People v. Lawrence, Cal.App., 308 P.2d 821, that the identity of an informant claimed to have been a participant in the crime must be disclosed on the voir dire if his activity or communications are relied on by the officer as furnishing probable cause for the arrest and search of the defendant and must in any event be disclosed on the trial.

So in this case if the information furnished by the confidential informers to the officers had been necessary to establish probable cause for the arrest and search of the defendant it would have been reversible error not to compel the disclosure of their identity. In Roviaro v. United States, supra, the court said on this precise subject: "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication."

It is because I agree that the conduct of the defendant in fleeing when the officers sought to question him furnished sufficient evidence of probable cause apart from the confidential communications of the undisclosed informers that I concur in the judgment.

DRAPER, J., joins in the concurring opinion of Justice DOOLING.

Hearing denied; CARTER, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Lois BROWN, Defendant and Appellant.*
Cr. 5773.

District Court of Appeal, Second District, Division 2, California.
April 24, 1957.

Rehearing Denied May 13, 1957.

Hearing Granted June 19, 1957.

Prosecution for abortion and murder. From judgment of conviction of murder in the second degree and on two counts of abortion entered in Superior Court, Santa Barbara County, Ernest D. Wagner, J., defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to establish the criminal agency and to sustain conviction of murder in second degree.

Judgment affirmed.

Ashburn, J., dissented in part.

1. Abortion 🔑11

Evidence to corroborate testimony of a woman upon whom abortion has been performed is sufficient, though slight when standing by itself, if it creates more than a suspicion of guilt and may consist of inferences from the circumstances surrounding the criminal transaction and need not establish the precise facts testified to by the witness whose testimony it supports, but it must connect defendant with commission of crime in such a way as to reasonably satisfy trier of fact that witness whose testimony it supports is telling truth.

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* Opinion vacated 320 P.2d 5.

2. Abortion ⚷11

Evidence which corroborated testimony of woman upon whom abortion was committed was sufficient to sustain conviction of abortion. West's Ann.Pen.Code, § 274.

3. Criminal Law ⚷673(2)

Admission of doctor's testimony, in prosecution for abortion, that case history showed that prosecuting witness had gone to a residence and that other person involved went there to perform an abortion on her was not prejudicial error in view of court's instruction that jury should not regard the statements made to doctor as evidence but that the case history simply disclosed the matters upon which doctor acted and upon which he based his opinion that the abortion was induced.

4. Criminal Law ⚷486

In making his diagnosis that prosecuting witness had been pregnant and that an abortion had been performed upon her, doctor was entitled to take into consideration the case history, together with his objective and subjective findings and the physical condition of the patient.

5. Criminal Law ⚷673(2)

In abortion prosecution, where court instructed jury that exhibit was purely for the purpose of illustration, syringe which was offered in evidence to illustrate testimony of prosecuting witness who said syringe resembled instrument used upon her by the defendant to induce abortion was properly admitted.

6. Criminal Law ⚷30

Count charging defendant with abortion was not merged into additional count charging defendant with murder. West's Ann.Pen.Code, § 274.

7. Criminal Law ⚷29

An abortion which results in death may be punished both as abortion and murder. West's Ann.Pen.Code, § 274.

8. Criminal Law ⚷1036(1)

In prosecution for abortion and murder, where defendant made no objection to testimony of witness to the effect that deceased woman had told the witness that she was pregnant and was going to Tijuana for an abortion, defendant's contention that court erred in admitting testimony would not be considered on appeal.

9. Homicide ⚷254

Evidence that deceased died from acute loss of blood due to induced abortion was sufficient to establish criminal agency and sustained conviction of murder in the second degree.

10. Criminal Law ⚷1171(1)

Where defendant in abortion and murder prosecution had testified that defendant's transcribed shorthand statement which was read to jury was taken by deputy district attorney who asked defendant several questions at a time, shouting at her without letting her answer and that such conduct persisted throughout taking of statement and defendant's objection to prosecution's request to play record so that jury might hear exactly what transpired was sustained, prosecuting attorney's statement to jury that he regretted that jury was not permitted to hear the record so that the truth could be established one way or the other was not prejudicial error.

11. Criminal Law ⚷829(1)

Where instruction as given in prosecution for abortion and murder adequately covered the issue, trial court's refusal to add portion which merely amplified the material included in the charge as given was not error.

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Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Vern B.

Thomas, Dist. Atty., Frank J. McCarthy, Asst. Dist. Atty., Santa Barbara, Thomas P. Weldon, Deputy Dist. Atty., Santa Maria, for respondent.

FOX, Justice.

A jury found defendant guilty of one count of murder in the second degree and two counts of abortion. She appeals from the judgment.

On the evening of January 18, 1956, defendant committed an abortion on Clara Thornton at the defendant's home in Santa Maria, California. Clara testified to the *modus operandi* in detail.

Defendant stopped at Clara's home the next morning about 11:00 o'clock to inquire as to her condition. Lucy Sanchez, with whom Clara lived, and Beatrice Duran were there at the time. Clara then passed a substance which defendant identified as "the afterbirth." Also, she massaged Clara's abdomen, and told her to repeat the operation at intervals and instructed Lucy with reference thereto. She explained that the purpose of the manipulation was to get the womb back into place. Also, she told Clara to visit a doctor and tell him that she had a cold, and to give her a shot of penicillin.

On January 30th, Clara, while a patient in a Santa Maria hospital, was examined by Dr. R. C. Randall. As a result of his examination he determined that Clara had been pregnant and that an abortion had been performed upon her approximately ten days previously. His findings were corroborative of the case history given to him by her as to the manner in which the abortion had been performed. The doctor testified that the abortion was induced and not spontaneous. Prior to the abortion Clara was in good health: therefore it was not necessary to preserve her life.

On the afternoon of January 26, 1956, defendant visited Lucy Sanchez and Clara. Lucy's sister, Elsie Castillo, was present. Lucy had previously told her sister that she (Lucy) was pregnant and was going to have an abortion. At that time Lucy was in good physical condition. When defendant arrived she inquired of Clara whether Lucy had obtained any money. After a conversation with Lucy, defendant left for a short period. In the meantime, Lucy dressed. Upon defendant's return, she and Lucy drove away in defendant's car.

At approximately 7:30 that evening defendant went to the cafe where Clara was employed and told her that "they had gotten through about 5:00 o'clock," that Lucy had started flowing heavily, became dizzy, and was in a coma. Defendant was excited and asked Clara to accompany her to defendant's home. There Clara saw Lucy lying on a couch, covered with a bedspread; she was gasping, and virtually in the nude. There was blood on the bedspread, on some newspapers, and on a raincoat on which Lucy was lying on the davenport; also, there was blood on Lucy's body. She was taken to the hospital by defendant and Clara and defendant's mother, Mrs. Canosa. At the hospital defendant stated that she had an emergency case in the car that required immediate attention. Defendant's mother stated, in defendant's presence, that the name of the patient was Lucy Sanchez.

The body of Lucy was taken to the emergency room. At that time defendant told Clara that "she shouldn't have done it," and took $30 out of her wallet and gave it to Clara saying that it was to be used in case Lucy needed anything.

Lucy was dead on arrival at the hospital. Upon being so informed, defendant told Clara that "she didn't know what to do—whether to tell the truth or whether to deny it * * * whether she should run away or stick it out," and then handed Clara $70, saying, "Here's the rest of Lucy's money so that you can use it for her funeral." Clara gave the $100 to Lucy's sister, Elsie, who delivered it to Captain Oxford of the Sheriff's office the following day when an autopsy was performed on Lucy's body by Dr. John Blanchard.

The latter found that her death was caused by an acute loss of blood from the large blood channels within the uterus due to an induced abortion, and he testified there was no indications that the termination of

Lucy's pregnancy was a spontaneous reaction or that it was necessary to preserve her life.

[1] As grounds for reversal of the count involving Clara, defendant contends that her testimony was not corroborated and that the court erred in the admission of certain evidence. Neither of these grounds is well founded. The applicable principles on the question of corroboration were stated by this court in People v. Kendall, 111 Cal. App.2d 204, 210, 244 P.2d 418, 422, as follows: "In order to sustain a conviction of the crime of abortion the testimony of the woman upon whom the abortion has been performed must be corroborated by other evidence. [Citation.] In determining the sufficiency of such other evidence there are certain established legal principles that serve as guides. It must 'tend to connect the defendant with the offense,' but 'So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it "be slight and, when standing by itself" entitled to but little consideration.' [Citations.] The necessary corroboration may consist of inferences from the circumstances surrounding the criminal transaction. [Citation.] It need not establish the precise facts testified to by the witness whose testimony it supports. * * * It is not necessary that the corroborative evidence prove the defendant is guilty of the offense. [Citation.] Such evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of fact that the witness whose testimony it supports is telling the truth [Citations]." To the same effect are People v. Gallardo, 41 Cal.2d 57, 62, 257 P.2d 29; People v. MacEwing, 45 Cal.2d 218, 224, 288 P.2d 257; and People v. Bowlby, 135 Cal.App.2d 519, 521, 522, 287 P.2d 547.

[2] Applying these principles to the instant matter, it is clear that there is ample corroborative evidence. The testimony of witness Duran, as to what was said and done by defendant when she visited Clara on the morning following the abortion, definitely connects defendant with the crime committed on Clara and indicates that Clara was telling the truth. It thus corroborates her testimony. The testimony of Dr. Randall serves to further corroborate the victim's story. People v. Ramsey, 83 Cal.App.2d 707, 717, 189 P.2d 802; People v. Pierson, 69 Cal.App.2d 285, 299, 159 P.2d 39.

Defendant seeks to discredit the testimony of Mrs. Duran by evidence indicating that at or about the noon period on January 19th she was at an attorney's office in Santa Maria transacting some business. She admits, however, that she was at the home of Clara and Lucy at "the noon hour or thereabouts" on the 19th; that she saw Mrs. Duran there at that time; and, upon leaving, took her to the packing shed where she worked.

[3, 4] Defendant vainly asserts prejudicial error by reason of the circumstance that Dr. Randall, in reciting the case history, mentioned that Clara had gone to a residence south of the city and the other person involved went there to perform an abortion on her; also, that the operator inserted the tip of a device into her womb and pumped a solution into it. In denying defendant's motion to strike this portion of the doctor's recitation of the case history, the court admonished the jury that the patient's statements to the doctor must not be taken as evidence proving the truth of such statements; that the case history simply disclosed the matters upon which the doctor acted and upon which he based his opinion. This instruction placed the doctor's testimony before the jury in proper focus. In making his diagnosis, Dr. Randall was entitled to take into consideration the case history, together with his objective and subjective findings and the physical condition of the patient. People v. Wilson, 25 Cal.2d 341, 348, 153 P.2d 720; People v. Shattuck, 109 Cal. 673, 678, 42 P. 315; Groat v. Walkup Drayage & Warehouse Co., 14 Cal.App.2d 350, 357, 58 P.2d 200.

[5] Defendant argues that the court improperly admitted in evidence a syringe

over her objections. This syringe was offered and received in evidence to illustrate the testimony of Clara, who said it resembled the instrument used upon her by defendant. In admitting the syringe in evidence the court advised the jury that "this exhibit * * * is purely for the purpose of illustration * * *." It was properly admitted for such purpose. People v. Miner, 96 Cal.App.2d 43, 51, 214 P.2d 557; People v. Thompson, 69 Cal.App.2d 80, 87–88, 158 P.2d 213.

As to the counts involving Lucy, defendant contends that (1) count 2, charging abortion, is merged into count 1, charging murder; (2) the court erred in admitting certain evidence; (3) the corpus delicti of the murder was not established; and (4) the district attorney was guilty of misconduct. None of these contentions justifies a reversal of the conviction on either count.

[6, 7] In support of her first contention defendant starts with the proposition that where death ensues as a result of an abortion, the death would be murder in the second degree because of the fact that the abortion was the causing factor. Therefore, she argues, "the abortion would be one of the elements in the crime of second degree murder." She further argues that "there was a single act involved," hence the abortion count is merged in the murder charge. This position is not well taken. The statutory crime of abortion is an offense entirely separate and distinct from that of murder and occurs when the acts specified in the statute have been committed with the requisite unlawful intent to procure a miscarriage, regardless of whether a death results. Pen.Code, sec. 274. Thus defendant's argument is fully answered in People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161, where the identical situation was presented, i. e., defendant was convicted of abortion and murder in the second degree. The two charges arose out of the defendant's treatment of a young girl and her subsequent death. In affirming the judgment the court stated, 5 Cal.2d at page 661, 55 P.2d at page 1167: "The act of committing an abortion and the act of killing a person while attempting to do this are not merely the same act made punishable in different ways. Not only are these two offenses separate and distinct in a legal sense and each dependent upon evidence not required in the other, but as a practical matter it cannot be said that the two charges involve but one act. The act of committing an abortion may be done without causing the death of the party operated upon. The act which causes the death of the same person is usually another act, careless or otherwise, which, while it may be committed in connection with the first and about the same time, involves a further and additional element."

The court further stated, 5 Cal.2d at pages 663–664, 55 P.2d at page 1168:

> "Certainly murder does not include abortion. Neither is the converse true. Death is by no means a necessary ingredient of abortion. There are classes of crime which have the same basic elements and a conviction or acquittal of one is a bar to a prosecution of the other. Assaults are of this class and a conviction of an assault with a deadly weapon with intent to commit murder, made upon the same person and consisting of one act, bars a prosecution for an assault with a deadly weapon or assault. Other illustrations could be drawn.
>
> "Abortion is a distinct crime from murder. * * *
>
> "In case of judgment pronounced on conviction of abortion, prosecution for murder would not abate, provided the party upon whom the abortion was committed died within one year and a day after its commission. Nor would the judgment of conviction obtained many months prior thereto be nullified by reason of the conviction of the murder charge resulting from said criminal operation.
>
> "Section 654, Penal Code, which provides that an act which is made punishable in different ways by different provisions of the Penal Code, cannot be punished under more than one of such

> provisions, has no relevancy whatever to the proposition before us. It is not sought in this proceeding to punish abortion in any different way than the sole manner provided by section 274, Penal Code, in which the crime is defined as the employment of certain means or methods or the use of instruments, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, the punishment being not less than two or more than five years. Murder and abortion are two distinct crimes and are not the same offenses, and there is no common basis upon which they may rest as the same offense."

In People v. Gomez, 41 Cal.App.2d 249, 106 P.2d 214, the court upheld the judgment where defendant was convicted of abortion and murder in the second degree growing out of the same transaction.

[8] Defendant contends that the court erred in allowing Ira Gin to testify that Lucy told him out of the presence of defendant, two months previous to her death, that "she was pregnant and that she was going to Tijuana and get an abortion." The answer to this contention is that no objection was made to this evidence. Shortly before this testimony was given the court sustained defense objections to questions which sought to connect defendant's name with this conversation. When the questions were later asked without any reference to defendant, no objection was interposed. Obviously, defendant is not now in any position to question the admissibility of this testimony.

[9] Defendant seems to argue that the corpus delicti of murder was not proved, on the theory that no criminal agency was established. "In a murder charge the corpus delicti consists of two elements: the death of the alleged victim and the existence of some criminal agency as the cause, either or both of which may be proved circumstantially or inferentially." People v. Amaya, 40 Cal.2d 70, 75, 251 P.2d 324, 327.

In the instant matter there is proof that prior to her death Lucy was in good physical condition except for her pregnancy. Dr. Blanchard found no indications that the termination of her pregnancy was a spontaneous reaction. On the other hand, he did find that she had suffered an induced abortion. Clara's testimony revealed defendant's interest, on the fateful afternoon, in whether or not Lucy had obtained any money. When defendant called for Clara at her place of employment early that evening she made the significant remark that "They had gotten through about 5:00 o'clock." Upon arrival at the hospital defendant made another significant statement, viz., that "she shouldn't have done it." Then, upon being informed that Lucy was dead, defendant stated, "She didn't know what to do—whether to tell the truth or whether to deny it * * * whether she should run away or stick it out." Finally, she handed Clara $70 (having a few minutes previously given her $30 to be used in case Lucy needed anything), making the incriminating statement, "Here's the rest[1] of Lucy's money so that you can use it for her funeral." The clear inference is, from the testimony of both Dr. Blanchard and Clara, that Lucy's death was caused by a criminal agency employed by the defendant.

[10] Defendant claims prejudicial misconduct by the district attorney in his argument to the jury and error in the court's refusal to admonish the jury to disregard the prosecutor's particular comment. The incident arose out of the fact that defendant's statement was taken at the Sheriff's office on January 27, 1956, by Deputy District Attorney Weldon. This statement was taken in shorthand, and also recorded.[2]

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[1] There was evidence that defendant charged Clara $100 and that she would take care of both Clara and Lucy for $200.

[2] By stipulation, the recorded statement was played for defendant and her counsel.

The transcribed shorthand statement was read to the jury as a part of the People's case. During defendant's testimony she testified that Mr. Weldon, when taking her statement, asked her several questions at a time, shouting and yelling at her without letting her answer, and that such conduct on the part of Weldon persisted throughout the taking of the statement. By way of rebuttal, the People requested the court to permit the record which was made of the questioning of defendant by Weldon to be played before the jury so that they might hear exactly what transpired at that time. After argument in the presence of the jury, defendant's objection to playing the record was sustained. In his summation of the case to the jury, Deputy District Attorney McCarthy referred to this incident and commented as follows: "And while I am on the subject of Mr. Weldon, you heard the defendant in her cross examination, or her redirect examination, rather, say in regard to the statement which she gave on January 27, 1956, that Mr. Weldon yelled and shouted at her and he asked two or three questions at the same time, and didn't give her a chance to answer, and that that course of conduct persisted throughout her entire questioning. The Court would not permit the actual voices of Mr. Weldon and Mrs. Brown to be played before you, but the denial of that permission was raised by an objection which the defendant made. The defendant herself made that objection and his Honor passed on it as a legal matter, and I cannot comment any more on that, except to say that, in my opinion, that that record would have established one way or the other. We regret that you were not permitted to hear it." The People seek to justify the prosecutor's comment on the basis that the People's request to play the record and the argument of counsel were had before the jury; that the statement of Mr. McCarthy was simply a summary or a reiteration of what had occurred during the trial in the jury's presence; and that no attempt was made to comment on the contents of the record and thus bring before the jury material which the court had excluded from their consideration. Conceding, at least arguendo, that the prosecutor overstepped the bonds of propriety in this instance, it does not appear that his remarks were prejudicial. Certainly there is no indication that the verdict probably would have been different but for this incident.

[11] In this connection, defendant complains that the court failed to give the portion of CALJIC Instruction No. 6 which is included in the brackets below.[3] The deleted portion of the instruction merely amplifies the material covered in the preceding sentences. The portion given adequately covered the offer of the recording into evidence, the objection, the trial court's ruling and the admonition that the jury was not to draw any inferences therefrom, and that the admissibility of evidence is purely a question of law.

The case was fairly tried and the jury was properly instructed on all pertinent issues. We find no prejudicial error.

The judgment is affirmed.

MOORE, P. J., concurs.

ASHBURN, Justice (concurring and dissenting).

I concur in the prevailing opinion and the judgment except in one respect. It is held that an abortion which results in death may be punished both as abortion and second degree murder. In my opinion this ruling, though apparently authorized by People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161, cannot stand in the face of later pronouncements of the Supreme Court. They point out that the present question is not one of double jeopardy, People v. Smith, 36 Cal.2d 444, 448, 224 P.2d 719, and that section 654, Penal Code,[1] precludes multiple punishment of a single act or combination of immediately related acts.

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[3] That instruction reads: "At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. [As to any offer of evidence that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.]"

In People v. Logan, 41 Cal.2d 279, 290, 260 P.2d 20, 27, it is said: "However, as is well stated by defendant's counsel, 'no mere combination of words can result in an inflexible yardstick by which *all* cases may be measured; in each case the particular facts have had to be related to the legislative intent.' (Italics defendant's.)"

In People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1, 8: "But the applicability of section 654 is not limited to necessarily included offenses. If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative." To the same effect see, In re Chapman, 43 Cal.2d 385, 390, 273 P.2d 817; People v. Kehoe, 33 Cal.2d 711, 715–716, 204 P.2d 321; People v. Smith, supra, 36 Cal.2d 444, 448, 224 P.2d 719.

To my mind the recent decision in People v. Marshall, 48 Cal.2d 394, 309 P.2d 456, establishes the charge of abortion on Lucy Sanchez to be an offense included in the murder charge. The information is in two counts, murder and abortion.

The record discloses only one act as the basis of conviction on these counts relating to Lucy Sanchez. There was no interval of time between successive acts. There was one composite act, an abortion which resulted in death almost immediately, with no new act intervening between abortion and death.

In such circumstances, although the sentences run concurrently, as here, the conviction of the lesser charge should be reversed in order "to 'preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the [Adult Authority].'" People v. Kehoe, supra, 33 Cal.2d 711, 716, 204 P.2d 321, 324; Accord: People v. Knowles, supra, 35 Cal.2d 175, 189, 217 P.2d 1; People v. Smith, supra, 36 Cal.2d 444, 448, 224 P.2d 719.

In my opinion the judgment should be reversed as to the conviction of abortion upon Lucy Sanchez (Count II) and affirmed in other respects.

150 Cal.App.2d 506

Henry LORENZEN, Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, and Honorable C. Harold Caulfield, Judge Presiding, Department 11, Thereof, Respondents.

No. 17605.

District Court of Appeal, First District, Division 1, California.

April 29, 1957.

Prohibition proceeding for dismissal of information on ground that arrest without a warrant and a search and seizure were not justified. The District Court of Appeal, Bray, J., held that confidential informant's information alone justified defendant's arrest without a warrant, search of his automobile and apartment, and seizure of betting paraphernalia and that question whether police officers' failure to get warrant of arrest or search warrant during the two weeks which elapsed between receipt of the information and the arrest was unreasonable was for the committing magistrate.

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[1] Pen.Code, § 654. "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such

Alternative writ discharged, and petition denied.

1. Arrest 🔑63(4), 71

Where confidential informant, whose information had proved reliable in the past, informed police officers that defendant was distributing football pool tickets, a felony, such information alone justified defendant's arrest without a warrant, search of his automobile and apartment, and seizure of betting paraphernalia. West's Ann.Pen. Code, § 337a, subds. 2, 4, 6.

2. Arrest 🔑63(4)

Weight to be accorded the information upon which officers acted in arresting defendant for a felony and in conducting a search and seizure without a warrant was to be determined by trial court in exercise of its sound discretion.

3. Evidence 🔑83(1)

Presumption is that official duty has been regularly performed and that law has been obeyed in regard to search and seizure made by police officer, and it will not be assumed that police officer, to suit his convenience, makes use of fictitious informants as basis for an illegal search and seizure.

4. Searches and Seizures 🔑3(1)

Where police officer testifies in good faith that he acted upon information of an unnamed person and that such unnamed informant was reliable, officer has thereby established a firm basis for his search of the suspect's premises.

5. Prohibition 🔑28

Question whether police officers' failure to get warrant of arrest or search warrant in the two-week period which elapsed between receipt of information leading to defendant's arrest and the arrest was unreasonable was one of fact for the committing magistrate.

6. Criminal Law 🔑234

Where, at preliminary examination, it appears that the arrest and search were made without a warrant, burden of showing reasonable grounds for the arrest and search shifts to the prosecution, but prima facie case of reasonableness is made when arresting officer testifies that he was told by a reliable informant facts which warranted the arrest and search.

Joseph C. Haughey, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

This petition for writ of prohibition raises two questions: 1. Does information from a reliable informant *alone* justify an arrest without a warrant and a search and seizure? 2. Does delay in using that information affect the validity of the arrest, search and seizure?

Record.

October 24, 1956, complaint filed in the municipal court charging petitioner with violations (1) of section 337a, subdivision 2, Penal Code (occupying premises for purposes of recording bets); (2) of section 337a, subdivision 4 (recording bets); and (3) of section 337a, subdivision 6 (accepting bets). Thereafter a preliminary examination was held at which petitioner moved to exclude all evidence taken at the time of arrest on the ground of unlawful

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provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *"

search and seizure. The motion was denied and petitioner was held to answer to the superior court. On arraignment on an information charging all three offenses, petitioner moved for a dismissal of said information, based on the contentions hereafter discussed. The motion was denied.

Evidence.

Police Officer Martin testified that approximately two weeks prior to the arrest, he received certain information from a confidential informant, whom he had known for several years. For approximately three years this informant had been giving him information concerning similar cases and other criminal matters upon which Martin had acted and found his informant reliable. The information given him and two other police officers on this occasion was that one Henry Lorenzen was distributing football pool tickets in the Mission district.[1] The informant described Lorenzen's personal appearance and stated that he was a postal employee at a particular substation, and that Lorenzen customarily received through the mail and personally distributed these tickets on Tuesdays after working hours. The distribution was made to various taverns, florists and small business places in a certain area of the Mission district. On Fridays he would go over the route again, pick up the stubs and money for the tickets. The informant gave the make and license number of Lorenzen's automobile. He stated that Lorenzen lived in an apartment house on Church Street near 20th. The informant did not disclose the source of his information. The officers ascertained petitioner's correct address through the city directory. On Tuesday afternoon Martin and three other police officers went to the vicinity of the apartment house in which petitioner lived, stationing themselves around the premises. The apartment house garage accommodates approximately 20 cars. They saw a man drive into the garage. Both he and the automobile fitted the descriptions given by the informant. Petitioner got out of the car and went into the house through an inside doorway. Five to ten minutes thereafter petitioner returned through the same doorway and walked towards his car. In his right hand he carried a small package (about 3½ by 8 by 1½ inches). Martin saw petitioner toss this package into the seat of the automobile. Martin approached petitioner and asked if he was "Mr. Lorenzen." Petitioner said he was. Identifying himself as a police officer Martin placed him under arrest. Martin then asked petitioner to step out of the car, which he did. Martin then seized the package above mentioned. It contained blank football pool tickets. The other officers gathered around and one of them asked petitioner if there was anyone else in his apartment. He replied that there was not. The officer asked petitioner if he would mind showing them his apartment. He said "all right" and handed the officer the keys. All then went upstairs to petitioner's apartment, where they found papers and paraphernalia which an officer testified was for the purpose of recording and registering bets and were a part of the modus operandi of football pools. Petitioner refused to answer questions about the football pool operation or the tickets. A second police officer corroborated Martin's testimony as to the occurrences at the apartment. A later search of the automobile revealed nothing incriminating. At no time did the officers have either a warrant for petitioner's arrest or a search warrant.

The record raises clearly the issue—may police officers make an arrest without a warrant and a search and seizure based only upon information from a confidential informant whose information has proved reliable in the past, that an individual is committing a felony?

1. Propriety of Arrest.

[1] This is not a new question in California. It has been decided so many times

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[1] Mostly throughout the transcript these tickets are referred to as "football tickets." The record and briefs plainly show that everyone at the preliminary examination considered the references to be to football *pool* tickets.

that such information is sufficient that it is an open question no longer.

Cases holding that an officer is justified in making an arrest acting solely upon information from an informant where that informant is known to the arresting officer and is believed by the officer to be trustworthy and reliable are: People v. Vice, 147 Cal.App.2d 269, 305 P.2d 270; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Gonzales, 141 Cal.App.2d 604, 606, 297 P.2d 50; People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36; People v. Holguin, 145 Cal.App.2d 520, 302 P.2d 635; People v. Penson, 148 Cal.App.2d 537, 307 P.2d 24; People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45; People v. Garnett, 148 Cal.App.2d 280, 306 P.2d 571; People v. Guerrera, 149 Cal.App.2d 133, 307 P.2d 940.

People v. Goodo, 147 Cal.App. 7, 304 P.2d 776, is not in point. There the informant was one whom the police officers had not previously known, had any contact with, nor did they "know his reputation or any other fact which would assist in evaluating his reliability." 147 Cal.App.2d 9, 304 P.2d at page 777. The court, however, referred to the statement in Willson v. Superior Court, supra, 46 Cal.2d 291, 294, 294 P.2d 36, to the effect that past experience with an informant showing him to be reliable would justify the police in acting on the information supplied by him. People v. Schraier, 141 Cal.App.2d 600, 297 P.2d 81, cited by petitioner, is not in point here, because it did not deal with information supplied by an informant. In fact the court stated "no reliable informant had reported a fact or such a suspicious circumstance as would reasonably have warranted action * * *." 141 Cal.App.2d at page 603, 297 P.2d at page 83.

[2] Petitioner contends that the failure of the officers to write down the information given them by the informant establishes that they did not believe the informant and that therefore he was not a "reliable" informant. This was a factual matter to be and which was resolved by the committing magistrate. "The weight to be accorded the information upon which the officer acts in making an arrest for a felony is to be determined by the trial court in the exercise of a sound discretion. United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652." People v. Gonzales, supra, 141 Cal.App.2d at page 607, 297 P.2d at page 51.

[3, 4] An additional contention made by petitioner is answered in People v. Garnett, supra, 148 Cal.App.2d 280, 306 P.2d at page 574: "Appellant assumes that police officers would, to suit their convenience, make use of fictitious informants as bases for illegal searches and seizures. Such assumption is unauthorized and is contrary to statutory presumptions that official duty has been regularly performed and that the law has been obeyed. * * * When an officer has in good faith testified that he had acted upon the information of an unnamed person and that such informant was reliable, he has thereby established a firm basis for his search of a suspect's premises. Pen. Code, § 836. * * * So long as the good faith of the arresting officer with respect to the reliability of his informant satisfies the scrutiny of the trial judge, he is in substantially the same position as if he had come with a warrant of arrest."

2. Delay.

Approximately two weeks elapsed between the receipt of information by the officers and the arrest. The leading case upon the question of the effect of failure to get a search warrant where there is time to get one seems to be United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653. There was a warrant of arrest issued in that case. The contention was made that it was not sufficient. The court held that it was, but went on to state that, assuming it to be insufficient, the officers nevertheless were justified in making the arrest. The further contention was made that a delay of some five days in obtaining it after information of the crime was received, and particularly in not getting a search warrant at all, made the search and seizure illegal. Concerning the failure to get a search warrant the court said,[2] 339 U.S. at pages 65–66, 70 S.Ct. at page 435: "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sina qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

"It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."

In Trowbridge v. Superior Court, supra, 144 Cal.App.2d 23, 300 P.2d 229, the court answered a similar contention to the one made here: "It was also contended that there was no good reason why the officers should not have waited and secured a search warrant in this particular case. No one would fairly argue that a magistrate would have refused to issue a warrant if the same facts and statements had been presented to him as were presented to the officer. It was recently appropriately said in People v. Allen, 142 Cal.App.2d [267], at page [280], 298 P.2d 714, at page 722:

"'* * * Merely because the officers could have obtained a search warrant does not render illegal their seizure without one. Even though officers have time to procure a search warrant to search the person or premises of a suspect, if his arrest is justifiable, a search of his premises and his person is reasonable as incidental to a lawful arrest. United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653; Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663. The Fourth Amendment does not forbid all searches, but only unreasonable searches. The authors of the Bill of Rights did not suggest or imply that when law enforcing agencies have learned that a person has committed a felony, they must await the convenience of the offender before moving into his lair. They were wrestling with the problems that had arisen from the arbitrary searches by the minions of an arbitrary despot. They had not conceived of the difficulties to be encountered by a generous government in dealing with arbitrary criminals in a complex society with countless avenues whereby to secrete the evidences of their crimes. But clearly they did reckon upon the apprehension of criminals and did not aim to inhibit prompt, reasonable searches to the end that after the robber has been arrested the officer might without a search warrant make a search as an incident of the arrest * * *.' "

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[2] Five members of the court joined in the opinion; one member did not participate, and three dissented.

In the Allen case the exact time when the officers obtained the information upon which they acted is not given. The case states that it was stipulated that prior to December 16, 1954 (the date of the search and seizure) the officers had reasonable cause to believe that Allen had committed a felony.

[5] Applying the test of the Rabinowitz case, namely, whether under all of the circumstances of the case the failure to get a warrant of arrest or a search warrant in a period of two weeks was unreasonable, we cannot say that it was. This was primarily a fact question for the committing magistrate to decide. The information given the officers by the informant did not give petitioner's exact address. To obtain it they were required to make further investigation. They were informed that Lorenzen received the football pool tickets on Tuesdays, at which time he distributed them. Martin testified that because of that fact they chose Tuesday as the best time to go to petitioner's residence. We cannot say that they were not justified in waiting for such a day to act, nor that as a matter of law, permitting an elapse of approximately two weeks without getting a warrant, is without the "flexibility" which the Rabinowitz case holds "will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential", 339 U.S. at page 65, 70 S. Ct. at page 435, or unreasonable.

[6] It should be pointed out that in this case we are dealing merely with a situation in which at the preliminary examination, where the burden of showing reasonable grounds for the arrest and search shifts to the prosecution when it appears that the arrest and search were made without a warrant, a prima facie case of reasonable arrest and search is made when the arresting officer testifies that he was told by a reliable informant facts warranting an arrest and search. The officer is not seeking to prove the truth of those facts but simply that he was in possession of certain facts that made it reasonable to make the arrest and search. In order that no implications might be attempted to be drawn from our decision under the facts of this case, as to what our ruling might be under different facts, we expressly call attention to the record showing that there is not involved herein the question of a denial of a demand by the defendant for the name of the informant. No such demand was made and therefore we neither directly nor indirectly are determining what the legal situation would be in a case where such demand is made.

The alternative writ is discharged and the petition denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

M. M. KOEHN, Petitioner and Respondent,

v.

STATE BOARD OF EQUALIZATION, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Russell S. Munro, Director, Respondents,

Alcoholic Beverage Control Appeals Board, Ralph McGill, Don Bonar, and Russell Mather, Members, Respondents and Appellants,

E. L. Ledger, d/b/a Ledger's Distributing Company, Respondent and Amicus Curiae.*

No. 17256.

District Court of Appeal, First District, Division 1, California.

April 22, 1957.

As Corrected on Denial of Rehearing May 22, 1957.

Hearing Granted June 19, 1957.

Proceeding by complainant before predecessor of Department of Alcoholic Beverage Control for suspension of licensee's wholesale beer and wine license. The predecessor department indefinitely suspended license and licensee appealed. The Alcoholic Beverage Control Appeals Board set aside order of suspension on ground of lack of jurisdiction and complainant filed petition for writ of mandate to compel Appeals Board to vacate its order. The Superior Court, Alameda County, Agee, J., ordered Appeals Board to vacate its order and Appeals Board appealed. The District Court of Appeal, Bray, J., held that the Alcoholic Beverage Control Appeals Board is a "party aggrieved" by decision of Superior Court reversing Appeals Board's ruling in license suspension proceeding and may appeal to District Court of Appeals from such Superior Court judgment, despite quasi-judicial character of Appeals Board's functions.

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* Opinion vacated 326 P.2d 502.

Motion to dismiss appeal denied.

1. Appeal and Error ⚷150(4)

As general rule, a court or board exercising judicial or quasi-judicial functions does not have any legal interest in maintaining its decisions, and cannot appeal from order or judgment of court reversing proceedings. West's Ann.Code Civ. Proc., § 938.

2. Intoxicating Liquors ⚷129

Direct court review of decisions of the Department of Alcoholic Beverage Control is not authorized, but court review thereof is authorized after decision by the Alcoholic Beverage Control Appeal Board. West's Ann.Const. art. 20, § 22; West's Ann.Code Civ.Proc., § 938.

3. Intoxicating Liquors ⚷108(10)

The Alcoholic Beverage Control Appeals Board is "party aggrieved" by decision of Superior Court reversing Appeals Board's ruling in license suspension proceeding, and may appeal to the District Court of Appeal from such Superior Court judgment, despite quasi-judicial character of Appeals Board's functions. West's Ann. Code Civ.Proc., § 938; West's Ann.Gov. Code, § 11180; West's Ann.Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Party Aggrieved".

Edsel W. Haws, Senior Counsel Alcoholic Beverage Control Bd., Sacramento, for appellant.

Albert G. Evans, San Francisco, for respondent M. M. Koehn.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Dep. Atty. Gen., for respondents State Board of Equalization.

Willard S. Johnston, George H. Johnston, Benjamin H. Parkinson, Jr., Johnston & Johnston, San Francisco, for Safeway Stores, Inc.

Dodge & Evans, Robert P. Brorby, Oakland, for E. L. Ledger, dba Ledger's Distributing Co.

BRAY, Justice.

This motion to dismiss appeal raises solely the interesting question: Is the Alcoholic Beverage Control *Appeals* Board a party "aggrieved" by the superior court judgment reversing the Appeals Board's ruling in this proceeding, and entitled to appeal from said judgment?

Record.

After the State Board of Equalization indefinitely suspended the wholesale beer and wine license of E. L. Ledger, he filed with said Appeals Board his appeal from the order of suspension. Said Appeals Board held that the Board of Equalization did not have jurisdiction to make said order of suspension and set it aside. Koehn, who was the complainant in the proceeding before the State Board of Equalization, then petitioned the superior court for a writ of mandate to compel said Appeals Board to vacate its decision. Answers were filed by the Appeals Board, the Board of Equalization, the Department of Alcoholic Beverage Control,[1] and Ledger. The court ordered the Appeals Board to set aside and vacate its order and to determine any undecided questions. Said Appeals Board appealed from that order. No other appeal was filed. Ledger has filed an amicus curiae brief in support of the Appeals Board's position, both on the merits and on this motion to dismiss.

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[1] By this time, the Department of Alcoholic Beverage Control had succeeded the State Board of Equalization.

Party aggrieved.

Only a "party aggrieved" may appeal. Code Civ.Proc. § 938; Nicholas v. Nicholas, 110 Cal.App.2d 349, 353, 242 P.2d 679. The other state agencies involved contend that since the Appeals Board performs quasi-judicial functions it is in the same position that the superior court would be in if it were to attempt to appeal to the Supreme Court for hearing of a decision of the District Court of Appeal on an appeal from the superior court's ruling on a petition for writ of mandate.

[1] Matter of De Lucca, 1905, 146 Cal. 110, 79 P. 853, seems to support this view. There it was held that a judicial tribunal whose acts are assailed either in certiorari or on appeal has no interest in the matter and that the real party in interest is the one in whose favor the act sought to be reviewed was done. The court referred to I.X.L. Lime Co. v. Superior Court, 143 Cal. 170, 175, 76 P. 973, holding to the same effect. However, in the later case of Simpson v. Police Court of Riverside, 1911, 160 Cal. 530, 117 P. 553, a contrary holding was made. There an action on a promissory note was brought in the police court. That court overruled a demurrer to the complaint which claimed that the court had no jurisdiction of the subject matter of the action. The superior court then issued a writ of prohibition, prohibiting the police court from proceeding in the case. Thereupon the police court appealed to the Supreme Court from the superior court order granting the writ. The Supeme Court, without considering the De Lucca and I.X.L. Lime Co. cases, or authorities elsewhere, held that although the police court was not a party to the civil action it did have an interest in the action of the superior court in depriving it of jurisdiction and a right to appeal that court's action. Thus, in California we have authorities holding both ways on the subject, two holding that a judicial body may not appeal, and one holding that it may. The general rule throughout the country seems to be that a court or board exercising judicial or quasi-judicial functions does not have any legal interest in maintaining its decisions, and cannot appeal from an order or judgment of a court reversing the proceedings. 4 C.J.S. Appeal and Error § 205, p. 389; Miles v. McKinney, 174 Md. 551, 199 A. 540, 117 A.L.R. 207, 216. However, statutes have been passed in one or two jurisdictions permitting such appeals. 4 C.J.S. p. 389.

[2] The question here seems to be one of construction of our Constitution and statutes to determine whether the right of appeal has been granted the Appeals Board by implication. Admittedly there is no express grant. The Department of Alcoholic Beverage Control and the Appeals Board were created by amendment to article XX, section 22, Constitution. The department, headed by its director, was given the exclusive power to license the manufacture, importation and sale of alcoholic beverages in this state, to collect fees or taxes on account thereof, and to deny, suspend or revoke liquor licenses. The Appeals Board was given the function of reviewing the decisions of the department. It is provided that on such review the board shall not receive evidence, but is limited to certain questions. The board under certain circumstances may remand the matter to the department for further hearing and recommendation. Otherwise it must either affirm or reverse the decision of the department. The Constitution then provides: "Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order." Thus, while the Constitution does not expressly grant the right of appeal to the Appeals Board, it in nowise restricts it. The set-up concerning liquor control is rather unusual, in that there are apparently two independent agencies created, one, the department, which as to the matter with which we are concerned, namely, the suspension or revocation of liquor licenses, acts as the administrative

trial court, and two, the Appeals Board, which, in effect, is the administrative appellate court. In all other constitutional statewide agencies the decision of the department given the power to try offenses and impose discipline is not reviewable by another administrative agency but only by the courts. The Unemployment Insurance Code sets up a system somewhat comparable to the liquor control system, with an appeals board as a part of it. This system is a legislative and not a constitutional one. Here there is no provision either in the Constitution or in the enabling legislation which authorizes direct court review of the decisions of the department. It is only after decision by the Appeals Board that the decisions of the department are reviewable by the courts. This brings us to the legislation implementing the constitutional provisions.[2] Section 23091, Business and Professions Code, provides: "Final orders of the board shall be subject to judicial review as prescribed by law." Section 23077, Business and Professions Code, provides that the Appeals Board shall exercise such powers as are vested in it by section 22, article XX, Constitution, "and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required. The board and its duly authorized representatives in the performance of its duties under this chapter *shall have the powers of a head of a department as set forth in Sections 11180 to 11190,* inclusive, of the Government Code." (Emphasis added.) Section 11180, Government Code, provides: "The head of each department may make investigations and *prosecute actions* concerning: (a) All matters relating to the business activities and subjects under the jurisdiction of the department * * *." (Emphasis added.)

[3] Respondents concede that it was the duty of the Appeals Board to file in the superior court an answer and attach to it a complete record of the proceedings had before it. Then, say they, the board is a nominal party only and cannot be aggrieved by any action of the superior court in the mandate proceeding. While not exactly analogous the situation in mandate proceedings brought against other statewide boards and commissions is of some value in determining the real position of an administrative board in the mandate proceeding. Take for example the Industrial Accident Commission. Section 111, Labor Code, states: "The Industrial Accident Commission * * * shall exercise all judicial powers * * *." Thus in this respect it is similar to the Appeals Board. On a review of a ruling of the Industrial Accident Commission by the District Court of Appeal, it is the duty of the Industrial Accident Commission to appear and present its record. It has never been contended that because of the judicial character of the commission, it had no power to apply to the Supreme Court for a hearing after an adverse decision in the District Court of Appeal. State boards and commissions, in ruling upon matters which are reviewable by writ of mandate as provided in section 1094.5, Code of Civil Procedure, are acting in a quasi-judicial capacity. It has never been contended that such boards and commissions, because of that capacity, had no right to appeal from an adverse decision of the superior court in such mandate proceedings. If the board or commission under such circumstances is a "party aggrieved" permitting it to appeal, we can see no reason why the Appeals Board here is not likewise a party aggrieved.

The motion to dismiss is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

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[2] It appears in sections 23049 through 26004, Business and Professions Code.

150 Cal.App.2d 572

H. R. BUCY, doing business as Bucy Manufacturing Company, Plaintiff and Respondent,

v.

NEW AMSTERDAM CASUALTY COMPANY, a corporation, and Schimel Arms Corporation, a corporation, Defendants,

New Amsterdam Casualty Company, a corporation, Appellant.

Civ. 21577.

District Court of Appeal, Second District, Division 1, California.

April 30, 1957.

Rehearing Denied May 20, 1957.

Action by seller of manufacturing dies against buyer's surety on claim and delivery bond. From judgment entered in Superior Court, Los Angeles County, Le Roy Dawson, J., for seller in amount of unpaid lien, surety appealed. The District Court of Appeal, Doran, J., held that where the seller was in possession of dies whose original cost was $5,200 and replacement value was more at time buyer brought claim and delivery action, award of $3,871.08 which represented amount of unpaid seller's lien was proper.

Judgment affirmed.

See also 293 P.2d 486.

1. Replevin ⚷119

Where defendant in claim and delivery action alleged right of possession of manufacturing dies by virtue of unpaid seller's lien but did not ask for return of dies or money judgment in lieu thereof and purchaser of dies dismissed action before trial, surety on claim and delivery bond was liable. West's Ann.Code Civ.Proc., §§ 512, 1041.

2. Replevin ⚷134

In action by seller of manufacturing dies against buyer's surety on claim and delivery bond where buyer had dismissed claim and delivery action before trial and dies had been sold at buyer's bankruptcy sale, evidence was sufficient to support trial court's finding that seller's lien on the dies for unpaid balance of purchase price had not been waived, lost or impaired. West's Ann.Code Civ.Proc., §§ 512, 1041.

3. Replevin ⚷133

Complaint which alleged history of original claim and delivery action brought by buyer of manufacturing dies, filing of seller's answer alleging existence of unpaid seller's liens, voluntary dismissal of action by buyer, and liability on the claim and delivery bond stated cause of action to recover unpaid balance of purchase price from surety. West's Ann.Code Civ.Proc., §§ 512, 1041.

4. Replevin ⚷124(3)

Where seller who held unpaid seller's lien for $3,871.08 was in possession of dies whose replacement cost was more than $5,200 original cost at time buyer brought claim and delivery action, the fact that dies were later sold at buyer's bankruptcy sale did not show that dies had value only as scrap, and award for amount of lien in action on claim and delivery bond was proper. West's Ann.Code Civ.Proc., §§ 512, 1041.

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Eugene S. Ives, Los Angeles, for appellants.

Stanley G. Pearson, Burbank, for respondents.

DORAN, Justice.

The controversy herein arises out of a claim and delivery action instituted by Schimel Arms Corporation against respondent Bucy to recover four dies used by Schimel in the manufacture of a carbon dioxide gun. The dies were made by Bucy, a die casting foundry operator, in 1949 or 1950; three of the dies were paid for while the fourth, known as the Gas Chamber Die, was made later and had not been paid for. Bucy claimed a lien on the dies and die molds for the unpaid price and the trial court found that such lien had not been waived.

In connection with its claim and delivery action against Bucy, the Schimel Arms Corporation provided a claim and delivery bond executed by appellant New Amsterdam Casualty Company, in accordance with Section 512 of the Code of Civil Procedure, whereupon the dies were taken from Bucy by the Marshal and delivered to Schimel Arms. The undertaking provides that the New Amsterdam Casualty Company "does hereby obligate itself to defendant under said statutory obligations (C.C.P. Sections 512 and 1041) in the sum of * * * $15,000.-00".

Section 512 provides that the obligors in such a bond "are bound to the defendant in double the value of the property as stated in the affidavit *for the prosecution of the action,* for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff". (Italics added.)

In the claim and delivery action Bucy filed an answer alleging right of possession by virtue of an unpaid seller's lien, but did not seek judgment for a return of the dies taken by the Marshal, or a money judgment in lieu thereof. Later, a motion was made by Bucy for permission to file an amended and supplemental answer asking a return of the dies or the value thereof. The claim and delivery action was never tried because two days after the filing of this motion, such action was dismissed by Schimel Arms. Thereafter, Bucy filed the present action on the bond executed by New Amsterdam Casualty Company, and recovered judgment in the sum of $3,871.08, interest and costs, from which judgment New Amsterdam now appeals.

It is appellants' contention that the complaint herein fails to state a cause of action on the bond for the reason that the answer in the claim and delivery suit did not ask for a return of the property or the value thereof, or damages for detention. It is also contended that since the complaint on the claim and delivery bond "does not contain allegations that a judgment was or could have been obtained for the return of the property seized, or its value, or damages for the detention thereof", it does not state a cause of action against the surety. And finally, appellants aver that "Even if the Court had the power to find for Bucy in this action it erred in awarding Bucy a judgment in the full amount of his lien instead of awarding the damages Bucy actually suffered by reason of the taking and detention of the dies".

[1] There is merit in none of these contentions. So far as liability on the bond is concerned, Section 512 of the Code of Civil Procedure, hereinbefore quoted, specifically provides that the obligor is bound, among other conditions, "for the prosecution" of the claim and delivery action. Were this not so, a plaintiff, after having secured possession by claim and delivery, might merely dismiss the action and the defendant, although possessing a worthy right to the property seized, would have no recourse on the bond although great injury had resulted from the unjustified action. This is exactly what has happened here. In place of proceeding with a trial which would have determined whether Bucy was entitled, by reason of a lien or otherwise, to possession of the dies, the Schimel Arms Corporation dismissed its claim and delivery action against Bucy. There can, under the applicable statute, be no question as to liability on the bond.

[2] The question of Bucy's lien on the dies appear to have been in the case from beginning to end, and as respondents point out, much evidence in the record relates to this very matter. The trial court's finding that there was such a lien and that the same had not been waived, lost or impaired is supported by substantial evidence. In this connection, the trial court also found "That subsequent to the purchase of said gas chamber die * * * and at least by October 25, 1952, cross-defendant (Schimel Arms) became and remained hopelessly insolvent and unable to pay its debts". It appears that the dies had been in use by Schimel and along with the assets of Schimel Arms, were ultimately sold at a bankruptcy sale.

[3] The complaint filed in the present action on the bond is quite adequate. It sets

forth the history of the original claim and delivery action, the filing of the answer alleging existence of the liens, the voluntary dismissal of that action by Schimel Arms, and liability on the bond. This leaves, then, only the question of the amount of the judgment rendered.

[4] The record discloses substantial evidence in support of the finding that at the time of the taking, "plaintiff was lawfully retaining possession of said dies under and by virtue of liens totaling $3,871.08, after giving credit for the $1,672.50 paid by * * * Schimel Arms Corporation after the commencement of the action but prior to the wrongful taking". The complaint and affidavit for claim and delivery place the value of the dies at $7,500; original cost of the three dies was $5,200, and $1,297.75 for the Gas Chamber Die purchased later. The replacement value was considerably more.

Appellants' contention that the proper measure of damages, if any, should have been the scrap value of the dies, is untenable. This was certainly not the true value of the property at the time of the taking, which is the proper measure of damages. Such value cannot be determined by metal content or weight, nor were the dies ever scrapped.

In Fletcher Aviation Corp. v. Landis Mfg. Co., 1950, 95 Cal.App.2d 905, 214 P.2d 400, the plaintiff had lawful possession of patterns and dies for making airplane parts. The defendant wrongfully took possession of leased premises including the dies; part were sold to a junk dealer for $487, and plaster patterns were disposed of at a dump. As said in respondents' brief in the instant case, "The court found that the dies and pattern had a value of $7,587, against the defendant's contention that they had only a junk value. * * * The court there, as in our case, admitted evidence of the original cost, replacement cost and junk value of the dies.". While it is quite true that the facts in the Fletcher Aviation case are not identical with those here presented, the underlying principle relating to value of the dies is clearly applicable.

The record indicates that appellants were accorded a full and fair trial of all existent issues, that findings and judgment are in all respects supported by the evidence, and that no reversible error has been committed.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

Carl H. PEARSON, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES, a public corporation; H. L. Byram, Walter G. Gastil, M. J. Brock, Jr., Gladys Johnson, E. C. Spruill, A. L. Thomas, C. H. Thurber, Members of the Board of Retirement of the Los Angeles County Employees' Retirement Association; Harry Albert, Hayden F. Jones, Winston W. Crouch, Members of the Board of Civil Service Commissioners of the County of Los Angeles; and E. W. Biscailuz, Sheriff of Los Angeles County, Defendants and Respondents.*

Civ. 22078.

District Court of Appeal, Second District, Division 1, California.
April 30, 1957.

Hearing Granted June 26, 1957.

Proceeding for a writ of mandate to compel the Civil Service Commission to conduct a hearing on the sheriff's charges against the petitioner or dismiss them. From an adverse judgment of the Superior Court of Los Angeles County, John J. Ford, J., the plaintiff appeals. The District Court of Appeal, Fourt, J., held that a conviction of felony of a petitioner automatically removed him from his office as deputy sheriff precluding an award of pension where the petitioner had not attained the age of 55 years at the time of the conviction.

Judgment affirmed.

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* Opinion vacated 319 P.2d 624.

1. Sheriffs and Constables ⚷21

The conviction of a deputy sheriff of a felony automatically removed him from his office. West's Ann.Gov.Code, §§ 1028, 1770.

2. Officers ⚷69.2

Charter provisions of Los Angeles County providing that discharge of civil service employees of county can be accomplished only by compliance with charter provisions if conflicting with Government Code Provisions vacating public office on conviction of felony must yield to the Government Code Provisions which announce a state-wide policy. West's Ann.Gov.Code, §§ 1028, 1770, 31450 to 31822, 32050.

3. Officers ⚷31

Statute disqualifying a person convicted of a felony from holding office manifests the legislative intent that a person who has been convicted of a felony should not be entrusted with the enforcement of the criminal law. West's Ann.Gov.Code, § 1028.

4. Sheriffs and Constables ⚷21, 28

A deputy sheriff after conviction of a felony was disqualified absolutely from holding office and he was automatically removed from office and was not entitled to pension rights where he had not at that time attained the age of 55 years. West's Ann. Gov.Code, §§ 1028, 1770, 6200, 31450 to 31822, 32050.

5. Officers ⚷31

Statute disqualifying a person convicted of felony from holding office and "from being employed" does not refer to future employment by a state or subdivision thereof and is not construable as providing that if a person is hired as a peace officer by a political subdivision and such person after such employment commits a felony while holding the office, there is no disqualification. West's Ann.Gov.Code, § 1028.

6. Officers ⚷94

The very nature and purpose of a pension for a peace officer presupposes that he has not been convicted of a felony in the course of his activities in his office. West's Ann.Gov.Code, §§ 31469, 31470, 31557.1, 31683.1, 31900 to 32082.

◆

S. V. O. Prichard, Hollywood, for appellant.

Harold W. Kennedy, County Counsel, Edward H. Gaylord and Andrew O. Porter, Deputies County Counsel, Los Angeles, for respondents.

FOURT, Justice.

The petitioner seeks to retire as a member of the Peace Officers' Retirement Association. This is an appeal from a judgment denying an alternative writ of mandate to compel the Civil Service Commission of the County of Los Angeles either to conduct a hearing on the Sheriff's charges against him or to dismiss them.

The petitioner Pearson was born July 24, 1895, and became fifty-five years of age on July 23, 1951. He was actively employed in the office of the Sheriff of the County of Los Angeles as a deputy sheriff from December 24, 1924, until December 13, 1950, when he was suspended for thirty days. The suspension just mentioned was because of a failure to make a certain report. Until December 16, 1950, he was a member of the Peace Officers' Retirement System and made all of the required contributions thereto. The suspension was apparently for the reason that petitioner had on Sunday, December 10, 1950, in the evening, visited at the office of an attorney, Samuel Rummel, in Los Angeles, and discussed a subject not in line or connected with his official duties in the Sheriff's department; that the next morning petitioner learned that Rummel had been murdered the night before and throughout that day, namely Monday, December 11, until that night, he did not report his visit to Rummel's office to his superior officers even though he was aware that the matter was under intensive police investigation; that by failing to so report he unnecessarily withheld for many hours information which was the object of inquiry which constituted neglect of duty.

On December 18, 1950, the Sheriff filed charges against petitioner, seeking his discharge. A copy of the charge was served upon the petitioner on December 19, 1950. An answer was filed to such charges on December 28, 1950, wherein a hearing was requested. The charge generally was to the effect that the petitioner, about 12:30 o'clock a. m., December 12, 1950, made certain statements to Los Angeles police officers, namely Thad Brown and other police officers, with reference to events which occurred shortly prior to the murder of Rummel which were false, a fact which was later admitted by the petitioner.

Petitioner was indicted by the grand jury for violating the provisions of section 6200 of the Government Code, which provisions generally have to do with the interference or removal of public records.

Pearson thereafter requested that the hearing on the charges before the Commission be postponed until after the determination of the criminal charge. On about February 8, 1951, the Civil Service Commission made an order that the matter of the hearing go "off calendar" until the Commission was notified by Pearson of the disposition of the criminal charge. Petitioner was convicted on July 16, 1951, of the felony charge set forth above, in the superior court. On August 8, 1951, the Commission advised him that on February 6th, it had ordered the matter of his hearing "off calendar" until notified by him of the disposition of the criminal charge.

On September 4, 1951, proceedings were suspended in the superior court and petitioner was placed on probation for three years. He thereafter appealed to the District Court of Appeal, second appellate district, which affirmed his conviction. People v. Pearson, 111 Cal.App.2d 9, 244 P.2d 35 [May 9, 1952]. On May 20, 1952, a petition for rehearing was denied, and on July 9, 1952, the remittitur was filed in the office of the clerk of the superior court. On April 16, 1953, petitioner having complied with the probationary terms, the cause was dismissed and the criminal charges expunged from the record.

On September 11, 1951, the petitioner directed a letter to the County Counsel of Los Angeles county wherein he stated that the charges had been filed, that he had made an answer thereto and that the matter was "off calendar" pending the disposition of the criminal charge. He further stated that he had been informed that unless the hearing was conducted within a year his right to reinstatement would be gone and that it appeared that the determination of the criminal charge would not be completed within the year, and asked the County Counsel to please advise him in the premises. On September 19, 1951, a deputy county counsel replied to the letter and stated that he had taken the matter up with a Mr. Porter, who advised the Civil Service Commission, and Porter had informed the writer of the letter that there was no rule requiring hearings on discharge to be held within a year of the discharge; that such a hearing could be held at any time. Petitioner was also told in the letter that the Commission would not set the date of hearing until the matter was brought to their attention by either the petitioner or the Sheriff.

On May 19, 1953, about a year after the affirmance of the judgment of conviction by the District Court of Appeal, the petitioner requested that the charges against him be restored to the calendar and that a hearing be conducted thereon. On May 20, 1953, the Commission ordered that the request be denied because of the unreasonable lapse of time since the original request for hearing was made.

Thereafter, on June 22, 1953, the petitioner filed his application for retirement, to be effective as of July 24, 1951.

A petition for a rehearing on the order made regarding his application to have a hearing conducted upon the charges against him was denied on July 2, 1953, because the request for a hearing was not made within a reasonable time and that his right to any further proceedings before the Commission were lost and the discharge was now final.

On July 13, 1953, the Retirement Board of Los Angeles County Retirement System denied the application of the petitioner for retirement. March 16, 1954, the petitioner filed a mandamus action (No. 626,090). The facts at the hearing on that proceeding were stipulated to and the writ was denied on or about June 28, 1955, "without prejudice". Thereafter, the petitioner requested both the Sheriff and the Civil Service Commission to proceed, and they refused to do so. He then requested of the Sheriff that he be restored to his position as a deputy sheriff in order that he might immediately retire. The County Counsel advised that it was the position of the respondent that no prosecution of the charges was necessary and that the petitioner had been discharged. Petitioner states that more than five years have now elapsed and the authorities have not prosecuted to trial the dismissal proceedings, and that by an analogy to section 583 of the Code of Civil Procedure the dismissal of those proceedings is mandatory. The present proceeding is to compel the proper authorities to receive from this petitioner the necessary monies to make him fully paid up for rights and thereupon to retire him and to pay him the pension to which he claims he is entitled, and that with respect to the dismissal charges, same be dismissed.

Appellant contends that the pension statute, Government Code, §§ 31450–31822, became a part of the contemplated compensation for the services which he rendered and was a part of the contract of employment; that the provisions for pensions should be liberally construed; that his right is a vested right and the fact that he was convicted of a felony has no bearing upon his right to a pension, and being convicted of a felony did not automatically discharge him from his position in the county service; that his present action is not barred by the statute of limitations; that he has not waived his right to a hearing before the Civil Service Commission and that he is fully qualified for a pension.

Respondents assert that the petition, on its face, shows that the applicant is not entitled to any relief by his action because when he was convicted of a felony on July 16, 1951, he was automatically removed from office, pursuant to sections 1028 and 1770 of the Government Code; that at the time he was fifty-five years of age, namely on July 23, 1951, he was not eligible to retire, Government Code, § 32050; further, that mandamus to the Civil Service Commission to hold a hearing is barred by the three-year statute of limitations, since appellant should have requested that the charges be restored to the calendar by July 9, 1952, and by delaying the request, he cannot extend the statute of limitations; that the appellant waived his right to a hearing before the Commission and that he forfeited his rights to retirement and to receive a pension by his own misconduct.

Section 1028 of the Government Code provides in part as follows:

> "Any person who has been convicted of a felony in this State * * * is disqualified from holding office or being employed as a peace officer of the State, county, city, city and county or other political subdivision, whether with or without compensation, and is disqualified from any office or employment by the State, county, city, city and county or other political subdivision, whether with or without compensation which confers upon the holder or employee the powers and duties of a peace officer. * * *"

Section 1770 of the Government Code provides in part as follows:

> "An office becomes vacant on the happening of any of the following events before the expiration of the term:
>
> * * * * * *
>
> "(h) His conviction of a felony or of any offense involving a violation of his official duties."

The court, in People v. Pearson, supra, held, 111 Cal.App.2d at page 17, 244 P.2d at page 43, "Pearson was an officer within the contemplation of section 6200. Gov. Code, secs. 24000, 24100; * * *". In our opinion, Pearson was an officer, and not an employee, for the purposes of the proceedings before us.

Appellant asserts that the provisions of sections 31469–31470 of the Government Code contain certain definitions, and that section 31683.1 of the Government Code provides for certain retirement rights. Counsel is correct as to what the sections contain. However, the sections referred to constitute a part of the County Employees Retirement Law. These sections do not necessarily apply to the appellant. He did not allege that he ever became a peace officer member of the County Employees' Retirement System, but did allege that he became a member of the Peace Officers' Retirement System. The provisions of Article 8.3 of the County Employees' Retirement Law did not come into existence until September 22, 1951, and only apply "in any County having a population not in excess of 2,000,000". Government Code, § 31557.1.

Whatever rights the appellant has arise under the County Peace Officers' Retirement Law, Chapter 4, Part 3, Division 4 of Title 3, consisting of sections 31900–32082 of the Government Code. Under these provisions any member who terminates his service with the county before he reaches the age of fifty-five (excepting when disabled) is not entitled to a pension.

Appellant has cited several cases which hold in effect that pension provisions become a part of the contemplated compensation for the services of appellant and are a part of the contract of employment itself. The most recent of the cases to which our attention is directed states: "[w]hile payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute" and "[t]he fact that a pension right is vested will not, of course, prevent its loss upon the occurrence of a condition subsequent such as lawful termination of employment before completion of the period of service designated in the pension plan." Kern v. City of Long Beach, 29 Cal.2d 848, 855, 853, 179 P.2d 799, 803.

[1, 2] The conviction of the felony on July 16, 1951, automatically removed Pearson from his office. Appellant asserts that the County Charter provides that the discharge of a civil service employee of the County can be accomplished only by the compliance with the provisions of the Charter. We believe that under sections 1028 and 1770 of the Government Code, the employees or officers covered thereby, upon conviction of a felony, are automatically removed from office. The Charter provisions are not in conflict with the Government Code provisions, but if they are, the Government Code provisions announce a statewide policy and should, and do prevail.

In the case of Di Genova v. State Board of Education, 45 Cal.2d 255, at page 260, 288 P.2d 862, at page 865, the court said:

> "In the revocation of a license for the conviction of a specified crime under statutes like section 12756 there is no real necessity for the board to 'examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto', Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545 * *. There can be little dispute as to the conviction as it is a matter of public record and the question of identity is not likely to arise."

[3] Clearly, the legislature intended by enacting the provisions of section 1028 that a person who had been convicted of a felony should not be entrusted with the enforcement of the criminal law.

The appellant had not attained the age of fifty-five years on July 16, 1951, and therefore he was not "a member * * * who has attained age 55 * * *." Government Code, § 32050.

[4] Simply stated, Pearson could not hold the office of deputy sheriff after he was convicted of a felony, and such conviction, in our opinion, disqualified him absolutely. The whole theory behind the

pension system in government is to put a premium on conscientious and honorable service. It would be an anomaly, indeed, to have a captain in the sheriff's office, a convicted felon, investigating and gathering evidence against other citizens who had done or were doing the very thing of which the captain was convicted to the end that such other citizens could be sent to the state prison, and at the same time, to have the captain running a race with another set of officials attempting to secure his retirement and a pension, although a convicted felon. It was never contemplated that the pension structure should be based on any such foundation.

Appellant asserts that his behavior while holding the office of captain in the Sheriff's office has nothing whatsoever to do with whether he is eligible to a pension. At the oral argument it was substantially his contention that he had earned the pension and if he had committed a felony every day during his time as a captain in the Sheriff's department for twenty years, he was still entitled to a pension. We do not agree with any such philosophy.

[5] Appellant interprets the words "from * * * being employed" as used in section 1028 of the Government Code to mean and refer to future employment by the state or a division thereof, and that it has nothing to do with his continuance in an employment already established. Stating it in another way, appellant contends that the words relate only to the initial act of employment, and do not refer to anything having to do with a discharge from an employment after once being employed. In other words, appellant argues that the legislature has provided, in effect, that the political subdivision cannot in the first instance hire or engage a person as a peace officer who has theretofore been convicted of a felony; however, if a person has been hired or engaged as a peace officer by a political subdivision, and such person, after such employment or hiring, commits a felony while holding the engagement or the office, there is no disqualification. Had the legislature been of such a mind it would have been an easy matter to provide that if a peace officer were convicted of a felony such conviction would not in any wise affect his right to retirement and a pension. We do not believe that the legislature intended any such limited interpretation of the words used.

In our opinion an incident of Pearson's engagement as a captain in the Sheriff's Department of the county of Los Angeles was that he not be convicted of a felony and that if he were so convicted, then, and in such event, his term as a deputy sheriff would end forthwith.

[6] It appears to us that the pension system for peace officers is as described in the Act creating the system "to recognize a public obligation to employees in the public service whose duties expose them to more than ordinary risks * * *." It is "designed to encourage long and faithful service by the assurance of ultimate honor and the reward of a lifelong competency." The very nature and purpose of a pension for a peace officer presupposes that he has not been convicted of a felony in the course of his activities in his office. In the case of People ex rel. Hardy v. Greene, 87 App.Div. 589, 84 N.Y.S. 673, at pages 674 and 675, the court made some statements which are appropriate here, saying among other things:

> "While there is no provision in the statute to the effect that the applicant for retirement must be in good standing at the time, it must be assumed, from the very nature and purpose of a pension, that no successful application could be made by one who was under suspension pending the trial of charges relating to his official conduct. The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of serv-

ice, might be dismissed from the force for misbehavior.

*   *   *   *   *   *

"* * * He is deprived of the right to retire because he has been suspended from the force until the charges pending against him have been tried; and should he be, unfortunately, convicted and dismissed as a punishment, his right to retirement would be lost by his own delinquencies, and not in a legal sense by reason of his continuance in service * * *.

"* * * If an intention existed to confer upon a favored class the special privilege claimed by the relator, it should have been manifested by explicit expression. It should not be construed into the law, for its effect would be not only to work injustice upon the other members of the force, but to greatly impair the efficiency of the department as a whole; for nothing can be imagined more likely to discourage ambition, to destroy discipline, or to stifle stimulus than the creation of a privileged class among the police, who should be possessed by law of the absolute right to avoid the consequences of violation of duty by the mere voluntary adoption of an honorary retirement, enriched by the enjoyment of a life annuity."

California courts appear to be in substantial agreement with the view just expressed. In MacIntyre v. Retirement Board of City of San Francisco, 42 Cal.App.2d 734, 109 P.2d 962, the question involved was whether an officer otherwise eligible for a pension, and who makes an application therefor, but who is dismissed for misconduct by the police commission prior to his final action on his application, is entitled to have such application granted. In determining the case, the court, among other things, stated, 42 Cal.App.2d at pages 735–736, 109 P.2d at pages 963–964:

"It is assumed that upon acceptance of a position as an officer or employee of a governmental agency, an appointee will perform his duties conscientiously and faithfully. In some instances an oath is required. When it is not required, efficiency and fidelity in the performance of duty are nevertheless paramount considerations. It is never contemplated that an officer or employee guilty of conduct warranting dismissal should continue in office or be permitted to receive other emoluments offered as an inducement to honesty and efficiency. The right to a pension is not indefeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty.

"In Douglas v. Pension Board, 75 Cal.App. 335, 340, 242 P. 756, 757, the court said: 'The considerations upon which a government adopts, as a part of its administrative policy, a system for the pensioning of those who have continuously, for a specified period of years, served the government in the performance of public civil duties, both as officers and employees, are, in a large measure, these: (1) To encourage those public officers or employees who have by experience or otherwise demonstrated peculiar fitness for the performance of the public services to which they have been assigned to continue in the service of the government and at all times faithfully discharged the duties involved in such service. The hope held out for future additional reward or compensation for their public services to that which they receive concurrently with the period during which they are actually and actively engaged in performing such services is conducive to uniform faithfulness and efficiency in discharging the duties which their offices or employments have exacted.'

*   *   *   *   *   *

"Without regard to the time of the vesting of pension rights, it is an implied condition of employment, and hence a condition of such vesting that the duties of the employee shall have been faithfully performed; it is immaterial whether the proper authorities discover the misconduct and file charges before or after the application for a pension so long as the charges are filed before an order is made by the retirement board. The filing of the application does not *ipso facto* retire the applicant. It is necessary that an order of retirement be duly made. Up to that time the police officer, whether under suspension or in actual service, is under the control and jurisdiction of the police commission. If, prior to an order of the retirement board he is dismissed upon charges of conduct unbecoming an officer, he is not entitled to 'a pension' as that term is used in the charter."

We are not unmindful of the views as expressed in State ex rel. Kirby v. Board of Fire Com'rs of City of Hartford, 129 Conn. 419, 29 A.2d 452, Bullock v. Spencer, D.C., 112 F.Supp. 147 and Stiles v. Board of Trustees of Police Pension Fund, 281 Ill. 636, 118 N.E. 202. However, we believe the better rule is as heretofore expressed.

In the light of our conclusions on the effect of the felony conviction, no useful purpose would be served in discussing the remaining contentions.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

48 Cal.2d 476

PEOPLE of the State of California, Plaintiff and Respondent,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, Defendant and Appellant.

Sac. 6610.

Supreme Court of California,
In Bank.
April 26, 1957.

Action by state to recover sum of money alleged to have been improperly paid to corporation as interest on refunds of franchise tax payments. From judgment for state entered in Superior Court, Sacramento County, Grover W. Bedeau, J., corporation appealed. The Supreme Court, Spence, J., held that where corporation elected to accelerate amortization of emergency facilities and claim deductions for overpayments of franchise tax and corporation received refunds of franchise taxes paid for years 1942, 1943 and 1944 together with interest up to date of payment in 1948 and statute under which corporation could claim interest on refunds had been amended in 1947 so that interest could not have been claimed after that date, corporation was entitled to interest only up to effective date of statute amendment in 1947.

Judgment affirmed.

Opinion, 304 P.2d 727, vacated.

1. States 🔑171

The liability of the state to pay interest is purely statutory.

2. Statutes 🔑219

An erroneous administrative construction of a statute does not become decisive no matter how long continued.

3. Constitutional Law 🔑121(1)
Taxation 🔑37.11

Franchise tax statute which gave corporation the right to make a claim for refunds for overpayments of tax and allowed corporation interest on tax refunds did not create a contract between the corporation and the state and no constitutional principles were involved in a situation where the corporation had applied for tax refunds at time when statute allowed interest but statute was amended so that corporation's claim for interest was terminated as of effective date of amendment. West's Ann.Rev. & Tax.Code, § 26080.

4. Interest 🔑40

A statutory interest right for a particular period depends upon the law in effect at that time.

5. Taxation 🔑535

Where corporation elected to claim deductions for amortization of emergency facilities and received refund for overpayments of franchise taxes paid for years of 1942, 1943 and 1944 in 1948 and statute under which corporation could claim interest on refund was amended in 1947, corporation was entitled to interest on refunds only up to date of statute amendment in 1947. West's Ann.Rev. & Tax.Code, §§ 24355, 26080.

6. Limitation of Actions 🔑16

The nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the particular statute of limitations.

7. Limitation of Actions 🔑37(2)

Where action by state to recover interest paid on franchise tax refunds to corporation was based on theory of relief on ground of mistake in that erroneous allowances were made by commissioner, cause of action would not have accrued except for the mistake of law which was the very basis or gravamen of state's action and applicable statute of limitation was three year statute governing an action for relief on ground of mistake. West's Ann.Civ. Code, § 338, subd. 4.

8. Taxation 🔑535

Although individual or private corporation could not recover for money paid out through mistake of law, state could recover interest which franchise tax office paid on prior overpayments of tax subsequent to enactment of statute prohibiting interest payments. West's Ann.Rev. & Tax.Code, § 26080.

L. A. Gibbons, Douglas C. Gregg, A. Andrew Hauk and Lewis D. Lawrence, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine and Irving H. Perluss, Asst. Attys. Gen., for respondent.

SPENCE, Justice.

Plaintiff sought to recover $6,781.69 alleged to have been improperly paid by plaintiff to defendant as interest on certain overpayments of franchise tax refunded to defendant for the income years 1942, 1943, and 1944. The propriety of the refund of the tax overpayments is not questioned, and it is only the propriety of the payment of a portion of the interest on the refund that must be determined. The trial court upheld plaintiff's claims in the light of the statutory provisions and rendered judgment in its favor. Defendant appeals contending: (1) that the court both misconstrued the statute and applied it retroactively in disregard of constitutional limitations; and (2) that in any event, plaintiff's recovery is barred by the statute of limitations. For the reasons hereinafter stated, we have concluded that defendant's contentions cannot be sustained.

There is no dispute as to the facts. Defendant paid its corporate franchise taxes as computed for the income years 1942, 1943, and 1944. Prior to those years the Franchise Tax Act provided that a taxpayer could elect to claim a deduction for amortization of emergency facilities under regulations prescribed by the Franchise Tax Commissioner. Bank and Corporation Franchise Tax Act, § 8, subd. f; Stats. 1929, ch. 13, as amended; now Rev. & Tax. Code, § 24121h [see West's Ann.Rev. & Tax.Code, § 24355]. Pursuant to such authority, the Franchise Tax Commissioner on November 11, 1945, issued a regulation providing that the election to accelerate the amortization of emergency facilities should be made by filing a statement of such election within certain prescribed time limits; and that upon such election the taxpayer could file a claim for refund and the tax liability would be recomputed to give effect to the revised amortization deduction. (FTA 8(f) No. 1.) Accordingly, defendant duly filed a statement of its election to accelerate the amortization for the income years in question, and within the time allowed defendant then filed its claims for refunds of franchise taxes overpaid for the income years 1942, 1943, and 1944. After some appropriate adjustments, the commissioner determined the amount of refund and mailed warrants to defendant on August 18, 1948. These warrants included the amount of the overpayments plus interest at six per cent per annum computed from the dates of the respective overpayments to a time shortly before August 18, 1848. Thereafter, the commissioner determined that interest in excess of that properly due had been paid to defendant, and demand was made on defendant for a return of such excess. Defendant refused, and this action was commenced on June 7, 1951.

At the time defendant paid its franchise tax for the years in question and until July 10, 1947, section 27(c) of the Bank and Corporation Franchise Tax Act (now Rev. & Tax Code, § 26080) provided: "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment *was not made because of an error or mistake on the part of the taxpayer,* at the rate of 6 per centum per annum. * * *" (Emphasis added.) In 1947 the statute was amended to provide: "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment *was made because of an error or mistake on the part of the commissioner,* at the rate of 6 per centum per annum. * * *" (Emphasis added.) The amendment went into effect July 10, 1947, and remained in effect until after the refund warrants were mailed to defendant. Under its election to accelerate amortization, defendant had overpaid its taxes for the years in question. These overpayments were not due to any error or mistake by either defendant or the commissioner. Under section 27(c) as it read when defendant filed its claims for refunds, defendant was entitled to interest because there had been no error or mistake on its part in making the overpayments. However, for the period of time subsequent to July 9, 1947, there was no statute authorizing the payment of interest on refunds for overpayment of taxes unless such overpayments resulted from error or mistake of the commissioner. Thus, the principal question for determination is whether the 1947 amendment operated from its effective date to prevent the running of interest thereafter on defendant's overpayments made prior thereto. The trial court held that the amendment did so operate, and judgment accordingly was entered for plaintiff.

[1] The liability of the state to pay interest in "purely statutory." Gregory v. State of California, 32 Cal.2d 700, 703, 197 P.2d 728, 4 A.L.R.2d 924. In the Gregory case an analogous question was presented where the taxpayer brought an action to recover a gift tax paid under protest. While the action was pending the gift tax statute was amended so as to allow interest on the amount of overpayment, the payment of such interest not being previously authorized. It was held that the taxpayer, in recovering judgment for the overpayment, was entitled to interest from the effective date of the amendment, and that such allowance of interest did not give retroactive effect to the amendment. In so concluding, this court stated: "* * * whatever the law may be elsewhere it has always been the rule in California that there is no implied contract of any kind that the State will pay interest on its indebtedness for it is liable only when made so by statute. (See 23 Cal.Jur. 588.) Thus all we have is a statutory liability and the sole question is whether the statute is applied retroactively." 32 Cal.2d 703, 197 P.2d 729.

[2] Defendant argues that it is entitled to retain the interest paid for the period *subsequent* to the effective date of the 1947 amendment because its overpayments of tax were made *prior* to that date and the amendment should apply only to overpayments made *after* that date. In support of its position defendant introduced, over plaintiff's objections as to relevancy, the testimony of certain employees of the franchise tax office indicating that defendant's interpretation of the amendment was their understanding of the Legislature's intent, and that their administration of the amendment was in accord therewith until the practice was changed upon advice of the attorney general following the decision in Gregory v. State of California, 1948, supra, 32 Cal.2d 700, 197 P.2d 728. See 15 Ops. Atty.Gen. 144; 17 Ops.Atty.Gen. 138. However, the initial administrative practice upon which defendant relied was of relatively short duration, but regardless of this fact "an erroneous administrative construction does not become decisive no matter how long continued." Trabue Pittman Corp. v. County of Los Angeles, 29 Cal.2d 385, 399, 175 P.2d 512, 521.

[3] Contrary to defendant's position, the trial court's conclusion involves no retroactive application of the 1947 amendment in an unconstitutional impairment of vested contractual rights. No element of contract is present here, either implied, Gregory v. State of California, supra, 32 Cal.2d 700, 703, 197 P.2d 728, or express. Southern Service Co., Ltd. v. Los Angeles County, 15 Cal.2d 1, 11–12, 97 P.2d 963. The Franchise Tax Act gave defendant the right to make a claim for refunds for overpayments of tax, a right created by statute. At the same time the act gave defendant the right to receive interest on its refunds, provided that the overpayment was not the result of error or mistake on the part of the taxpayer. Had the act not allowed interest, then defendant could have filed its claim for refunds of overpayment of taxes, but it would have received no interest because there would be no statutory authority therefor. The Legislature, having granted to plaintiff the authority to pay interest on overpayments under one certain proviso, had the right to terminate that authority, which it did by the 1947 amendment, substituting another proviso. No constitutional principles are involved

in such situation. Unlike such case as Aetna Casualty & Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 388, 182 P.2d 159, the 1947 amendment operates only on *future* events—the right of the taxpayer to interest *after* the effective date of the amendment defining the authority of the state to make interest payments. See Eichelberger v. City of Berkeley, 46 Cal.2d 182, 189, 293 P.2d 1; Gregory v. State of California, supra, 32 Cal.2d 700, 702–703, 197 P.2d 728; Record v. Indemnity Ins. Co., 103 Cal.App.2d 434, 443–444, 229 P.2d 851.

In Southern Service Co., Ltd. v. Los Angeles County, supra, 15 Cal.2d 1, 7, 97 P.2d 963, 967, it was recognized as "the settled law of this state that illegal taxes vountarily paid may not be recovered by the taxpayer in the absence of a statute permitting a refund thereof." It was then further said, 15 Cal.2d at pages 11–12, 97 P.2d at page 969: "The general relationship of sovereign and taxpayer is not founded on nor does it create any contractual rights. * * * A right to a credit or refund of taxes is purely statutory. * * * The legislature may withdraw such a statutory right or remedy, and a repeal of such a statute without a saving clause will terminate all pending actions based thereon." See also People ex rel. Eitel v. Lindheimer, 371 Ill. 367, 21 N.E.2d 318, 321–322, 124 A.L.R. 1472. Since under this reasoning there is no vested right to the refund of the taxes but rather such action is a matter of legislative grace, it necessarily follows that the right to the payment of interest on such refunds is not vested and the Legislature may enact a statute cutting off such right theretofore accorded the taxpayer.

[4, 5] While an interest obligation based upon contract may resist change under constitutional guarantees, a statutory interest right for a particular period depends upon the law in effect at that time. This has been the settled law in this state for many years. White v. Lyons, 42 Cal. 279, 284; see Gregory v. State of California, supra, 32 Cal.2d 700, 702, 197 P.2d 728. It is likewise so held with respect to the federal revenue acts pertaining to the allowance of interest on credits or refunds of taxes. (See cases cited in Mertens, The Law of Federal Income Taxation (1948), vol. 10, § 58.87, pp. 449–450.) Accordingly, plaintiff concedes defendant's right to the interest on overpayments for the period prior to July 10, 1947, the effective date of the amendment. But defendant's contention that the refunding provision (Bank and Corporation Franchise Tax Act, § 8, subd. f) constituted a continuing offer which was accepted by the taxpayer by electing to accelerate amortization, so that a vested right to the refund, including payments immutably fixed as of the time of the overpayments, is contrary to settled legal principles governing tax laws and cannot prevail.

Defendant finally contends that plaintiff's action is barred by the two-year statute of limitations. Code Civ.Proc., § 339, subd. 1. It asserts that if plaintiff's payment of interest on the overpayments of tax was improper because without statutory authority, then plaintiff's cause of action arose as of the date of the refunds, August 18, 1948, and the period of limitations applicable for enforcement of defendant's obligation to repay such illegally held funds, implied by law, was two years. This action was commenced on June 7, 1951. But in the light of the record, it appears that the proper statute of limitations is the three-year period governing an action for relief on the ground of "mistake" (Code Civ. Proc. § 338, subd. 4), and plaintiff's action was therefore timely filed.

[6] The nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the particular statute of limitations. Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719, 733, 146 P.2d 673, 151 A.L.R. 1062. The record here indicates without dispute that after the effective date of the 1947 amendment, the employees of the franchise tax office believed that authority still existed to continue interest payments on

prior overpayments of tax that were not the result of error or mistake on the part of the taxpayer, and that they continued to administer tax refunds on that basis until advised to the contrary by the attorney general following the decision rendered in 1948 in Gregory v. State of California, supra, 32 Cal.2d 700, 197 P.2d 728. Clearly a mistake of law was involved. Seeking relief from such mistake, plaintiff filed its complaint setting forth two causes of action. In the first it alleged, in substance, its improper payment of interest on the overpayments made by defendant for the period subsequent to July 9, 1947; the enactment of the 1947 amendment prohibiting such interest payments to defendant; the amount of interest properly allocable to defendant on its overpayments and the erroneous allowance made by the commissioner; and its demand upon defendant for repayment of the alleged improper interest payments—allegations sufficient to show plaintiff's theory of relief "on the ground of mistake." In the second cause of action, plaintiff pleaded the common count of money had and received, but this cause of action was based entirely upon the allegations of the first cause of action.

[7] Defendant argues that while said mistake of law may have caused the improper interest payments, such mistake is merely incidental to plaintiff's cause of action as one for money had and received, that no other ground of relief was available to plaintiff, and that therefore the two-year statute of limitations applies. In support of its argument, defendant cites such out-of-state cases as McFarland v. Stillwater County [109 Mont. 544], 98 P.2d 321 and Independent School District of Union Indiana Tp. v. Independent School Distict [123 Iowa 455], 99 N.W. 106. But here the mistake of law is not a mere incident to plaintiff's right to recovery. Rather it is the very basis or gravamen of plaintiff's action and if it were not for such mistake of law by the administrative officers, the cause of action would not have accrued. See Independent School Dist. No. 1, etc. v. Common School Dist. No. 1 [56 Idaho 426], 55 P.2d 144, 148, 105 A.L.R. 1267. Accordingly, the applicable statute is the three-year statute governing an action for relief on the ground of mistake. Code Civ.Proc. § 338, subd. 4.

[8] While as a general rule a mistake of law is of no legal consequence, just as ignorance of the law is no excuse, it has been said that the recovery of public moneys paid out through mistake by the state or an agency of government should be permitted "in many instances where, if paid out by an individual or by a private corporation [they] could not be." Aebli v. Board of Education, 62 Cal.App.2d 706, 725, 145 P.2d 601, 610; see also 70 C.J.S. Payment § 156, p. 365. This appears to be such a case. Since plaintiff's action was filed within less than three years after the erroneous interest payments to defendant, we conclude that it was not barred.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

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48 Cal.2d 484

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald Richard RANDAZZO, Defendant and Appellant.

Cr. 5996.

Supreme Court of California,
In Bank.
April 30, 1957.

Defendant was charged with robbery and kidnaping for the purpose of robbery and from the judgment in the Superior Court, Los Angeles County, Kenneth C. Newell and Benjamin J. Scheinman, JJ., the defendant appeals. The Supreme Court, Traynor, J., held that where the District

Court of Appeal decided that remittitur should not have been recalled, it had the power to and must vacate its order of recall instead of redeciding the case on the merits; that the recall of a remittitur on error of law was unauthorized; that the information was sufficient; and that the correct disposition of the case as to the granting of petition for rehearing by the Supreme Court was to return the proceeding to the District Court of Appeal with appropriate directions.

Cause transferred to the District Court of Appeal with directions.

Shenk and McComb, JJ., dissented in part and Carter, J., dissented.

Opinion, 302 P.2d 39, vacated.

1. Criminal Law ⚷1193

An order of an appellate court recalling a remittitur and setting the appeal for further hearing is an "interlocutory order", that does not establish the law of the case for further proceedings therein, and in such respect, it is analogous to an order of a trial court, sustaining or overruling a demurrer to the complaint, which does not become binding on it.

See publication Words and Phrases, for other judicial constructions and definitions of "Interlocutory Order".

2. Criminal Law ⚷1193

If an appellate court determines on further consideration, that a remittitur should not have been recalled, it has the power to and must vacate its order of recall, instead of redeciding the case on the merits.

3. Criminal Law ⚷1193

Where after affirmance in the District Court of Appeal, a petition for rehearing was denied and the subsequent petition for hearing in the Supreme Court was also denied, and subsequently defendant's motion to recall remittitur and consider an amended petition for rehearing was granted as to count two of the information and the attorney general after petition for rehearing was denied in the appellate court petitioned for hearing in the Supreme Court, implicit in the District Court of Appeal's reversal of the judgment was its redetermination of the correctness of its recall of the remittitur, and such issue was before the Supreme Court on its order of transfer.

4. Criminal Law ⚷1193

Where appellate court granted defendant's motion to recall a remittitur as to count two of the information, fact that Supreme Court denied a hearing following the order of recall was immaterial, since its denial of a hearing to the attorney general constituted only an exercise of the Supreme Court's discretionary power to transfer or refuse to transfer a cause to the Supreme Court that is pending in the District Court of Appeal. West's Ann.Const. art. 6, § 4c.

5. Criminal Law ⚷1193

An error of law does not authorize the recall of a remittitur.

6. Indictment and Information ⚷71

An information is sufficient if it charges defendant with commission of a public offense in words sufficient to give him notice of the offense of which he is accused. West's Ann.Pen.Code, § 952.

7. Indictment and Information ⚷60

Only the essential elements of the offense need be charged in the information.

8. Indictment and Information ⚷60

Notice of the particular manner, means, place or circumstances of the offense are given, not by detailed pleading, but by the transcript of the evidence before the committing magistrate.

9. Indictment and Information ⚷119

Surplusage does not vitiate the information and may be rejected if enough remains to charge the offense. West's Ann. Pen.Code, § 952.

10. Indictment and Information ⚷120

Parts of information charging that defendant did seize, confine, abduct, conceal and detain a victim with intent for the purpose of committing robbery, were not chargeable as public offenses under the statute penalizing kidnapping for the purpose of robbery, but information was not thereby rendered insufficient, where if such parts were disregarded as surplusage, the count would still charge the offense. West's Ann.Pen.Code, § 209.

11. Indictment and Information ⚷147

If offense of kidnaping for purpose of robbery was not stated with sufficient clarity to enable defendant to present his defense, he should have demurred on grounds set forth in the Code. West's Ann.Pen.Code, §§ 209, 1004.

12. Criminal Law ⚷1193

Complaint that erroneous instructions were given would not authorize the recall of remittitur by the District Court of Appeal.

13. Criminal Law ⚷1193

Any objection defendant had to instructions should have been raised on his appeal from the judgment of conviction and not by a motion to recall the remittitur of District Court of Appeal.

14. Criminal Law ⚷1193

Where District Court of Appeal erroneously recalled its remittitur and motion to recall was made to the District Court of Appeal, correct disposition after granting a petition for rehearing by the Supreme Court was to return the proceeding to Court of Appeal with appropriate directions to file its order vacating its order recalling the remittitur and to reissue the remittitur on its decision, affirming the judgment.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was charged by information in two counts, robbery, Pen.Code, § 211, in Count I and kidnaping for the purpose of robbery, Pen.Code, § 209, in Count II, and was found by a jury to be guilty on both counts as charged. The conviction was affirmed by the District Court of Appeal, Second Appellate District, Division One, on March 29, 1955. People v. Randazzo, 132 Cal.App.2d 20, 281 P.2d 289. A petition for rehearing in the District Court of Appeal was denied, a subsequent petition for hearing in this court was also denied, and the remittitur issued on April 29, 1955.

On May 10, 1956, defendant filed with the District Court of Appeal a "Motion to Recall the Remittitur, Reinstate Appeal, and Consider Supplemental or Amended Petition for Rehearing." This motion was granted as to Count II only and the attorney general's petition for rehearing was denied. The attorney general then petitioned for a hearing in this court. Since the appeal was already set for hearing in the District Court of Appeal, we denied the petition because of our unwillingness to interfere until the District Court of Appeal had come to a final decision.

On October 16, 1956, the District Court of Appeal issued its order reversing the judgment of conviction as to Count II, stating as its basis the same ground that it had used in granting the motion to recall the remittitur, that "the opinion of this court * * * affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnaping 'with intent and for the purpose of committing robbery,' under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery. * * *" A petition for rehearing in the District Court of Appeal was denied, and the case is now before us after the granting of a petition for hearing in this court.

[1–4] It is contended at the outset that the order of the District Court of Appeal recalling its remittitur now constitutes a final order reinstating the appeal and that therefore, following the transfer of the cause, this court is precluded from reviewing the order recalling the remittitur and must decide the appeal on the merits. We believe, however, that an order of an appellate court recalling a remittitur and setting the appeal for further hearing is an interlocutory order that does not establish the law of the case for further proceedings therein. In this respect it is analogous to an order of a trial court sustaining or overruling a demurrer to the complaint, which does not become binding on it. Berri v. Superior Court, 43 Cal.2d 856, 860, 279 P.2d 8, and cases cited. Although the issues of fraud, mistake, or inadvertence on which the recall of a remittitur depend are distinct from the issues on the merits of the appeal, they are usually so closely related thereto that the court can determine them only by a review of its decision on the merits. See, Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 628–629, 241 P.2d 985; Isenberg v. Sherman, 214 Cal. 722, 732, 7 P.2d 1006; Davis v. Basalt Rock Co., 114 Cal.App.2d 300, 304–310, 250 P.2d 254; Kohle v. Sinnett, 136 Cal.App.2d 34, 38–40, 288 P.2d 139. If the court was bound by its tentative decision that a fraud had been perpetrated upon it or that it had been inadvertent or mistaken, it would be foreclosed from the full review of the case implicit in its order for reconsideration. Given the strong policy in favor of finality of appellate judgments after the going down of the remittitur, and the fact that the court must be free to review the grounds of its decision recalling the remittitur properly to dispose of the merits, we conclude that if it determines on further consideration that the remittitur should not have been recalled, it has the power to and must vacate its order of recall instead of redeciding the case on the merits. See, Southwestern Inv. Corp. v. City of Los Angeles, supra, 38 Cal. 2d 623, 626, 241 P.2d 985; Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal.App.2d 1, 3, 204 P.2d 387; Ex parte Gallagher, 101 Cal. 113, 114, 35 P. 449. Accordingly, implicit in the District Court of Appeal's reversal of the judgment herein was its redetermination of the correctness of its recall of the remittitur, and that issue is now before this court by virtue of our order of transfer. In this respect, the fact that we denied a hearing following the order of recall is immaterial, since our denial of hearing constituted only an exercise of our discretionary power to transfer or refuse to transfer a cause to this court that is pending in a District Court of Appeal. Cal.Const. art. VI, § 4c. Cases holding that an order denying a motion to dismiss an appeal becomes the law of the case, see, George v. Bekins Van & Storage Co., 33 Cal.2d 834, 850–851, 205 P.2d 1037, and cases cited, are not inconsistent with our conclusion herein, for in such cases the issues on the motion and merits respectively are ordinarily distinct and the policy in favor of finality of judgments is not involved. The statement in Municipal Bond Co. v. City of Riverside, 4 Cal.App.2d 442, 445, 41 P.2d 215, that the determination of issues on an order recalling a remittitur becomes the law of the case was not necessary to the decision therein and is disapproved.

[5] The order of the District Court of Appeal granting the motion to recall the remittitur as to Count II, ordering the judgment on that count vacated and the remittitur recalled, shows on its face that it was based on an error of law. It is settled that an error of law does not authorize the recall of a remittitur. Southwestern Inv. Corp. v. City of Los Angeles, supra, 38 Cal.2d 623, 626, 241 P.2d 985, and cases cited.

Moreover, it is clear from its first opinion that the District Court of Appeal reviewed the sufficiency of the evidence in the light of the provisions of Penal Code section 209 as they read at the time the alleged crime was committed. Thus, both defendant and the attorney general briefed the case with reference to the code section as amended, and the District Court of Appeal quoted defendant's contention that he was not guilty of kidnaping to commit robbery "under Section 209, Penal Code, as amended in 1951," [281 P.2d 291] set forth the facts that the victim was kidnaped after the service station was robbed, and quoted with approval the argument in the attorney general's brief that defendant was guilty under section 209 as amended on the ground that

> " 'Where a kidnaping takes place after the actual perpetration of a robbery such kidnaping may be a kidnaping for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to affect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm. People v. Kristy, 4 Cal.2d 504, 507–508 [50 P.2d 798]. People v. Raucho, 8 Cal.App.2d 655, 665–666 [47 P.2d 1108]. People v. Bean, 88 Cal.App.2d 34, 40–41 [198 P.2d 379].' " 132 Cal. App.2d at page 24, 281 P.2d at page 291.

Defendant contends that the judgment of conviction on Count II was void and that he was denied due process of law on the ground that he was convicted of an offense unknown to the law. In support of this contention he urges that the information failed to state a public offense since it was couched in the language of section 209 prior to its amendment in 1951 and that the jury was instructed according to the law prior to the amendment.

At no time during the course of the appeal, in his brief on appeal, or his petitions for rehearing and hearing, did defendant, who was then represented by the same counsel as he is now, make any attack upon the information, nor did he point out any inaccuracy or other impropriety of the instructions that he now complains of. He merely asserted, so far as the instructions on kidnapping for the purpose of robbery were concerned, that none should have been given on that subject on the ground that the evidence would not support a conviction of that crime. No explanation is offered for his failure to raise these points during the appeal or before the issuance of the remittitur, or for his delay for more than a year after the remittitur issued in seeking to set it aside.

[6–9] An information is sufficient if it charges the defendant with the commission of a public offense in words sufficient to give him notice of the offense of which he is accused. People v. Roberts, 40 Cal.2d 483, 486–487, 254 P.2d 501; Pen.Code, § 952. Only the essential elements of the offense need be charged. People v. Britton, 6 Cal.2d 1, 5, 56 P.2d 494. Notice of the particular manner, means, place or circumstances of the offense is given, not by detailed pleading, but by the transcript of the evidence before the committing magistrate. People v. Pierce, 14 Cal.2d 639, 646, 96 P.2d 784. Surplusage, however, does not vitiate the information and may be rejected if enough remains to charge the offense. People v. Steelik, 187 Cal. 361, 371, 203 P. 78; People v. Walton, 70 Cal.App.2d Supp. 862, 865, 161 P.2d 498, and cases cited.

At the time the crime was committed Penal Code section 209 provided: "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

In Count II of the amended information it was charged that "For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count I hereof, the said Donald Richard Randazzo is accused by the District Attorney of and for the County of Los Angeles, State of California, by this amended information, of the crime of Kidnaping for the Purpose of Robbery, a felony, committed as follows: That the said Donald Richard Randazzo on or about the 14th day of September 1953, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously seize, confine, abduct, conceal, kidnap and carry away Ed Hallmark, an individual, with the intent to hold and detain, and who did hold and detain, said Ed Hallmark, with intent and for the purpose of committing robbery.

"That said Ed Hallmark so kidnaped was subjected to and did suffer bodily harm by said Donald Richard Randazzo."

[10, 11] The part of the foregoing count that defendant did "seize, confine, abduct, conceal" and "who did hold and detain said Ed Hallmark, with intent and for the purpose of committing robbery," are not chargeable as public offenses under Penal Code section 209 as amended. If these parts of the count are disregarded as surplusage, however, People v. Steelik, supra, 187 Cal. 361, 371, 203 P. 78, Count II would still charge the offense of kidnaping for the purpose of robbery in violation of section 209 as amended and give defendant ample notice of the offense of which he was accused, for it would then read: "* * * that the said Donald Richard Randazzo on or about the 14th day of September, 1953, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously * * * kidnap and carry away Ed Hallmark, an individual, * * * with intent and for the purpose of committing robbery." If the offense was not stated with sufficient clarity to enable defendant to present his defense, he should have demurred on one or more of the grounds set forth in Penal Code section 1004. People v. Schoeller, 96 Cal.App.2d 61, 62, 214 P.2d 565; People v. Waid, 127 Cal.App.2d 614, 616–617, 274 P.2d 217.

[12, 13] Defendant's complaint that erroneous instructions were given would not authorize the recall of the remittitur, for it is a complaint of an error of law and judicial error only, and a remittitur will not be recalled to correct judicial error or mistake of law. Any objection defendant had to the instructions should have been raised on his appeal from the judgment of conviction. People v. Whitton, 112 Cal.App.2d 328, 332, 246 P.2d 60.

[14] It follows from the foregoing that the District Court of Appeal should have vacated its order recalling the remittitur and not redecided the case on the merits. Since the motion to recall the remittitur was made to the District Court of Appeal, however, the correct disposition after granting the petition for hearing is to return the proceeding to that court with appropriate directions. Southwestern Inv. Corp. v. City of Los Angeles, supra, 38 Cal.2d 623, 630, 241 P.2d 985. Accordingly, the cause is transferred to the District Court of Appeal, Second Appellate District, Division One, with directions to file its order vacating its order recalling the remittitur and to reissue the remittitur on its decision affirming the judgment.

GIBSON, C. J., and SCHAUER and SPENCE, JJ., concur.

SHENK, Justice (dissenting in part).

I concur in the conclusion of the majority that the judgment as to Count II should be affirmed. However, I am convinced that the judgment of affirmance should be rendered by this court and not by the District Court of Appeal upon remand with directions or otherwise; and I agree with the discussion and conclusions of Mr. Justice Carter on this point in his dissenting opinion. I wish to emphasize the confusion which in my opinion the prevailing opinion has injected into the practice and procedure in situations of this sort and that in this respect the opinion is not constitutionally sound.

It is noted that the defendant was charged by information in two counts, robbery in Count I and kidnapping for the purpose of robbery in Count II. He was convicted on both counts and separate sentences were pronounced. On appeal to the District Court of Appeal the judgment as to both counts was affirmed. A petition for rehearing in that court was denied and a petition for hearing in this court was denied. The defendant moved the District Court of Appeal to recall the remittitur as to Count II only on the ground that the judgment on that count was void; that it had been improvidently made upon an innocent false suggestion; that it has been based on a mistake of fact; that it had been made through inadvertence on the part of the court and counsel, and that it had resulted in a miscarriage of justice. The motion was granted and the remittitur was recalled as to Count II. The appeal as to that count was reinstated and was set down for rehearing. The judgment on Count I became final. The Attorney General filed a petition for hearing in this court following the order recalling the remittitur. That petition was denied. The appeal as to Count II was reconsidered by the District Court of Appeal and the judgment as to that count was reversed. A petition for a hearing as to that judgment was granted and the cause was thereby transferred to this court.

It may not be denied that the District Court of Appeal had jurisdiction to entertain the motion to recall the remittitur. It is also beyond question that the motion was a "cause" as contemplated by the Constitution and was subject to transfer to this court on petition for hearing. This court entertained such a petition and denied it. The power of each court to act in each instance was present and when this court denied the petition for hearing the question of the propriety of the order of recall was settled and became either the law of the case or res judicata. Thereafter the appeal as to Count II was before the District Court of Appeal the same as if no judgment had been rendered by that court therein and as if no remittitur had issued. Thereafter that court reversed the judgment based on Count II. When this court granted a hearing the judgment of the District Court of Appeal was thereby set aside and the appeal was pending in this court the same as on original appeal and subject to disposition as such. Whatever occurred in the District Court of Appeal on the motion to recall the remittitur had been finally settled and this court should now determine the appeal on its merits.

If the petition for hearing after the decision of the District Court of Appeal in recalling the remittitur had been granted the disposition of that matter might have taken the course followed in Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985. But such is not this case. When this court denied the petition to review the order of the District Court of Appeal in recalling the remittitur the question whether the order of recall was rightly or wrongly granted faded from the case and was no longer subject to reconsideration. Notwithstanding that fact the majority now directs the District Court of Appeal to vacate its order recalling the remittitur, to reinstate its original judgment and to affirm the judgment of the trial court.

It should be remembered that this court has no appellate jurisdiction as such over the judgments of the District Courts of Appeal. The method of review is by petition for hearing. In the absence of an order of transfer to this court pursuant thereto, those judgments become final by operation of law. When an order of transfer is entered the appeal is then pending not in the District Court of Appeal but in this court for determination. The majority opinion states that the District Court of Appeal "lost jurisdiction" of the appeal upon the issuance of the remittitur and was without jurisdiction to recall it. That question was inherent in the petition for hearing in this court to set aside the order recalling the remittitur and has long since become final. It is not a matter for review on the appeal from the judgment, which is the only matter now before us.

Further confusion is infused into the law by calling the order of the District Court of Appeal in recalling the remittitur an "interlocutory order." Such an order is one that imports a lack of finality in the disposition of the matter involved. Here the question of the finality of the order of recall became final and the order can in no sense be deemed "interlocutory". That term has a well known and definite meaning, usually provided for by statute, and has no application to a final disposition of the appeal now before us.

On the merits the record supports the judgment and it should be affirmed by order of this court.

McCOMB, J., concurs.

CARTER, Justice (dissenting).

I dissent.

The majority opinion is predicated upon the theory that the recall of a remittitur by an appellate court is a mere interlocutory order and is analogous to an order of a trial court sustaining or overruling a demurrer to a complaint. In this connection it cites and relies upon Berri v. Superior Court, 43 Cal.2d 856, 279 P.2d 8, which holds that an order sustaining a demurrer without leave to amend is not a final order and may be changed by the court at any time before judgment is entered in accordance therewith. The holding of the majority in this respect is clearly unsound as it fails to give consideration to the basic problems involved in a proceeding for the recall of a remittitur. It has been repeatedly held that when a remittitur is issued and filed in the court below, the appellate court loses jurisdiction of the cause and thereafter has no power to modify or change its decision or judgment unless and until the remittitur is recalled and its jurisdiction is restored. This court has recently reannounced the rule as to when and upon what conditions a remittitur may be recalled. In Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, at page 626, 241 P.2d 985, at page 986, this court stated: "That a remittitur may be recalled on the reviewing court's own motion, on motion or petition after notice supported by affidavits, or on stipulation setting forth the facts which will justify the granting of the order is now determined by Rule. Rule 25(d), Rules on Appeal; 36 Cal.2d at p. 22. The question as to when the facts constitute grounds for the granting of the motion is resolved by the case law. Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error." Recent decisions of the District Courts of Appeal are to the same effect. Davis v. Basalt Rock Co., 114 Cal.App.2d 300, 250 P.2d 254; Kohle v. Sinnett, 136 Cal.App.2d 34, 288 P.2d 139. Therefore, having in mind that as a general rule an appellate court cannot exercise any jurisdiction over a cause in which the remittitur has been issued by its order and filed in the court below, and that the office of the remittitur is to return the proceedings which have been brought up by appeal to the court below, and when the remittitur has been duly filed, the proceedings from that time are pending in the trial court and not in the appellate court, and that as to such proceedings it is not competent for the appellate court to make any further order until the remittitur is recalled by it, Kohle v. Sinnett, supra, it should be apparent that an order granting a motion for the recall of a remittitur issued by an appellate court is something more than a mere interlocutory order such as an order sustaining or overruling a demurrer. This must be the situation because, until such an order is made, the appellate court is without jurisdiction to act in the case. Chin Ott Wong v. Title Ins. & Trust Co., 91 Cal.App.2d 1, 204 P.2d 387. It must necessarily follow, therefore, that when an order is made by an appellate court recalling a remittitur issued by it, the effect of such order is to restore jurisdiction of the cause in that court. True, it may have erroneously granted such order, but if so, the error would be one committed within the exercise of its jurisdiction, and when such an order becomes final, it is not subject to collateral attack. In this respect, an order made by an appellate court recalling a remittitur is analogous to an order made by such a court denying a motion to dismiss an appeal. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 205 P.2d 1037. Either of them may be based on facts outside of the record. Following either the court must make its decision on the merits of the case on appeal.

The majority erroneously assumes that the issues which may be involved on a motion for the recall of a remittitur are usually so closely related to the issues on the merits of the appeal that the court can determine them only by a review of its decision on the merits. There is no basis in either law or fact for this assumption. On the other hand, let us assume that in support of a motion to recall a remittitur issued by a District Court of Appeal the moving party made out a clear case of extrinsic fraud by a showing that he was falsely induced by the adverse party to absent himself from the hearing before the District Court of Appeal and that the adverse party falsely represented to the District Court of Appeal that the moving party waived any right to a decision in his favor by the appellate court and the appellate court acted upon such misrepresentation to the detriment of the moving party who did not learn of the deception and fraud until after the issuance of the remittitur. Assume that upon such showing the District Court of Appeal recalled and set aside its remittitur and this court thereafter denied a petition for hearing of the cause and the order granting the motion to recall and set aside the remittitur became final. Would this court hold in such a case that on petition for hearing after the District Court of Appeal had rendered its decision on the merits that its prior decision recalling and setting aside the remittitur could then be reviewed by this court? I have grave doubt that it would so hold, but under the holding in the majority opinion in this case, the order of an appellate court recalling a remittitur, even in the circumstances above recited, could be set aside by this court at any time *regardless of the period of time which had elapsed since the remittitur was recalled.*

The majority cites and relies upon Southwestern Inv. Corp. v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985; Isenberg v. Sherman, 214 Cal. 722, 7 P.2d 1006; Davis v. Basalt Rock Co., 114 Cal.App.2d 300, 250 P.2d 254; Kohle v. Sinnett, 136 Cal.App.2d 34, 288 P.2d 139. But in none of these cases had the order recalling the remittitur become final as it had in the case at bar; that is, in every one of the last cited cases this court granted a hearing and transferred the cause from the District Court of Appeal to this court before the order made by the District Court of Appeal recalling the remittitur had become final, and this court, therefore, had before it the cause in which the order was made granting the recall. Such being the case, there was no collateral attack upon the order recalling the remittitur as this court had the same power to review the order recalling the remittitur as the District Court of Appeal had when it heard the motion and made the order in the first instance. Such is not the situation here as the record discloses that on July 11, 1956 the District Court of Appeal rendered a decision in which it ordered that the remittitur be recalled. That decision is as follows: "It appearing from the record that the opinion of this court, filed March 29, 1955, affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnapping 'with intent and for the purpose of committing robbery', under Section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, prior to defendant's alleged criminal acts, in which year it was amended, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, good cause appearing, it is ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered that the judgment heretofore entered (on March 29, 1955) as to said Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled.

"The appeal as to said Count II is ordered on calendar August 28, 1956, at 10 a. m., for consideration of an amended Petition for Rehearing as to the affirmance of the judgment rendered on said Count II." 143 Cal.App.2d 59, 299 P.2d 307, 308.

It will be recalled that this court denied the petition of the Attorney General to grant a hearing and review said decision on August 8, 1956. Such denial had the effect of rendering the order recalling the remittitur a final judgment of the District Court of Appeal which should now be binding upon this court.

In this respect the majority opinion states: "We believe, however, that an order of an appellate court recalling a remittitur and setting the appeal for further hearing is an interlocutory order that does not establish the law of the case for further proceedings therein." No authority is cited in support of this statement, and the only decided case on this subject is to the contrary. See, Municipal Bond Co. v. City of Riverside, 4 Cal.App.2d 442, 41 P.2d 215. The majority opinion purports to disapprove the holding in this case.

In my opinion the order of the District Court of Appeal in recalling its remittitur here is res judicata and may not now be reexamined by this court. The case, however, is properly before this court on the merits as it was transferred to this court by an order granting a hearing on November 14th, 1956 after the decision of the District Court of Appeal rendered on the merits on October 16th, 1956 as follows: "It appearing that the opinion of this court, filed March 29, 1955, affirming a conviction of 'life imprisonment without possibility of parole' for the crime of kidnapping 'with intent and for the purpose of committing robbery', under section 209 of the Penal Code, was erroneously predicated upon said statute as it existed prior to 1951, and prior to defendant's alleged criminal acts, whereas said statute, as amended in 1951, does not make it an offense separate from robbery, to hold or detain a person for the purpose of committing robbery, and the remittitur in said case having been recalled as to Count II by order of this court filed on July 11, 1956 and the judgment as to Count II having been vacated by said order, and the matter now being submitted for decision,

"It is hereby ordered, good cause appearing therefor, that the judgment appealed from, in respect to Count II, is hereby reversed." Cal.App., 302 P.2d 39.

I agree with this decision and I find no answer to it in the majority opinion.

In conclusion I wish to point out that the provision for transfer of causes from a District Court of Appeal to this court is stated in the Constitution.* The term "cause" is broad and includes any and all orders. It is said in In re Wells, 174 Cal. 467, 471, 163 P. 657, 658: "The particular cause involved here is that which gives the Supreme Court power 'to order any *cause* pending before a District Court of Appeal to be heard and determined by the Supreme Court.' The contention is that the matter before the district court was not a 'cause' within the meaning of that word as used in the above-quoted clause of the section.

"* * * This provision has always been understood to apply to *all cases, matters*

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* "The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal, and to order any cause pending before District Court of Appeal to be heard and determined by the Supreme Court. The order last mentioned may be made before judgment has been pronounced by a District Court of Appeal, or within 15 days in criminal cases, or 30 days in all other cases, after such judgment shall have become final therein. The judgment of the District Courts of Appeal shall become final therein upon the expiration of 15 days in criminal cases, or 30 days in all other cases, after the same shall have been pronounced.

"The Supreme Court shall have power to order causes pending before a District Court of Appeal for one district to be transferred to the District Court of Appeal for another district, or from one division thereof to another, for hearing and decision." Cal.Const. art. VI, § 4c.

and proceedings of every description. It has been the unvarying custom of the court in Bank to entertain an application for rehearing of any matter decided in department, *regardless of its nature or character.* The rule has been applied in original proceedings of all kinds, *in motions to dismiss appeals* and other matters, as well as in ordinary cases on appeal. The word 'cause,' in the clause above quoted, was understood to be broad enough to include *everything that could possibly come before the department for decision.*

"* * * To describe the decisions subject to this power the word 'cause' was selected. This was the word used in the clause of section 2 giving similar power over the department decisions, which in that clause, as we have said, has been understood to apply to every matter that could be decided by a department. The familiar rule of construction requires that it be given a similarly *broad* meaning in the new provision, and to include *every* matter decided by a District Court of Appeal, and operating as a final decision or disposition thereof in that court. It is clear, therefore, that the power to transfer causes from the District Court of Appeal, to the Supreme Court, either before or after judgment in the District Court of Appeal, was intended to have this *all-embracing* application." (Emphasis added.)

From the foregoing discussion in the Wells case it seems clear that a motion to recall a remittitur in a District Court of Appeal is a cause within the purview of the above cited constitutional provision, and, therefore, when the District Court of Appeal rendered its decision on July 11th, 1956 in which it [299 P.2d 308] "ordered that appellant's motion to recall the remittitur as to Count II is granted and it is ordered that the judgment heretofore entered (on March 29, 1955) as to said Count II is vacated and set aside and the remittitur issued thereon (April 29, 1955) is recalled," it decided a cause pending in that court. Its decision in said cause became final 30 days thereafter (under the former rule) unless an order was made by this court within that time transferring said cause to this court. Since no such order was made by this court, the decision of the District Court of Appeal in said cause became final and, like a decision of that court on a motion to dismiss an appeal, was not thereafter subject to review by this court.

For the reasons above stated I would reverse the judgment as to Count II of the information.

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150 Cal.App.2d 528

Sarah Katherine Stokes HARKINS et al., Plaintiffs and Respondents,

v.

Landon FIELDER, Executrix of the Estate of Oscar F. Stokes, Deceased, etc., et al., Defendants and Appellants.

Kenton E. KROGSTAD, Administrator of the Estate of Georgia Stokes Bell, etc., Plaintiff and Respondent,

v.

Landon FIELDER, Executrix of the Estate of Oscar F. Stokes, Deceased, etc., et al., Defendants and Appellants.

Civ. 22209, 22210.

District Court of Appeal, Second District, Division 2, California.

April 29, 1957.

Actions to establish constructive trust and for damages predicated on fraud. The Superior Court of Los Angeles County, Fred Miller, J., granted the relief sought, and appeals were taken. The District Court of Appeal, Fox, J., held that evidence sustained findings (1) that intestate's brother had concealed from his attorneys, from his nominee for administrator, and from the probate court fact of existence of other heirs, and that he had thereby prevented intestate's brother and sisters of the half blood from receiving notification of probate proceeding and appearing in probate court and asserting therein their claims against intestate's estate, (2) that intestate's brother had been unjustly enriched at other heirs' expense, and (3) that his concealment of facts, whether induced by fraud or mistake, was extrinsic in nature and cognizable in this independent suit in equity.

Affirmed.

1. Appeal and Error 🔑843(3)

If judgment is supported by findings based on substantial evidence, questions relative to sufficiency of evidence to support other findings may be disregarded on appeal.

2. Appeal and Error 🔑854(2)

A judgment will not be reversed because some conclusions are not legally sound, if ultimate conclusion upon which judgment rests is not erroneous in view of facts found.

3. Executors and Administrators 🔑315(4)

Where decree of distribution has been procured by fraud in matters outside issues to be adjudicated, as where distributee has prevented party who has interest in estate from making an appearance to protect his interest in estate, equity will intervene to rectify wrong perpetrated by such extrinsic fraud.

4. Judgment 🔑443(1)

Invocation of equity on grounds of extrinsic fraud is warranted where heir or legatee fails to notify court of existence of other heirs of whose existence he has knowledge and files false petitions with court representing that there are no such other heirs.

5. Judgment 🔑443(1)

Actual or positive fraud is not required as an element of extrinsic fraud which will justify equitable intervention, and a mistake on part of distributee which keeps legatee in ignorance of true facts or deprives him of fair notice of probate proceedings constitutes a type of extrinsic fraud.

6. Judgment 🔑511

Fraud or mistake is "extrinsic" when it deprives unsuccessful party of opportunity to present his case to court; and if unsuccessful party to action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and judgment is open to attack at any time.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic".

7. Fraud 🔑58(2)
Trusts 🔑110

From fact that no mention of intestate's half-brother and half-sisters appeared in document filed in superior court in connection with petition for appointment of administrator nominated by intestate's brother, it could reasonably be found that intestate's brother had, in fraud of court and intestate's brothers and sisters of the half blood, failed to divulge latters' existence. West's Ann.Code Civ.Proc., § 1963, subd. 15.

8. Fraud 🔑58(1)

Fraud, like any other fact, may be inferred from circumstantial evidence.

9. Fraud 🔑17

Even where a fiduciary relationship is absent, one who speaks is not only obligated to tell truth but is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated.

10. Fraud 🔑29

It is not essential to right to maintain action in equity for extrinsic fraud that representations have been made directly to one defrauded.

11. Fraud 🔑58(2)
Trusts 🔑110

In actions to establish constructive trust and for damages predicated on fraud, evidence sustained findings (1) that intestate's brother had concealed from his attorneys, from his nominee for administrator, and from probate court fact of existence of other heirs, and that he had thereby prevented intestate's brother and sisters of the half blood from receiving notification of probate proceeding and appearing in court and asserting therein their claims against intestate's estate, (2) that intestate's brother had been unjustly enriched at other heirs' expense, and (3) that his concealment of facts, whether induced by fraud or mistake, was extrinsic in nature and cognizable in independent suit in equity.

12. Fraud ⚷22(1)

A party's right to proceed on theory of fraud is not destroyed merely because opportunities for examination or means of knowledge were open to him, where no legal duty devolved upon him to employ such means of knowledge.

13. Limitation of Actions ⚷104(1)

Where there is an improper concealment of facts at time of transaction and thereafter which causes party to forego investigation, statute of limitations does not commence to run until he discovers fraud thereby worked upon him.

14. Records ⚷19

Where, by reason of representations made to defrauded party, he is dissuaded from making inquiry, he is not charged with constructive notice of contents of public records.

15. Limitation of Actions ⚷199(1)

In actions to establish constructive trust and for damages predicated on fraud, evidence, on limitations issue, did not require finding as a matter of law that any of circumstances known to plaintiffs should have put a reasonably prudent person on inquiry at an earlier time.

◆

Johnson & Johnson, Long Beach, for appellants.

Charles E. Frisco, Benjamin Hansen, South Gate, Arthur Lund, Los Angeles, and Peter H. Stevens, South Gate, for respondents.

FOX, Justice.

Plaintiffs in the instant actions sought an adjudication that certain property, formerly part of the Estate of Eldridge James Stokes, was held in trust for them. As an alternate remedy they sought recovery of damages for fraud. The court held in favor of their contentions and appeals from the judgments followed.

On March 20, 1946, one Eldridge J. Stokes died intestate in Los Angeles County. His estate consisted of both real and personal property. The only California resident surviving him was a brother, Oscar F. Stokes. Also surviving him were a half-brother, James W. Stokes, and four married half-sisters named Landon Fielder, Sarah Harkins, Gertrude Davidson and Georgia Bell.[1] At all time here material, these brother and sisters of the half blood, with the exception of Mrs. Bell, resided in Oklahoma. Mrs. Bell resided in Texas as well as in Oklahoma. Mrs. Fielder is an appellant herein. The other out-of-state kin are sometimes referred to as respondents.

Upon Eldridge's death, Oscar Stokes notified his half-sister, Mrs. Harkins, of the passing of their brother. Mrs. Harkins communicated this information to Mrs. Fielder, Mrs. Davidson and Mrs. Bell, who came to California to attend the funeral. These latter remained in California less than three days before departing for their homes.

In due course, the administration of Eldridge's estate was instituted. By agreement between Oscar and Eldridge's sister-in-law, Ethel Hamilton, who desired a disinterested person as administrator, one Robert Lewis was prevailed upon to apply for letters of administration. Lewis, who was an old friend of Eldridge, had only a casual acquaintance with Oscar. Lewis selected the law firm of Schweitzer & Schweitzer to handle the administration of the estate. Lewis accompanied Oscar to the Schweitzer office and introduced him to the partners. He left the office while Oscar was being interviewed about Eldridge's estate.

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[1] Mrs. Bell is since deceased and her estate is represented as a party plaintiff by K. E. Krogstad, administrator thereof.

The record is barren of precise information about what took place during that interview. The surviving member of the firm, now the Honorable Harold Schweitzer, Judge of the Superior Court in and for the County of Los Angeles, has no recollection of any of the details of the administration. However, the parties stipulated that at the time Eldridge's estate was probated, it was the custom and practice of the firm of Schweitzer & Schweitzer, in preparing petitions for letters of administration, to interrogate their clients as to other living kindred of the decedent. Following the conference with Oscar, the Schweitzer office prepared a document entitled "Nomination of Administrator." This document, which was signed by Oscar, recites that he "is the sole heir at law" of Eldridge and designates Lewis to serve in his stead as administrator. This nomination was filed in the Superior Court simultaneously with a petition for letters of administration signed by Lewis. Lewis' application for appointment as administrator recites that he is "nominee of the sole heir at law" and lists only Oscar as an heir of Eldridge. Both these documents were apparently prepared by Schweitzer & Schweitzer, who appear thereon as attorneys of record. Lewis testified he did not know Eldridge had sisters and a brother other than Oscar who survived him. During Lewis' service as administrator, Oscar at no time informed him of the existence of such kin. Lewis could not remember whether he saw the "Nomination of Administrator" before signing his petition for letters of administration. At one point, in response to a question regarding the basis of the statement in his petition for letters of administration that he was the nominee of the sole heir at law, Lewis testified, "it was based purely upon the request."

Lewis' petition was granted and he assumed the office of administrator. Upon completion of the administration, the estate was distributed to Oscar as sole heir at law. On January 4, 1947, Oscar signed and filed with the court a distributee's receipt acknowledging "receipt of all the property coming to me as the only heir at law" of Eldridge.

Mrs. Fielder testified that after the funeral, in a conversation with Oscar about Eldridge's property, he told her "that part went to Ethel [Hamilton] and he would get Eldridge's part, it would be settled that way. Anyway, that it had to be, it would be. They were going to meet with attorneys a day or two after we left here for that all to be settled." Upon her return to Oklahoma, Mrs. Fielder told her sisters and her brother James that Oscar "got" all of Eldridge's property. During the course of the administration of the estate, no notices of the proceedings were sent to any of the out-of-state relatives who are respondents here by the administrator or the court. Though Oscar corresponded regularly with some of these relatives, he never informed them of the probate proceedings. Oscar visited respondents in Oklahoma in 1949 and 1953 but never mentioned to them the probate proceedings under which Eldridge's property had been distributed to him.

Oscar died in 1954, leaving a will devising and bequeathing his estate to a niece, Frances Fielder, daughter of his half-sister Landon Fielder. Landon was named executrix and was so appointed after Oscar's will was admitted to probate. About a month after Oscar's death, Mrs. Harkins received a letter from Oscar's aunt, informing her that Eldridge had died intestate and that Oscar had taken over the estate which should have been shared equally by all the brothers and sisters. Mrs. Harkins notified the other respondents and an investigation was undertaken. As a result of such inquiry, respondents filed creditors' claims against Oscar's estate which Mrs. Fielder rejected. Thereafter respondents brought suit against Mrs. Fielder individually and in her capacity as executrix to establish a constructive trust and for damages predicated on fraud. Two separate actions were commenced, one by

Krogstad, administrator of Mrs. Bell's estate, and another by the other respondents. The two actions were consolidated for trial. Judgments were rendered in each case for plaintiffs. These judgments are the subject of these appeals.

Appellants contend that the material findings are not supported by any substantial evidence and that the "conclusions of law essential to affirmance of the judgments are not warranted by the application of appropriate rules of law to the undisputed facts."

[1, 2] It is unnecessary for us to set out in detail the various findings made by the court, some of which are specifically expressed and others taking the form of an omnibus statement finding true or untrue particular segments of the complaints and answers. We direct our attention to only those findings essential to support the judgment and those conclusions upon which said judgments ultimately rest. It is elementary that if a judgment is supported by findings based on substantial evidence, questions relative to the sufficiency of the evidence to support other findings may be disregarded on appeal. Logan v. Forster, 114 Cal.App.2d 587, 602, 250 P.2d 730; Bohn v. Watson, 130 Cal.App.2d 24, 41, 278 P.2d 454. Furthermore, as has been consistently held, a judgment will not be reversed because some conclusions are not legally sound, if the ultimate conclusion upon which the judgment rests is not erroneous in view of the facts found. Bohn v. Watson, supra, 130 Cal.App.2d at page 42, 278 P.2d at page 465.

So far as is here germane, we epitomize the findings of the trial court, which are that respondents (including the deceased Mrs. Bell), who are Oscar's brother and sisters, were persons of modest means, residing over 1,000 miles from Los Angeles County. They regarded Oscar with affection and believed that he would deal fairly with them and would refrain from any false act which would impinge upon their rights.

The court found also that the firm of Schweitzer & Schweitzer acted as attorneys for both Lewis and Oscar in all matters connected with the administration of Eldridge's estate and prepared all papers filed with the court relative to the estate. Neither Lewis nor the Schweitzers had any knowledge of Eldridge's kindred other than Oscar before or after the administration of Eldridge's estate until Lewis was informed of respondents' existence at about the time this action was filed. The Schweitzers followed the ordinary course of their business in handling Eldridge's estate, it being their custom and practice to interrogate clients as to other living kindred of a decedent whose estate they handled. Both Lewis and the Schweitzers relied on Oscar to furnish them with information as to Eldridge's kin, but at no time before, during, or after administration did Oscar disclose to them that respondents were a living brother and sisters of Eldridge. Oscar's failure to divulge the existence and relationship of respondents was intentional.

It was found also that the Superior Court had no knowledge of respondents' existence or relationship to Eldridge and relied upon Oscar's written nomination in appointing Lewis administrator. That in each instance when Oscar stated he was the sole heir at law of Eldridge, his statement was false, and he had adequate assistance to determine the truth or falsity of said statement. During and after administration Oscar intended to obtain distribution of the estate to himself, to the exclusion of plaintiffs. Finally, the court found respondents were not barred by laches or limitations from asserting their claims, in view of the finding that respondents did not learn until October, 1954, that Oscar had caused Eldridge's estate to be distributed to himself.

In its conclusions of law, the court determined, inter alia, (1) that Oscar breached his duty to disclose to the Superior Court, to his attorneys, and to his nominee, the existence of respondents; (2) that Oscar breached a duty to respondents of refraining from any conduct preventing the communication to them of their interest in Eldridge's estate, and (3) that these breaches of duty amounted to a fraud by which Oscar was unjustly enriched.

[3-6] It is now settled that where a decree of distribution has been procured from the probate court by fraud in matters outside the issues to be adjudicated—as where the distributee has prevented a party who has an interest in the estate from making an appearance to protect his interest in the estate—equity will intervene to rectify the wrong perpetrated by such extrinsic fraud. Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Cardozo v. Bank of America, 116 Cal.App.2d 833, 254 P.2d 949. While there are many varieties, facets and shadings of extrinsic fraud, a familiar example consists of deceptive conduct on the part of the distributee of an estate which has kept other interested parties away from court by some fraudulent artifice or wilfull suppression of material facts. Larrabee v. Tracy, 21 Cal.2d 645, 651, 134 P.2d 265; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Bankers' Trust Co. v. Patton, 1 Cal.2d 172, 175, 33 P.2d 1019; Duffy v. Duffy, 82 Cal.App.2d 203, 207, 186 P.2d 61. The invocation of equity on the grounds of extrinsic fraud is warranted where an heir or legatee fails to notify the court of the existence of other heirs of whose existence he has knowledge and files false petitions with the court representing there are no such heirs. Purinton v. Dyson, supra, 8 Cal.2d at page 326, 65 P.2d at page 779; Cardozo v. Bank of America, 116 Cal.App.2d 833, 837, 254 P.2d 949; Zaremba v. Woods, 17 Cal.App.2d 309, 316, 61 P.2d 976. Actual or positive fraud is not required as an element of extrinsic fraud, since a mistake on the part of the distributee which keeps a legatee in ignorance of the true facts or deprives him of fair notice of the probate proceedings constitutes a type of extrinsic fraud. Bacon v. Bacon, 150 Cal. 477, 490, 89 P. 317. See Wendell v. Wendell, 111 Cal.App.2d 899, 900, 245 P.2d 342; Antonsen v. Pacific Container Co., 48 Cal.App.2d 535, 538, 120 P.2d 148; Rogers v. Mulkey, 63 Cal.App.2d 567, 147 P.2d 62; Sullivan v. Lumsden, 118 Cal. 664, 668, 50 P. 777. It has been held in varying factual situations that an extrinsic mistake which has foreclosed a party from presenting his case in court furnishes a ground for equitable intervention. Hallett v. Slaughter, 22 Cal.2d 552, 557, 140 P.2d 3; Olivera v. Grace, 19 Cal.2d 570, 578, 122 P.2d 564, 140 A.L.R. 1328; Boyle v. Boyle, 97 Cal.App. 703, 706, 276 P. 118. As stated in Westphal v. Westphal, supra [20 Cal.2d 393, 126 P.2d 107]: "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. [Citations.] If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citation] there has been no true adversary proceeding, and the judgment is open to attack at any time."

[7, 8] The instant case is manifestly within the purview of these principles. As found by the court, Oscar failed to inform his attorneys, Schweitzer & Schweitzer, of the existence of respondents. That they were his attorneys admits of no doubt. Oscar consulted with them with respect to the initiation of probate proceedings and they prepared for him a "Nomination of Administrator," which he signed. That document was filed in the superior court in connection with Lewis' petition for appointment as administrator as Oscar's nominee. In that document he was listed as the sole heir at law. There was evidence that it was the custom and practice of Schweitzer & Schweitzer to interrogate clients about other living kindred of the deceased person. The court was entitled to find, as it did, that the Schweitzers followed the ordinary course of their business procedure during their consultation with Oscar. Code Civ.Proc. sec. 1963; Hallett v. Slaughter, supra, 22 Cal.2d at pages 555–556, 140 P.2d at page 5. From the fact that no mention of respondents appeared in that document, the court could reasonably find that Oscar failed to divulge their existence to the Schweitzers. Such concealment was a fraud upon the court and upon respondents, Wells v. Zenz, 83 Cal.

App. 137, 142, 256 P. 484; Guardianship of Levy, 137 Cal.App.2d 237, 245, 290 P.2d 320, and having the effect of depriving respondents of notice of the hearing, constituted a species of extrinsic fraud. Fraud, like any other fact, may be inferred from circumstantial evidence. Palmquist v. Mercer, 43 Cal.2d 92, 100, 272 P.2d 26; McNulty v. Copp, 91 Cal.App.2d 484, 491, 205 P.2d 438; Bohn v. Watson, 130 Cal. App.2d 24, 33–34, 278 P.2d 454. The court was entitled to assume that, as attorneys at law and as officers of the court, the Schweitzers would have regularly performed their official duties, Code Civ.Proc. sec. 1963, subd. 15, and would not have failed to apprise the probate court of the existence of other heirs at law had they been in possession of such information. Our statutes "expressly provide that the suppression of a fact by one who gives information of other facts likely to mislead for want of communication of the fact concealed is deceit (Civ.Code, § 1710), and any other act fitted to deceive is actual fraud. (Civ.Code, § 1572.)" Wells v. Zenz, supra, 83 Cal.App. at page 140, 256 P. at page 485.

[9, 10] This same type of non-disclosure is brought out with equal force in connection with Lewis' petition for letters of administration. Lewis had no knowledge of respondents' existence. As Oscar's nominee, he was obliged to rely either on Oscar for such information or on the facts incorporated in the various documents prepared in the course of administration, by the Schweitzers, who possessed only such information as Oscar chose to give them. Oscar never informed Lewis at any time that other brothers and sisters existed. By thus concealing and suppressing both from his attorneys and from his nominee, Lewis, that respondents were also a surviving brother and sisters, Oscar effectively prevented them from receiving the notices that otherwise would have been sent them. Even where a fiduciary relationship is absent, one who speaks is not only obligated to tell the truth but he is equally bound not to suppress or conceal any facts within his knowledge which materially qualify those stated. Gillespie v. Ormsby, 126 Cal. App.2d 513, 527, 272 P.2d 949. Since Oscar's conduct resulted in keeping respondents from the probate proceedings, regardless of whether it was done with intent to defraud or was the result of mistake as to the rights of respondents to succeed to Eldridge's estate, there was present that element of extrinsic fraud which entitled respondents to relief from the effect of the decree of distribution. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Cardozo v. Bank of America, 116 Cal.App.2d 833, 254 P.2d 949; Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Wendell v. Wendell, 111 Cal.App.2d 899, 900, 245 P.2d 342. The effect of Oscar's failure to disclose was to perpetuate the fiction in the superior court, which was carried into the decree of distribution, that he was the sole heir at law. As stated in Purinton v. Dyson, supra, 8 Cal.2d at page 326, 65 P.2d at page 779: "It is true that in most cases of extrinsic fraud the defendant has said something directly to the person whose rights were involved amounting to representations that it was not necessary for such person to take any part in the proceedings. In other cases, acts have been held to amount to such representations. But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded."

[11] Evaluated in the light of the evidence and the reasonable inferences therefrom the record is clear (1) that Oscar concealed from the Schweitzers, from Lewis, and from the court the fact of the existence of other heirs; (2) that by such concealment he prevented respondents from receiving notification of the probate proceedings and deprived them of the opportunity to appear in court and assert their claims to Eldridge's estate; (3) that Oscar was unjustly enriched at respondents' expense by virtue of conduct prejudicial to their interests; and (4) that Oscar's concealment or suppression of the facts, whether induced

by fraud or mistake, was extrinsic in nature and cognizable in an independent suit in equity. The cases previously cited, which need not here be repeated, authorize the relief granted respondents under such circumstances. Appellants' argument on the evidence in their briefs amounts to no more than a claim that the trial court drew erroneous inferences from the testimony. But viewing the evidence in the light most beneficial to the prevailing parties, the evidence supports the conclusion that Oscar misled the probate court and by extrinsic fraud or mistake effectively prevented respondents from protecting their interests in the estate of their brother.

[12-15] Appellants' final point is that the instant action is barred by the statute of limitations. Code Civ.Proc., sec. 338(4). It is argued that respondents knew of Eldridge's death and that his property was being transferred to Oscar and were thus put on inquiry regarding the probate proceedings as the means by which Oscar was acquiring the property. The fact that an investigation would have revealed the fraud sooner will not alone bar recovery. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437–438, 159 P.2d 958; Schaefer v. Berinstein, 140 Cal.App.2d 278, 294, 295 P.2d 113. A party's right to proceed on the theory of fraud is not destroyed merely because opportunities for examination or means of knowledge were open to him where no legal duty devolved upon him to employ such means of knowledge. Teague v. Hall, 171 Cal. 668, 671, 154 P. 851; Stevens v. Marco, 147 Cal.App.2d 357, 305 P.2d 669; Blackman v. Howes, 82 Cal.App.2d 275, 279, 185 P.2d 1019, 174 A.L.R. 1004. Where there is an improper concealment of facts at the time of the transaction and thereafter which causes a party to forego an investigation, the statute of limitations does not commence to run until he discovers the fraud thereby worked upon him. Neet v. Holmes, 25 Cal.2d 447, 468, 154 P.2d 854; South v. Wishard, 146 Cal.App.2d 276, 303 P.2d 805. Where, by reason of representations made to a defrauded party he is dissuaded from making inquiry, he is not charged with constructive notice of the contents of public records. Dabney v. Philleo, 38 Cal.2d 60, 66, 237 P.2d 648; Schaefer v. Berinstein, supra, 140 Cal.App.2d at page 296, 295 P.2d at page125; South v. Wishard, supra, 146 Cal.App.2d at page 285, 303 P.2d at page 812. It has been shown that respondents reside 1,000 miles from California; that Oscar misrepresented and concealed the true facts and caused them to believe he was entitled to receive Eldridge's property; that respondents had no reason to doubt this and had no knowledge of facts or circumstances likely to arouse their suspicion until late in 1954; that they filed suit promptly upon discovery of the true facts concerning Oscar's extrinsic fraud or mistake. From the evidence, we cannot hold as a matter of law that any of the circumstances known to respondents should have put a reasonably prudent person on inquiry at an earlier time. It was a question for the trier of fact to determine whether respondents' delay in the investigation and discovery of the true facts was reasonable and excusable. Neet v. Holmes, supra, 25 Cal.2d at page 468, 154 P.2d at page 864; Schaefer v. Berinstein, supra, 140 Cal.App.2d at page 294, 295 P.2d at page 124; Hallett v. Slaughter, 22 Cal.2d 552, 557, 140 P.2d 3; Soule v. Bacon, 150 Cal. 495, 497–498, 89 P. 324, 325. As stated in the Soule case, supra: "At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion."

The judgments are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

150 Cal.App.2d 630

UNITED STATES PIPE AND FOUNDRY COMPANY, a corporation, Milton Salz, Holly Sugar Corporation, a corporation, Alden E. Oliver, Adolph A. Oliver, Jr., Millicent O. Schafer, Christena M. Anderson, Maurice Y. Nicole, Daniel Riley, Marian C. Fry and Jeryl R. Fry, Petitioners and Respondents,

v.

The CITY COUNCIL OF The CITY OF HAYWARD; Frank R. Biggs, Art Phillips, John J. Purchio, Bob Wright, and W. O. Wilson, members thereof; and the City of Hayward, a body corporate and politic and a political subdivision of the State of California, Respondents and Appellants.

Civ. 17186.

District Court of Appeal, First District, Division 2, California.

May 2, 1957.

Proceeding upon petition for writs of mandamus and review to determine validity of proceeding by which city sought to annex territory under the Annexation Act of 1913. The Superior Court, Alameda County, Cecil Mosbacher, J., found the annexation proceedings to be invalid, and city council and city appealed. The District Court of Appeal, Draper, J., held that evidence sustained findings that substantial, separate, and distinguishable uninhabited area existed within the proposed annexation.

Judgment affirmed.

1. Municipal Corporations 🔑29(4)

Proceeding under Annexation Act of 1913 is void if it seeks annexation of a substantial area which is uninhabited and is clearly separable and distinguishable from the inhabited portion of the land sought to be annexed, but, where the area to be annexed, as a whole, can fairly be said to be inhabited, inclusion in such a proceeding of parcels of uninhabited land is not barred. West's Ann.Gov.Code, §§ 35000–35006, 35100–35158, 35200–35213, 35300–35326.

2. Municipal Corporations 🔑29(4), 63(1)

Question of extent of area to be annexed under the Annexation Act of 1913 is a political question, not a matter for judicial determination, but such political discretion cannot extend scope of the statute, and question whether uninhabited territory is improperly included in such annexation is one for the courts. West's Ann.Gov.Code, §§ 35100–35158.

3. Municipal Corporations 🔑33(6)

In annexation proceedings commenced under the Annexation Act of 1913 evidence sustained findings that substantial, separate, and distinguishable uninhabited areas existed within the proposed annexation. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326.

4. Municipal Corporations 🔑29(4)

Under the Annexation of Uninhabited Territory Act of 1939 providing that territory is deemed uninhabited if less than 12 registered voters reside therein, registration, as well as residence, had to be within the annexation area, and, therefore, persons who were registered voters in another city were not to be counted in determining whether the area was inhabited and, therefore, whether area could be annexed under the Annexation Act of 1913. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326, 35303.

5. Municipal Corporations 🔑33(8)

In proceeding to annex territory to city under the Annexation Act of 1913, question whether certain persons resided in area to be annexed was, upon issue whether the area sought to be annexed was inhabited, question of fact, and trial court's finding upon conflicting evidence would be sustained. West's Ann.Gov.Code, §§ 35100–35158, 35300–35326, 35303.

6. Municipal Corporations 🔑29(4)

Government Code provision defining uninhabited territory as that having less than 12 registered voters was not precluded from applying to proceeding to annex territory to city under the Annexation Act of 1913, even though the Government Code provision stated that it applied

"For purposes of this article". West's Ann.Gov.Code, §§ 35100–35158, 35303.

7. Municipal Corporations ⚷33(1)

Statutory provision for a distinct procedure for annexation by city of uninhabited territory excludes inhabited territory from operation of such statute. West's Ann.Gov.Code, §§ 35300–35326.

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John W. Scanlon, City Atty., Hayward, Robert T. Anderson, Berkeley, for respondents and appellants.

Rutherford, Jacobs, Cavalero & Dietrich, D. R. Jacobs, Mark S. Bray, Stockton, for petitioner and respondents.

DRAPER, Justice.

This appeal involves the validity of proceedings by which the City of Hayward sought to annex territory designated as Treeview Annex. The annexation proceedings were commenced under the Annexation Act of 1913, Gov.Code, §§ 35100–35158. After protest hearing an election was called. Before the election, a petition for writs of mandamus and of review was filed. After trial, the annexation proceedings were found invalid, and peremptory writ of mandate issued, terminating the annexation. Council and City appeal.

The basis of the trial court's action was its determination that substantial and clearly separable and distinguishable portions of the territory proposed for annexation were uninhabited, and thus subject to annexation only under the Annexation of Uninhabited Territory Act of 1939, Gov. Code, §§ 35300–35326.

[1] A proceeding under the 1913 act is void if it seeks annexation of a substantial area which is uninhabited and is clearly separable and distinguishable from the inhabited portion of the lands sought to be annexed, Johnson v. City of San Pablo, 132 Cal.App.2d 447, 283 P.2d 57; People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal.App. 715, 181 P. 825; Capuchino Land Co. v. Board, 34 Cal.App. 239, 167 P. 178 [the last was under the act of 1889]. Of course, this rule does not bar the inclusion in such a proceeding of parcels of uninhabited land when the annexation area as a whole can fairly be said to be inhabited, Rogers v. Board, 218 Cal. 221, 22 P.2d 509; People v. Town of Ontario, 148 Cal. 625, 84 P. 205. Any other construction would wholly negate use of the 1913 act in the great majority of cases. However, where the uninhabited area is a substantial portion of the whole, and is separable and distinguishable from the inhabited area, the rule clearly applies.

[2] Appellants argue that "the extent of the area to be annexed is a political question and not a matter for judicial determination". This, of course, is true, People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, 97 P. 311; Peart v. Board, 145 Cal.App.2d 8, 301 P.2d 874. But this political discretion cannot extend the scope of the statute. Whether uninhabited territory is improperly included in the annexation is a question for the courts, Capuchino Land Co. v. Board, supra, 34 Cal.App. 239, 167 P. 178.

[3] Appellants next contend that the evidence is insufficient to support the findings that substantial, separate and distinguishable uninhabited areas exist within the proposed annexation. Appellants suggest that this court must review the evidence and reach its own conclusion thereon, independent of the findings of the trial court. No authority is cited for this contention and it is clear that the general rule applies here. The question before us is whether there is substantial evidence to sustain the findings of the trial court, Johnson v. City of San Pablo, supra, 132 Cal.App.2d 447, 452, 283 P.2d 57. We therefore review the evidence only to determine whether it meets this test.

Treeview Annex lies southerly of Hayward. Three railroad lines traverse the area in a general north-south direction. Toward the easterly side, closely adjoining lines of the Southern Pacific and Western Pacific are generally parallel. The westernmost of these lines is referred to as the

Decoto rights of way. In the western section of the area is another line of the Southern Pacific, here referred to as the Newark right of way. Both rights of way are built upon fill which raises them above the level of the adjoining land. The Decoto rights of way are as much as 25 feet above the lands on either side. The fill for the Newark right of way through portions of this annex is about 50 feet wide at the base and 16 feet at track level, with a ditch below ground level on each side. The surface of this right of way is as much as 8 feet above the land on either side.

East of the Decoto rights of way, the annexation area contains 396 acres. This area includes the Hillview Crest tract of more than 600 homes, together with a golf course.

Between the Decoto and Newark rights of way, the annexation area contains 1,721 acres. This area includes industrial plants of Holly Sugar Corporation, American Pipe and Construction Co. and United States Pipe and Foundry Co. Land not occupied by these plants is used principally for agricultural purposes. But few roads cross the Decoto rights of way to connect this area with the easterly portion of the annexed land. The parties agree that 9 registered voters and 12 persons who were not registered voters lived in this area. Appellants contend, and respondents deny, that three others, George W. and Edith D. Loorz and Daniel Riley, were registered voters living within this area.

West of the Newark right of way lie 266 acres. This area contains three ponds maintained by duck hunting clubs. There was testimony that the remaining land in this section is used largely for raising of duck feed or is uncultivated. Some is used for agriculture and pasture, but the land is frequently flooded in the rainy season and is poor land. Only one road, not open to the public, connects this section with the rest of the annex. No one lives in this section.

Zoning of the area east of the Decoto rights of way is residential. The golf course is allowed in an R-1 zone with a use permit, and is supplemental to the residential use of the area. The bulk of the area to the west is differently zoned. It includes substantial heavy industrial plants, together with farm lands. The plant areas are zoned for industrial use. Most of the remainder is in a "U" zone which permits uses which are only slightly restricted. Its only residences, aside from that of the caretaker for a water works, are farm homes or agricultural labor camps. In appearance, as shown by photographs in evidence, as well as in use, it is distinguishable from the lands east of the Decoto rights of way.

The trial court found the area east of the Decoto rights of way to be residential and inhabited. These findings are not disputed. The area between the Decoto and Newark rights of way was found to be predominantly agricultural and industrial in use. The land west of the Newark right of way was found to be marsh and overflow land, predominantly used as a duck-hunting area. These findings are sustained by the evidence. Additionally, it was found that the entire area west of the Decoto rights of way, considered as a unit, differed materially in use and nature from that to the east.

One element of the factors of separability and distinguishability, as indicated by the decisions cited above, appears to be a dividing line clear enough to constitute a basis for distinguishing with reasonable clarity and certainty between the inhabited and uninhabited areas of the annexation territory. Such lines exist here in the railroad rights of way. Appellant quotes Government Code, § 35105: "Contiguous inhabited territory may be annexed as one parcel although divided by a road, stream, or other natural or artificial barrier or right of way." Concededly, the railroad rights of way do not, of themselves, bar inclusion of lands on both sides in a single annexation. However, these raised rights of way, constituting visible barriers between sections of the proposed annexation, can be considered with all the other evidence upon the issues of separability and distinguishability. They were so considered in Johnson v. City of San Pablo, supra, 132 Cal.App.2d 447, 283 P.2d 57, and in Capuchino Land Co. v. Board, supra, 34 Cal.App. 239, 167 P. 178. Further, the code section refers only to contiguous inhabited territory. Here, the finding is that the area on one side of the right of way was uninhabited. These rights of way divide the annexation area into three sections, and the principal line, that of the Decoto rights of way, can be regarded as dividing the whole area into two portions.

There can be little question that the areas found to be separable and distinguishable are also substantial portions of the whole. The entire annexation area consists of 2,383 acres. The area between the Decoto and Newark rights of way contains 1,721 acres, or 72.2% of the whole, while 266 acres, 11.2% of the whole, lie west of the Newark tracks. Combined, the areas west of the Decoto tracks constitute 83.4% of the total proposed annexation.

[4, 5] Appellants also attack the finding and conclusion that the land between the Decoto and Newark rights of way was uninhabited. Under the 1939 act, territory is deemed uninhabited if "less than twelve registered voters reside within it" Gov. Code, § 35303. The trial court found Mr. and Mrs. Loorz not to be inhabitants within this definition. On and for some time before the date here critical, they had occupied a home on his father's land within the annexation area. They were registered voters in the City of Alameda. Registration, as well as residence, must be within the annexation area to meet the code requirements, People ex rel. Pennington v. City of Richmond, 141 Cal.App.2d 107, 296 P.2d 351. Thus, Mr. and Mrs. Loorz are not to be counted in determining whether the area is inhabited. There was evidence that they stayed rather frequently at the Alameda address, kept many of their possessions there, and used that address for vehicle registration, drivers' licenses, and Mr. Loorz' draft registration. Whether they resided in the area was a question of fact, People ex rel. Pennington v. City of Richmond, supra; People ex rel. Scholler v. City of Long Beach, 155 Cal. 604, 102 P. 664. The trial court's finding upon conflicting evidence must be sustained. It is unnecessary for us to consider the questions raised as to the residence of Mr. Riley, whose property was divided by the boundary line of the proposed annexation. Even if he were held to reside in the area, there still would be fewer than 12 residents in this separable portion of the annexation area.

[6] Appellants argue that Government Code, § 35303, supra, which defines uninhabited territory as that having less than 12 registered voters, has no application to this proceeding because it specifically applies "For purposes of this article". This section appears in Article 5 (the Annexation of Uninhabited Territory Act of 1939). Thus, say appellants, it can have no application to proceedings under the 1913 act, which is found in Article 2. They say that originally the uninhabited territory act could not apply if there were even one resident in the annexation area. Thus, the argument runs, the purpose of Section 35303 was to broaden the application of the uninhabited territory act, without in any way restricting application of the 1913 act. Appellants also rely upon Section 35101, which is a part of Article 2, the 1913 act. This provides that "When any proceedings for annexation * * * are commenced pursuant to this article, the provisions of Article 1 of this chapter and of this article alone apply." This, they say, emphasizes that Section 35303, in Article 5, cannot restrict the operation of the 1913 act.

[7] We cannot accept this contention. For many years, the mutual exclusiveness of the two acts has been recognized. The act of 1913 stems from that of 1889, Stats. 1889, p. 358. The present provisions of the 1939 act are adapted in large part from the act of 1899, Stats. 1899, p. 37. The act of 1889, like the present statute, did not in terms require that an area be

inhabited to be subject to annexation under its provisions. Nevertheless, it was held as early as 1917 that substantial uninhabited areas could not be annexed under the 1889 act, Capuchino Land Co. v. Board, supra, 34 Cal.App. 239, 167 P. 178. It is apparent that a given territory cannot be both inhabited and uninhabited at the same time. Thus, statutory provision for a distinct procedure for annexation of uninhabited territory excludes inhabited territory from operation of the same statute. It is this clear exclusion which has given rise to the rule that substantial uninhabited areas which are severable and distinguishable from the inhabited portions of an annexation area cannot be included in an attempted annexation of inhabited territory. The limitation of Section 35303 to the "purposes of this article" makes it no less a limitation upon the 1913 act.

The suggestion that Section 35101 leaves the 1913 act applicable to territory which is "uninhabited" within the definition of the 1939 act is equally unsound. Under that section, Articles 1 and 2 are specifically applicable. Included in Article 1 is Section 35006, which, as adopted in 1953 and in effect at the critical date here, provided that "When uninhabited territory is annexed, proceedings may be had under Article 3 or Article 5 of this chapter." Thus, the very section upon which appellants rely does not exclude, but specifically refers to, Section 35303, as a part of Article 5.

In another respect, Section 35006 tends to refute appellants' contention. It is significant that the Legislature deemed it necessary to provide specifically for the overlapping operation of Article 3 (annexation of territory owned by a city or contiguous school district) and the 1939 act, yet wholly failed to provide for such operation of the 1913 and 1939 acts. We find it difficult to conclude that the Legislature intended to make both acts applicable to territory having from 1 to 11 inhabitants, as appellants argue. In the light of the legislative abstention from including such provision when adding Section 35006 in 1953, it would be judicial legislation for us now to insert such language in the guise of construction.

The two acts differ substantially in their application. The 1913 act provides for effective protest by owners of a majority of parcels within the area, and for determination whether to annex by vote of the qualified electors in the area. Under the 1939 act, protest by owners of half the value of the territory terminates the proceedings. Obviously, the two acts differ substantially, and are not intended to apply to the same territory at the same time. In the case at bar, protestants owned more than half the value and area of the uninhabited territories, but fewer than half of the parcels in the entire annexation area.

Appellants concede that the decision in Johnson v. City of San Pablo, supra, 132 Cal.App.2d 447, 283 P.2d 57, is implicitly contrary to their argument. They suggest that the point is not specifically discussed in that opinion, and thus is but "assumption" upon that issue. In the light of the above discussion, and the decisions in People ex rel. City of Pasadena v. City of Monterey Park, supra, 40 Cal.App. 715, 181 P. 825, and Capuchino Land Co. v. Board, supra, 34 Cal.App. 239, 167 P. 178, we consider the conclusion in the Johnson case to be sound and controlling.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

150 Cal.App.2d 469

Arnie E. THOMPSON, Plaintiff and Appellant,

v.

CALIFORNIA BREWING COMPANY, a corporation, Foote, Cone & Belding, a corporation, and G. B. Richardson, Defendants and Respondents.

Civ. 17137.

District Court of Appeal, First District, Division 1, California.

April 26, 1957.

Proceeding for reasonable value of idea for advertising and promotion of sale of beer. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., sustained demurrers, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that complaint alleging that at defendants' request plaintiff disclosed and offered to them, orally and in writing, a new and novel idea, that defendants agreed to pay reasonable value therefor, if and when they used it, that within two years preceding filing of action, defendants used idea, and that by such use defendants became obligated to pay plaintiff reasonable value therefor, but failed to do so, stated facts constituting cause of action for breach of express contract and implied in fact contract.

Reversed with directions.

1. Literary Property ⚷9

Complaint alleging that, at defendants' request, plaintiff disclosed and offered to them orally and in writing a new and novel idea for advertising and promotion of sale of beer, that defendants agreed to pay reasonable value therefor, if defendants used it, that, within two years preceding filing of action, defendants used idea, and that by such use defendants became obligated to pay plaintiff reasonable value therefor, but failed to do so, stated facts constituting causes of action for breach of express oral contract and for breach of implied in fact contract. West's Ann.Code Civ.Proc. § 339, subd. 1.

2. Literary Property ⚷9

Because there is no property interest in abstract ideas, quantum valebant, in an idea case, depends upon contract implied in fact from conduct of parties, not upon contract implied in law. West's Ann.Civ.Code, § 980.

3. Literary Property ⚷9

Complaint alleging that at defendants' request plaintiff disclosed in confidence and offered to them, orally and in writing, a new and novel idea for advertising and promotion of sale of beer, that defendants accepted idea in confidence on understanding that they would not use idea without consent of plaintiff, but that defendants, without plaintiff's consent, commenced employment of idea, and that by reason of such unlicensed use of idea plaintiff suffered damage, sufficiently stated cause of action for violation of confidence.

4. Pleading ⚷214(1), 216(1)

Upon demurrer allegations in complaint are accepted as true, and whether evidence that might be adduced would support them is question of fact to be decided when adduced, not upon hearing of demurrer.

5. Literary Property ⚷8

A duty not to disclose or use an idea without consent of its originator is not limited to cases where there is a fiduciary relationship, since other circumstances may create such duty.

6. Limitation of Actions ⚷37(2)

Allegation that defendants used plaintiff's idea for advertising and promotion of sale of beer in violation of understanding that idea would not be used without plaintiff's consent, did not allege elements of fraud and did not bring it within three year statute of limitations. West's Ann.Code Civ.Proc. §§ 338, subd. 4, 339.

7. Pleading ⚷308

Idea for advertising and promotion of sale of beer was "intellectual production" within statute requiring that if complaint be for alleged infringement of rights in intellectual production, copy of alleged infringing production must be attached to complaint. West's Ann.Code Civ.Proc. §§ 339, subd. 1, 426, subd. 3.

8. Pleading ⚷310

In action against brewery for reasonable value of idea for advertising and promotion of sale of beer, wherein court, on brewery's motion, first made order for view of production not attached to complaint and later made order making copies of certain newspaper advertisements part of complaint, contents of production became part of complaint for all purposes, and furnished basis for raising question of statute of limitations. West's Ann.Code Civ. Proc. §§ 339, subd. 1, 426, subd. 3.

9. Limitation of Actions ⚷46(6), 49(1)

Use by brewery of idea for advertising and promotion of sale of beer more than two years before plaintiff brought action, in which he alleged breach of express and implied in fact contract, if such use had been for test purposes to ascertain whether idea was suitable, would not constitute breach of contract, and action would not be barred by two year statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

10. Limitation of Actions ⚷55(1)

Use by brewery of idea for advertising and promotion of sale of beer in newspaper advertisements for 13 days, more than two years before plaintiff brought action in which he alleged breach of confidence, by use of idea without his consent, constituted breach of confidence, even if use had been only for test purposes, and plaintiff's action was barred by two year statute of limitations. West's Ann.Code Civ.Proc. § 339, subd. 1.

◆

Edward B. Gregg, Henry Gifford Hardy, San Francisco, for appellant.

Eisner & Titchell, San Francisco, Gang, Kopp & Tyre, Los Angeles, for respondent California Brewing Co.

Lillick, Geary, Wheat, Adams & Charles, San Francisco, for respondents Foote, Cone, & Belding et al.

FRED B. WOOD, Justice.

Plaintiff seeks to recover the reasonable value of a new and novel idea[1] for the advertising and promotion of the sale of beer by the defendant brewing company.

Demurrers to his first amended complaint were sustained without leave to amend and he has appealed. The demurrers challenged the sufficiency of each of the three counts of the complaint and pleaded as to each the bar of subdivision 1 of section 339 of the Code of Civil Procedure.

[1] *The first count is sufficient.* It alleges that at defendants' special instance and request plaintiff disclosed and offered them, orally and in writing, a new and novel idea conceived and devised by him (describing it, as above indicated); that "defendants * * * expressly and orally agreed to pay to plaintiff the reasonable value of such new and novel idea if and when the defendants, or any of them, used the same"; that within two years next preceding the filing of this action defendants and each of them "did * * * use such new and novel idea," describing the use thus made of it;[2] that by reason of such use defendants became obligated to pay plaintiff $50,000, the reasonable value of such idea; that they have failed and refused to pay and the whole amount is due and owing. Clearly, this is a statement of facts which constitutes a cause

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[1] Described in the complaint as "being that the defendant * * * should advertise and sell at least two kinds of beer under two different labels, including 'a man's beer,' and the then present beer of California Brewing Company under its then new label for the feminine and home consumption trade."

[2] Alleging that the defendants "commenced and carried on the advertising and sale of two kinds of beer under two different labels, one of which bore and now bears the trade-mark 'Bulldog Beer' and which was and still is advertised extensively on billboards, in newspapers, on radio, on television and through other advertising media as 'A man's beer' and 'A real man's beer.'"

of action for the breach of an express oral contract.[3]

[2] *The second count is sufficient.* It pleads the same facts as the first except it alleges an implied in fact instead of an express contract,[4] and in doing so states a cause of action. Because there is no property interest in abstract ideas (since the 1947 amendment of section 980 of the Civil Code), quantum valebant in an "idea" case depends upon a contract implied in fact from the conduct of the parties, not upon a contract implied in law. Weitzenkorn v. Lesser, 40 Cal.2d 778, 789, 792–795, 256 P.2d 947; Kurlan v. Columbia Broadcasting System, 40 Cal.2d 799, 810–811, 256 P.2d 962; Desny v. Wilder, 46 Cal.2d 715, 738–739, 299 P.2d 257.

If the distinction between express and implied contracts is only a matter of proof, see Weitzenkorn v. Lesser, supra, 40 Cal. 2d 778, at page 794, 256 P.2d at page 959; Desny v. Wilder, supra, 46 Cal.2d at pages 735 and 738 footnote 9, 299 P.2d at pages 267 and 270, it would seem that the promise to pay could also be proved by conduct. Desny v. Wilder, supra, apparently holds that in proving the promise by conduct mere acceptance and use of the idea is not enough, but this does not preclude proof of a promise to pay through other subsequent acts of the defendants: "From plaintiff's testimony, * * * it does not appear that a contract to pay for conveyance of the abstract photoplay idea had been made, or that the basis for inferring such a contract from subsequent related acts of the defendants had been established, at the time plaintiff disclosed his basic idea to the secretary. * * * Certainly the mere fact that the idea had been disclosed under the circumstances shown here would not preclude the finding of an implied (inferred in fact) contract to pay for the synopsis embodying, implementing and adapting the idea for photoplay production." 46 Cal. 2d at pages 739–740, 299 P.2d at pages 270–271.

Since from the pleadings it does not appear impossible to prove an implied in fact contract, and the necessary allegations for an implied contract appear in the complaint, the complaint sufficiently states a cause of action for breach of an implied in fact contract.

[3, 4] *The third count is sufficient.* It pleads a violation of confidence reposed by him in the defendants.[5] The letter by

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[3] Defendants rely upon Glane v. General Mills, Cal.App., 298 P.2d 626, 628, but that case is inapplicable. A letter describing the plaintiff's idea written to a representative of General Mills in 1945, concluded, "'If you are interested in this idea we would naturally expect to have a conference with you personally on this matter.'" Seven or eight years later General Mills put out a kit essentially like that described in plaintiff's letter. In the plaintiff's brief it was admitted that there was no response from General Mills concerning this matter. The court held that the complaint, supplemented by the admissions, indicated that the dealings of plaintiff and defendant were in the nature of preliminary negotiations and that there was no acceptance by defendant of plaintiff's offer. (The appeal in that case, after the granting of a hearing by the Supreme Court, has been dismissed.)

[4] "* * * at the special instance and request of defendant, plaintiff submitted to defendants * * * orally and in writing, a new and novel idea * * *, such idea being submitted * * * with the expectation, which was fully and clearly understood by defendants, that plaintiff would be compensated for its use by defendants when and if the defendants should use it. The second count then describes the idea (as in the first count) and avers that subsequently and within two years next preceding the filing of this action defendants used said new and novel idea, describing the use; and that by reason of such use the defendants became obligated to plaintiff for the reasonable value of compensation for such use, said value being $50,000.

[5] He alleges substantially the same facts as those pleaded in the second count except that he avers that he submitted this new and novel idea to defendants "in confidence"; that they accepted it "in confidence and upon the understanding that they would not use the idea without the consent of plaintiff. But, notwithstanding such confidence and un-

which he transmitted this idea to the defendants (annexed to the complaint as an exhibit) does not of itself indicate any element of confidence in their relationship. Upon the other hand, nothing said in this letter necessarily negatives there having been an understanding between the parties of such a nature that when thus transmitted this new and novel idea was submitted to them "in confidence" and accepted by them "in confidence and upon the understanding that they would not use the idea without the consent of plaintiff" as alleged in the body of the complaint. Upon demurrer these allegations are accepted as true. Whether the evidence that might be adduced would support them is a question of fact to be decided when adduced, not upon the hearing of a demurrer. That is the main distinction between this case and Taylor v. Kelly, 103 Cal. 178, 37 P. 216, and Ruhl v. Mott, 120 Cal. 668, 53 P. 304, heavily relied upon by defendants. The Kelly and the Ruhl cases came to the Supreme Court after trial and judgment. Quite significant is the statement in the Ruhl case that the fact that plaintiff "imposed confidence in the defendant did not cast any duty upon the latter, unless he 'voluntarily assumed a relation of personal confidence' with plaintiff, and this is not found." At page 679 of 120 Cal., 53 P. at page 308. Here, plaintiff has alleged the voluntary assumption of such a relationship by the defendants. Why might they not have assumed such a relationship? If the evidence should show they were looking for "ideas" and that plaintiff undertook to supply several such upon the condition that they be not disclosed or used without his consent, why should there not ensue a duty to that effect?

This is, we think, a good deal like some aspects of the law relating to trade secrets as expressed in the Restatement of the Law of Torts, section 757: "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if * * * (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him * * *."

Comment *j* on section 757 points up the distinction between breach of contract and breach of confidence: "A breach of confidence under the rule stated in this Clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him." 4 Restatement of Law of Torts, p. 13.

[5] This element of confidence is not necessarily limited to the type of case in which there is a fiduciary relationship (such as that between partners or joint venturers or employer and employee) between the parties. Other circumstances may create a duty not to disclose or use without the consent of the originator of the "idea." This is well expressed in Comment *j* on section 757: "The chief example of a confidential relationship under this rule is the relationship of principal and agent. See Restatement of Agency, §§ 395 and 396. Such is also the relationship between partners or other joint adventurers. But this confidence may exist also in other situations. For example, A has a trade secret which he wishes to sell with or without his business. B is a prospective purchaser. In the course of negotiations, A discloses the secret to B solely for the purpose of enabling him to appraise its value. Or, A requests a loan from B, a banker, for the purpose of aiding the manufacture of a product by A's secret process. In order to assure B about the

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derstanding, the defendants have * * without plaintiff's consent, and in violation of such confidence, commenced and continued the employment of such idea * * *."

And that plaintiff "by reason of such unlicensed use by defendant of his idea * * * suffered damage in the amount of $50,000 * * *."

soundness of the loan, A discloses the secret to him in confidence. In both cases B is under a duty not to disclose the secret or use it adversely to A. Again, this confidence may exist even when no business relation between A and B exists or is contemplated, as when A comes to B, his former teacher, for free advice which B is willing to give with respect to the secret and discloses the secret to him in confidence. But in all these cases A cannot impose a confidence on B without B's consent. If A discloses the secret to B despite B's protest that he does not wish to hold it in confidence and will not so hold it if it is disclosed, the confidence requisite for liability under the rule stated in Clause (b) does not arise. Likewise, the confidence does not arise if B has no notice of the confidential character of the disclosure. But no particular form of notice is required. The question is simply whether in the circumstances B knows or should know that the information is A's trade secret and that its disclosure is made in confidence." 4 Restatement of the Law of Torts, pp. 13–14.

Comment *b* on section 757 indicates that under appropriate circumstances these principles apply to information which is not a trade secret: "Although given information is not a trade secret, one who receives the information in a confidential relation or discovers it by improper means may be under some duty not to disclose or use that information. Because of the confidential relation or the impropriety of the means of discovery, he may be compelled to go to other sources for the information. As stated in Comment *a,* even the rule stated in this Section rests not upon a view of trade secrets as physical objects of property but rather upon abuse of confidence or impropriety in learning the secret. Such abuse or impropriety may exist also where the information is not a trade secret and may be equally a basis for liability." 4 Restatement of the Law of Torts, pp. 7–8.

We conclude that the third count is not vulnerable to a general demurrer.

The statute of limitations came into the picture through certain additions to the complaint which the trial court made upon motion of the defendants pursuant to the provisions of section 426(3) of the Code of Civil Procedure.[6] The court first made an order "for a view of the production not attached," and later an order making copies of certain newspaper advertisements a part of the complaint. In these advertisements the defendant brewing company made some use of the "idea" described in plaintiff's complaint. These advertisements appeared in editions published during a period of about six weeks immediately preceding two years prior to the filing of the complaint.

Thus it appears from the complaint that defendants made use of the "idea" more than two years prior to the filing of the complaint and that the action is barred by section 339(1) of the Code of Civil Procedure unless, as plaintiff claims, the running of the advertisements mentioned did not in fact constitute a "use" of the "idea" within the meaning of the contract.

Clearly this two-year statute applies to the first two counts of the complaint, each of which pleads a contract not founded upon an instrument in writing. The obligations arose when defendants first began to use the "idea." Defendants agreed to pay the reasonable value of the idea "if and when the defendants * * * used the same," as stated in the first count. It was understood by the parties that plaintiff would be compensated for its use (its reasonable value, $50,000) "when and if the defendants should use it," as stated in the second count.

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[6] In compliance with that section plaintiff had attached to the complaint a copy of his letter to the defendant brewing company in which he described the "idea," to serve "as a copy of the production as to which the infringement is claimed." He attached no copy of "the alleged infringing production," claiming it would not be possible or feasible to do so.

[6] Section 339(1) applies also to the third count. See Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal.App.2d 464, 467, 114 P.2d 370, for an analysis of this section in its relation to torts and other actions not specifically mentioned in other portions of the statute of limitations. Compare Bendien v. Solov, 89 Cal.App.2d 904, 907–908, 202 P.2d 372, oral agreement whereby plaintiffs furnished money for purchase and rehabilitation of certain land upon the undertaking that they would be repaid upon sale of the land; two-year statute applied. We find alleged in the third count no elements of fraud such as would bring it within the purview of section 338(4) of the Code of Civil Procedure.

[7] Plaintiffs contend that section 426 (3) does not apply, upon the theory that the "idea" involved is not an "intellectual production." We see no merit in this point.

[8] He also claims that the view ordered by the court can not furnish a basis for raising the question of the bar of the statute of limitations. He is mistaken. Section 426 declares that the view may be ordered "to the end that the contents of such production may be deemed to be a part of the complaint *to the same extent and with the same force as though such production* had been capable of being and *had been attached to the complaint.*" (Emphasis added.) We think it becomes a part of the complaint for all purposes. See Weitzenkorn v. Lesser, supra, 40 Cal.2d 778, 785–786, 256 P.2d 947.

[9, 10] However, plaintiff contends that the advertising which the court viewed was merely "test" advertising which the defendants conducted for the purpose of ascertaining whether the "idea" was suitable to their needs and uses; that the actual use by them did not commence until later and within the two-year period prescribed by section 339 (1). In short, he claims that no real breach occurred during such test advertising, not until after the test had been made and defendants had decided to and did adopt it as a part of their merchandising and advertising policy and practice. The advertisements themselves, naturally, do not show these facts, if facts they are. This claim of plaintiff has possibilities except as to the third count, the breach of confidence count. Test advertising to the extent of displays appearing in one Sacramento newspaper on eleven different days between June 6 and July 31, 1952, and in one San Diego newspaper on the 19th and 26th of June of that year (as shown by the documents annexed to the complaint by order of the trial court) appears to us to be quite as complete a breach of "confidence" as would a more extended period of advertising. It, therefore, does not appear that plaintiff can amend the third count to show that the statute has not run. Accordingly, we hold that the court correctly sustained the bar of the statute of limitations to the third count without leave to amend.

The order which directed that the copies of the newspaper advertisements mentioned be made a part of the complaint is the same order which sustained the demurrers without leave to amend. Plaintiff has not had an opportunity to plead facts which, if they exist, negative the seeming bar of the statute as to the first and second counts. He should be given such an opportunity by granting permission to further amend the first and second counts but not the third count of his complaint, if he be advised so to do.

We need not consider plaintiff's criticism of certain items of the costs assessed against him, for they fall with the judgment, which must be reversed.

The judgment is reversed with directions that plaintiff be permitted to amend the first and second counts of his complaint if he be so advised.

PETERS, P. J., and BRAY, J., concur.

ESTATE of Josephine H. GRAHAM, Deceased.

Jean E. FITZGERALD, Claimant and Appellant,

v.

The SALVATION ARMY OF CALIFORNIA, a corporation, Claimant and Respondent. *

Civ. 22172.

District Court of Appeal, Second District, Division 2, California.

April 29, 1957.

Rehearing Denied May 23, 1957.

Hearing Granted June 26, 1957.

Proceeding for determination of heirship under will. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgment adverse to claimant, and claimant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained trial court's finding that testatrix intended words "personal property" to mean personal effects, furniture, furnishings, and other tangible personalty in testatrix' home, not cash, stocks, securities, and bank accounts.

Judgment affirmed.

1. Wills ⚷486

It is necessary to apply every will to the subject matter upon which it is to operate and, to that end, extrinsic evidence is always necessary.

2. Wills ⚷488

Will, which provided that testatrix' close friend, who was stranger to testatrix' blood, was to receive $2,000 and any part of the "personal property" she might desire and that residue of testatrix' property and estate was to go to a religious corporation, was ambiguous when applied to estate which contains personal property consisting of $117,925.92 in stocks and oil and gas lease and $125 in household furniture and furnishings. West's Ann.Civ.Code, § 663.

3. Wills ⚷488

Ambiguity in will, whether deemed latent or patent, is removable by resort to extrinsic evidence. West's Ann.Prob.Code, §§ 105, 106.

4. Wills ⚷457

Under Probate Code provision that technical words in will are to be taken in their technical sense, unless the "context" clearly indicates a contrary intention, quoted word means the part or parts of something written or printed which precede or follow a text or quoted sentence or are so intimately associated with it as to throw light on its meaning. West's Ann.Prob. Code, § 106.

See publication Words and Phrases, for other judicial constructions and definitions of "Context".

5. Wills ⚷470

In the interpretation of an instrument, a passage or phrase is not to be understood absolutely as if it stood by itself, but it is to be read in the whole of the context, i.e. in its connection with the general composition of the instrument.

6. Wills ⚷455, 470

Application of Probate Code provision for construction of words in will must, like all other rules of interpretation, yield to testatrix' dominant purpose as deduced from a consideration of the entire instrument.

7. Wills ⚷439, 457

Testamentary instrument is to be examined with a view to discovering decedent's testamentary scheme or general intention, and the apparent meaning of particular words, phrases, and provisions is to be subordinated to such scheme, plan, or dominant purpose, and technical import of words should not prevail over testator's obvious intent.

8. Wills ⚷565(1)

Statutory definition of "personal property" controls in solving technical problems, but such connotation is not universally or inexorably attributed to the term, and, frequently, it means "personal effects" when used in wills. West's Ann.Civ.Code, § 663; West's Ann.Prob.Code, § 106.

See publication Words and Phrases, for other judicial constructions and definitions of "Personal Property".

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* Opinion vacated 316 P.2d 945.

9. Wills ⚷458

In construing will, court will not be confined to examination of meaning of words used in one particular sentence without regard to other sentences contained in will, but will consider all of the sentences, and, when possible, give some force and effect to each one. West's Ann.Prob.Code, § 106.

10. Evidence ⚷76

In proceeding for determination of heirship under will, claimant's failure to explain a crucial impeachment of her testimony raised presumption that any testimony she might have given would have been prejudicial to her own interests.

11. Evidence ⚷78

Where evidence tends to prove a material fact which imposes liability on a party who has power to produce but refused to produce evidence which, from its very nature, must overthrow case made against him if case is not founded on fact, presumption arises that the evidence, if produced, would operate to his prejudice, especially where party charged with conduct apparently suspicious or dishonorable fails to explain it upon having an opportunity to do so.

12. Evidence ⚷87

Presumption arising from party's failure to produce evidence which, from its very nature, would overthrow case made against him if case was not founded upon fact does not supply affirmative evidence of what actually happened but adds weight to averse inferences arising from the other evidence.

13. Wills ⚷703

A reasonable inference is enough to sustain the trial court's finding as to testator's intent.

14. Wills ⚷706

To overthrow trial court's finding as to testator's intent, it must be demonstrated that there is no substantial evidence to support the challenged finding.

15. Wills ⚷703

In proceeding to determine heirship under will which gave claimant $2,000 and any part of the personal property she might desire, evidence sustained trial court's finding that testatrix intended phrase "personal property" , as used in will, to mean personal effects, furniture, furnishings, and other tangible personalty in testatrix' home, not cash, stocks, securities, and bank accounts.

16. Wills ⚷706

Where, in proceeding for determination of heirship under will, earlier will was excluded upon objection of claimant's attorney and never received in evidence, claimant's argument on appeal pertaining to comparison of an earlier will with the probated document could not be entertained.

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Hugh E. McManus, Los Angeles, for appellant.

Meserve, Mumper & Hughes, J. Robert Meserve and Douglas M. Shumway, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal by Jean E. Fitzgerald from judgment rendered in favor of the Salvation Army of California in a proceeding for determination of heirship under the will of Josephine H. Graham, deceased.

The question presented is the correctness of the trial court's construction of paragraph Twelfth of the will which reads: "When my said brother shall have died, then the Trustee shall distribute the remaining portion of the Trust as follows: To Jean E. Fitzgerald, the sum of Two Thousand Dollars ($2000.00) and any part of the personal property she may desire. The residue of my property and estate to go to The Salvation Army of California, a religious and charitable corporation." The holding is found in the following conclusions of law: "When testatrix used the words 'personal property' in paragraphs Twelfth and Fourteenth of her Will admitted to probate herein she intended this phrase to be used in its popular sense to mean personal effects, furniture, furnishings and other tangible personal property in and about the premises of her home. Testatrix did not mean that the words 'personal property' in such paragraphs included intangible personal property such as cash, stocks, securities and bank accounts. * *

That Jean E. Fitzgerald is entitled to have distributed to her on the death of Fred L. Graham the sum of $2,000 and any part of testatrix' furniture, furnishings, personal effects and other tangible property of similar nature found at testatrix' home premises that the said Jean E. Fitzgerald may desire. * * * The Salvation Army is entitled to have distributed to it on the death of Fred L. Graham the rest and residue of testatrix' estate after bequest made to the said Jean E. Fitzgerald, said residue consisting of balance of cash, securities, stocks, other intangible properties, real properties and remaining tangible personal property not selected by and distributed to the said Jean E. Fitzgerald."

Appellant's statement of claim says: "That petitioner Jean E. Fitzgerald has elected to, and does hereby elect and select to take all of the personal property, and stocks, bonds and cash, except the sum of $1.00, that may be on hand in said trust estate upon date of death of said Fred H. Graham. * * * That your petitioner's claim is that she is entitled to receive and have distributed to her under said Paragraph 12 of said Will all of the stocks, bonds, cash, except the sum of $1.00, and all personal property that may be on hand on date of death of said Fred H. Graham."

Josephine H. Graham, who had never been married, died on January 6, 1955, at the age of 91 years, leaving a last will dated August 6, 1947. She had no relatives except a brother, Fred L. Graham, who resided with her and is "in his late eighties." Appellant Fitzgerald, a stranger to the blood of decedent, was a realtor and insurance agent with whom Miss Graham had done business over the years and whom she considered her "close friend," although the evidence of any real intimacy between the two women is decidedly sketchy. Miss Graham had frequently expressed to her attorney and her financial advisor great admiration for the Salvation Army and its work. She left an estate consisting of realty appraised at $40,000 and personal property consisting of furniture and furnishings of her home, preferred and common stocks, and an oil and gas lease, which were appraised in the aggregate at $117,925.92. The household furniture and furnishings were valued at $125. There was no cash in the estate at the time of death, for decedent's money was in two joint tenancy bank accounts, with her brother and Mrs. Fitzgerald as co-tenants. Those joint accounts at the time of death amounted to approximately $50,000. Mrs. Fitzgerald transferred half into her own bank account and the other half into a joint tenancy account with Fred L. Graham. She now claims she is entitled to the $117,925.92 of personalty (less $1.00) to the exclusion of the Salvation Army.

The major contention of appellant is that the court erred in receiving parol evidence upon the theory that the will is ambiguous on its face; her counsel assert that there is no uncertainty, that the phrase "personal property" is a technical term and must be given the meaning attributed to it by § 663, Civil Code, i.e., including "every kind of property that is not real."

[1] It is a mistaken notion that a will can be interpreted without any reference to the property upon which it operates or the circumstances in which it was made. Paley v. Superior Court, 137 Cal.App.2d 450, 455–456, 290 P.2d 617, 620: "The will on its face is not ambiguous. * * * But it is necessary to apply every will to the subject matter upon which it is to operate. To that end extrinsic evidence is always necessary. * * * Wigmore on Evidence, section 2470, page 227 says: 'The truth had finally to be recognized that words *always* need interpretation; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. "Words *must* be translated into things and facts." Instead of the fallacious notion that "there should

be interpretation only when it is needed", the fact is that there must always be interpretation. Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view; but there must always be a traveling out of the document, a comparison of its words with people and things. The deed must be applied "physically to the ground." * * * Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore *all the circumstances must be considered which go to make clear the sense of the words,*—that is their associations with things.' "

[2, 3] When the language of the document before us is applied to its factual setting, an ambiguity arises. See the Supreme Court's most recent definition of ambiguity in Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 524–525, 297 P.2d 428. Such an uncertainty, whether deemed latent or patent, is removable by resort to extrinsic evidence. Paley v. Superior Court, supra, 137 Cal. App.2d at page 457, 290 P.2d at page 621; In re Estate of Sargavak, 41 Cal.2d 314, 319, 259 P.2d 897. Section 105, Probate Code, says: "[W]hen an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations," i. e., "oral declarations of the testator as to his intentions."

[4–7] The crux of appellant's argument is reliance upon § 106, Probate Code, which is as follows: "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense." The portion of the section most pertinent to the instant problem is the phrase "but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention." "Context" means "the part or parts of something written or printed which precede or follow a text or quoted sentence, or are so intimately associated with it as to throw light on its meaning." 17 C.J.S. p. 178. "It is the general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the whole of the context; i. e. in its connection with the general composition of the instrument." State v. Heyer, 89 N.J.L. 187, 98 A. 413, 414, Ann.Cas.1918D, 284. The application of the statutory rule at bar is dependent upon the context of the will and like all rules of interpretation must yield to the dominant purpose of the testatrix as deduced from a consideration of the entire instrument. "It is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases and provisions is to be subordinated to this scheme, plan, or dominant purpose. The technical import of words should not prevail over the obvious intent of the testator. * * * The cited authorities are of present value in that they indicate the propriety of applying to the phrase 'all the personal property' a limited and restricted meaning and operation consistent with the testator's evident intention." In re Estate of Puett, 1 Cal.2d 131, 133–134, 33 P.2d 825, 826. "In determining the intention of the testatrix here we must, as appellants insist, stand by the words of the will, and no intention should be attributed to the testatrix which cannot reasonably be drawn from the language of the document itself; but it is generally recognized that a testamentary instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention, and that the apparent meaning of particular words, phrases and provisions is to be subordinated to this scheme, plan or dominant purpose. [Citation.] The technical import of words should not prevail over the obvious intent of the testator." In re Estate of La Fetra, 14 Cal.App.2d 599, 601, 58 P.2d 678, 679.

[8, 9] Though it may be conceded that the statutory definition of "personal property" controls in solving technical problems, that connotation is not universally or inexorably attributed to the term. Frequently it means "personal effects" when used in wills. "The words 'personal property' have many meanings. * * * The broad meaning happens to coincide with the statutory definition. When under such circumstances a court is construing the meaning of a will it will not be confined to an examination of the meaning of the words used in one particular sentence without regard to other sentences contained in the will. But it will consider all of the sentences and when possible give some force and effect to each one. Probate Code, sec. 103." In re Estate of Combs, 136 Cal.App. 286, 291, 28 P.2d 711, 713. It was held that the phrase "personal property," when used in wills considered in the following cases, meant "personal effects" only: In re Estate of Combs, supra, 136 Cal.App. 286, 291, 28 P.2d 711; In re Estate of Norrish, 135 Cal. App. 166, 169, 26 P.2d 530; In re Estate of La Fetra, supra, 14 Cal.App.2d 599, 603, 58 P.2d 678; In re Estate of Kruger, 55 Cal.App.2d 619, 623, 131 P.2d 619; In re Estate of Puett, supra, 1 Cal.2d 131, 134, 33 P.2d 825; In re Estate of Duraind, 51 Cal.App.2d 206, 211–212, 124 P.2d 330. In the next cited cases such items as cash, notes, stocks or bonds were held not to be included within the phrase "personal property": In re Estate of Cowden, 10 Cal. App.2d 481, 51 P.2d 1165; In re Estate of Marin, 69 Cal.App.2d 147, 149, 158 P.2d 412; Wolf v. Schaeffner, 51 Wis. 53, 8 N. W. 8, 10; In re O'Malley's Estate, 238 Wis. 456, 300 N.W. 10, 12; Tallman v. Tallman, 3 Misc. 465, 23 N.Y.S. 734, 741; Obetz v. Boatmen's Nat. Bank of St. Louis, 361 Mo. 221, 234 S.W.2d 618, 623.

Not without superficial persuasiveness is appellant's argument that the instant will is couched in legal phraseology and therefore the words "personal property" must have their technical meaning under the compulsion of § 106, Probate Code. It is true that the document in the main bears the earmarks of legal draftsmanship. This is emphasized by paragraph Fifth which leaves the residue to Mrs. Fitzgerald in trust for the brother, Fred L. Graham, and is in customary legal language. But here and there appears a layman's wording, so worked into the legal scheme as to suggest a copying and adaptation. For instance, the executrix is to serve "without bonds or security;" the devise of a lot at Lake Arrowhead to William H. Aston, a friend, concludes with the phrase "asking him to not let the fact of my death interrupt his friendship for my brother;" the matter of a successor trustee is handled thus: "The word 'Trustee', as used by me, includes the possibility of 'Successor Trustee';" no successor trustee is named and no specific grant of power is made to one. Payment of debts is directed "as soon after my death as funds on hand make it possible to do so." These phrases suggest a layman's authorship rather than that of a lawyer. A copying and amending becomes a compelling inference when other circumstances are considered.

In 1944, Mr. James N. Hastings, a well-known attorney, had drawn a will for Miss Graham; shortly prior to that time Mr. Dee Holder, another prominent lawyer, had drawn one for her. Mr. Hastings testified that "my work in preparing the Will was just to change one that she brought in." Inferentially, that was the Holder will. The Hastings document was delivered to her. Soon she went back to Mr. Holder and had him draw another will which was handed to her. She was an intelligent woman; must have known just what Mr. Hastings had done; having the work of these two lawyers available it would not be unnatural for her to borrow their work and make her own draft. If this occurred it was not due to any dissatisfaction with Mr. Holder for, although she did not consult him or Mr. Hastings, or Mr. Otis, her financial advisor, about the will which was admitted to probate, that document says: "Because I have found the legal advice and assistance of my attorney Mr. Dee Holder, both wise and dis-interested, I suggest to my said Trustee that she continue to use that legal advice whenever necessary." Had Miss Graham deemed legal services advisable she undoubtedly would have consulted Mr. Holder or Mr. Otis, or both of them.

That Miss Graham or Mrs. Fitzgerald prepared this 1947 will in the manner suggested appears from the Fitzgerald testimony and her ultimate admissions in open court. On the witness stand she swore that she had no part in the preparation of the will and never saw it until decedent's safety box was opened for inheritance tax purposes. An executed duplicate was found and first seen after Miss Graham's death, in a box in her home, so the witness said. She also testified that she never prepared or typed any documents for Miss Graham, did not prepare this will or know who did so and, though shown to have been present at its execution, did not recall the fact or any mention of it. The will was executed at the office of Liberty Escrow Company, which Mrs. Fitzgerald used in her real estate business. It was executed in duplicate, which is contrary to the custom of lawyers. No lawyer was present and the document does not bear the customary name or address of any attorney.

On the basis of two exemplars of typewriting appearing upon documents concededly prepared in Mrs. Fitzgerald's office (Exhibits 1 and 2), Mr. John J. Harris, an expert witness, testified that the two exemplars and the will were typed on the same machine, a Royal of pica type style, and that the operator was not a touch typist but a "hunt and peck" operator. For years, Viola Dawson had resided with Mrs. Fitzgerald, she owned that kind of Royal typewriter and was a "hunt and peck" typist. After the Harris testimony a recess was taken and then appellant's counsel informed the court that he had just conferred with Mrs. Fitzgerald and Miss Dawson, saying: "So during the recess Mrs. Fitzgerald has told me that yes, she believes that the original Will as admitted to probate here was drafted on the Royal typewriter in the house. And it is also her memory that she requested Viola Dawson to do the typing. And Viola Dawson says that she does not remember. But she uses the words it is possible that she did do it." He later offered to stipulate "that the original Will as heretofore admitted to probate was typed by Miss Viola Dawson on the Royal typewriter in the Dawson home, and, of course, that would naturally include the copy thereof." Opposing counsel did not accept the proffered stipulation because it did not include the fact of this being done at the direction of Mrs. Fitzgerald. After further colloquy this formal admission was made: "The Court: So that there may be no misunderstanding, then the admission is to the effect that the original Will was typed on a Royal typewriter by Miss Dawson in her home. Mr. McManus: Yes, your Honor." Miss Dawson was later recalled as a witness and testified that she must have written the will, though she did not remember it, that she had a Royal typewriter in the house. Mrs. Fitzgerald, though subsequently called as a witness in her own behalf, was not questioned about this matter.

[10–12] This failure to explain a crucial impeachment of her story raised a presumption that any testimony she might give would be prejudicial to her own interests. " 'It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary.' [Citations.] This principle applies with, perhaps, greater force where a party charged with conduct which is apparently suspicious or dishonorable has an opportunity to explain it, but fails to do so." Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172, 175. Of course the presumption thus arising does not supply affirmative evidence of what actually happened, In re Estate of Bould, 135 Cal.App.2d 260, 265, 287 P.2d 8, 289 P.2d 15, but it adds weight to adverse inferences arising from other evidence.

Mrs. Fitzgerald is a stranger to the blood of decedent, but six days previous to the making of the will she had been placed in control and probable ultimate ownership of two bank accounts which Miss Graham had;[1] one, a savings account, then had $10,867.43 in it (and grew to $48,267.75 by time of death); the amount of the commercial account in 1947 does not appear, but it was $5,377.52 at the time of death. Miss Graham had repeatedly expressed admiration for the Salvation Army and its work. The will furnishes internal evidence of her intention.

After creating for her brother a trust of the residue, practically all of her estate, she makes provision for its distribution in the event that the brother predeceases her and in the event of his surviving.[2] In each instance the property goes "To Jean E. Fitzgerald, the sum of Two Thousand Dollars ($2000.00) and any part of the personal property she may desire. The residue of my property and estate to go to The Salvation Army of California, a religious and charitable corporation." Having placed her bank accounts in joint tenancy testatrix would not expect to have any cash in her estate; she then had stocks and bonds worth $70,000 to $75,000 and real estate then worth $30,000 which grew to $40,000 at the time of her death, some seven and one-half years later. Did Miss Graham intend that Mrs. Fitzgerald should have all of her estate except the real property? If so, why not say that? "Any part of the personal property she may desire" would not seem to refer to stocks and bonds and oil lease, not when used by one who "had a very keen mind," as appellant said Miss Graham had. She must have known that no business woman (for such Mrs. Fitzgerald was) would elect not to take valuable properties like those. She must have recognized that human nature does not work that way. On the other hand, her personal effects were so meager,—household furnishings worth $125 at death and no jewelry except "a little cross of like you would have from the Catholics or the Lutherans or whoever you are, on her little jacket",—so meager as to raise a question of whether Mrs. Fitzgerald would want all or any part of them. "It does not seem to us reasonable to assume that the testatrix believed that any of the very valuable stocks and bonds embraced in her personal property would be rejected by appellants; while it is, in our opinion, reasonable to assume that she felt some of her personal effects or household goods might not be acceptable to the four nieces and nephews. This conclusion, in our opinion, is consistent with and does no violence to the expressed intention of the testatrix because it harmonizes with decedent's apparent scheme or general intention." In re Estate of La Fetra, supra, 14 Cal.App.2d 599, 603, 58 P.2d 678, 680.

If Mrs. Fitzgerald was to have all stocks and bonds and the oil lease there would be little point in giving her any sort of an election. If testatrix had her investments in mind as a legacy to Mrs. Fitzgerald there would appear to be no occasion for leaving the cash bequest of $2,000 to her. Under Mr. Otis' guidance those investments were increasing in value over the years, they had grown from $70,000 to $100,000 between 1940 and 1951, and she had no reason in 1947 to fear a reverse trend. As the bank accounts were already controlled by appellant, testatrix had no occasion to expect any cash to go into her estate and the gift of $2,000 would normally come out of the investments; if she wanted that legatee to have all those valuable items she naturally would not have required the sale of those assets to raise the cash when the legatee would be entitled to take all of them in kind. The record does not disclose what the rents from the realty were and hence there is no basis for inferring that she expected them to take care of the $2,000 bequest as well as expenses of administration or that she expected the realty to be sold for that purpose. Upon appellant's construction of the will the gift of the $2,000 in addition to the investments would be a somewhat inexplicable duplication by the testatrix, while the court's construction of the will attributes to her normal and reasonable mental processes.

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[1] Miss Graham was then 83 years old; her brother about 79; Mrs. Fitzgerald's age is uncertain for her own testimony varied from 58 to 70 years.

[2] Paragraphs Twelfth and Fourteenth.

Finally, the will expressly authorizes Mrs. Fitzgerald, as trustee of the estate, to convert into cash any realty other than the residence (appraised in probate at $9,000). This made it possible for her, during the brother's lifetime, to reduce the Salvation Army's share of the residue to that figure. If that were done she in all probability would ultimately absorb not only the bank accounts ($50,000 at death), but all the real and personal property except the $9,000 home place. The total appraised value of $157,925.92, less $9,000, leaves her $148,925.92; this in addition to the bank accounts. An inference that testatrix so intended seems not a reasonable one and certainly not inevitable. Though Miss Graham designated Mrs. Fitzgerald as a close friend when making her a joint tenant of the bank accounts, and manifested confidence in her by permitting her to draw on those accounts over the years, the record affords little, if any, substantial basis for a finding that she desired her to take all of the estate to the practical exclusion of the Salvation Army.

[13–15] A reasonable inference is enough to sustain the trial court's finding of the testatrix' intent; to overthrow it appellant is required "to demonstrate that there is no substantial evidence to support the challenged findings." Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552; see also, People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 538, 256 P.2d 677. The evidence amply sustains the court's findings that the will "was not drawn or prepared by or at the direction of an attorney at law or person technically trained in the study of law or drafting of wills," and that "[w]hen testatrix used the words 'personal property' in paragraphs Twelfth and Fourteenth of her Will admitted to probate herein she intended this phrase to be used in its popular sense to mean personal effects, furniture, furnishings and other tangible personal property in and about the premises of her home. Testatrix did not mean that the words 'personal property' in such paragraphs included intangible personal property such as cash, stocks, securities and bank accounts."

[16] The argument of counsel for appellant which is based upon comparison of an earlier will with the probated document cannot be entertained, for that earlier will was excluded upon objection of appellant's attorney and was never received in evidence. Nor can arguments as to the alleged inconsistency between the court's oral ruling and its formal findings prevail. 4 Cal.Jur.2d § 536, p. 391; Southern California Freight Lines v. San Diego Electric Ry. Co., 66 Cal.App.2d 672, 676, 152 P.2d 470.

Appellant's claim of error in receiving extrinsic evidence has been covered by the foregoing discussion; counsel do not complain of any specific evidence thus received except expressions of testamentary intent, but the record shows that they were consistently excluded by the trial judge whenever the point was raised.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 488

CONSOLIDATED LOAN COMPANY, a California corporation, Plaintiff and Respondent,

v.

Louis HARMAN, Defendant and Appellant.

Civ. 22197.

District Court of Appeal, Second District, Division 2, California.

April 26, 1957.

Action by loan company against guarantor for a balance due by debtor which went into bankruptcy. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for loan company and denied a motion for new trial, and guarantor appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained finding that guarantor had knowledge of and consented to an alteration in continuing guaranty signed by guarantor consisting of striking out the name of a bank, "or any other accredited lending institution" and substituting therefore name of loan company.

Judgment affirmed; attempted appeal from order denying new trial dismissed.

1. Alteration of Instruments ⚷2, 3

An alteration of a written instrument made after delivery and without previous consent vitiates the obligation, at the option of the other party, if it enlarges or diminishes the obligation, but not where it merely identifies the intended obligee.

2. Alteration of Instruments ⚷3

Where an original guaranty ran in favor of an alternative class, namely "any other accredited lending institution," and a loan company was within such class, it was named as an anticipated obligee, and when such instrument was changed to eliminate all other potential obligees and confine the obligation to the loan company which advanced the money, such alteration did not rise to the dignity of a material one, and therefore did not vitiate guarantor's obligation thereunder.

3. Alteration of Instruments ⚷2

Test of materiality of an alteration of a written instrument is whether it changes the rights and duties of the parties, or either of them. West's Ann.Civ.Code, § 1700; West's Ann.Code Civ.Proc., § 1982.

4. Guaranty ⚷30

Where a loan company was licensed as a money lender under the Personal Property Brokers' License Act, it was an "accredited lending institution" within meaning of a guarantee extended to any accredited lending institution, notwithstanding the fact it was not licensed under the Bank Act. West's Ann.Financial Code, §§ 22200 et seq., 22206.

See publication Words and Phrases, for other judicial constructions and definitions of "Accredited Lending Institution".

5. Frauds, Statute of ⚷131(1)
Principal and Agent ⚷117(1)

Where guaranty running in favor of named bank or any other accredited lending institution was altered by plaintiff loan company so as to strike out the reference to the bank or other accredited lending institution and to substitute name of loan company, and an agent merely conveyed information to and from guarantor, statute of frauds and statute relating to authority of agent to make written contracts were inapplicable. West's Ann.Code Civ.Proc., § 1973, subd. 2; West's Ann.Civ. Code, § 2309.

6. Appeal and Error ⚷901

The duty rests upon an appellant who asserts insufficiency of the evidence to demonstrate that fact.

7. Alteration of Instruments ⚷29

In action by loan company against guarantor, for a balance due by debtor which went into bankruptcy, evidence sustained finding that guarantor had knowledge of and consented to an alteration in continuing guaranty signed by guarantor consisting of striking out the name of a bank, "or any other credit or lending institution" and substituting therefor name of loan company.

Franklin D. Laven, Los Angeles, for appellant.

Phillips & Gooing, Wm. R. Phillips and Homer H. Gooing, Huntington Park, for respondent.

ASHBURN, Justice.

Appeal from judgment rendered against defendant Louis Harman upon a continuing guaranty signed by him.

Defendant's wife (under the name of Charlotte Silver) was a partner with Fred Gusinow in conducting business under the name of Frosty Foods. The partnership needed more money, had been refused further credit at the Santa Monica branch of Bank of America, was about to try the Bishop branch but did not expect to succeed. Gusinow explained the situation to defendant, who agreed to give a continuing guaranty of any indebtedness of Frosty Foods not exceeding $50,000 at any one time. Gusinow told him that he "would need another guarantee made out to the Bank of America or any other lending institution to take it to in the event the bank in Bishop did not accept it, which I felt certain they would not." A printed form of the bank was used. It was addressed to and ran in favor of Bank of America National Trust and Savings Association "or any other accredited lending institution," the quoted words being typed into the form. Plaintiff was licensed by the state as a money lender under the Personal Property Brokers License Act, Financial Code, § 22200 et seq. and was engaged in buying conditional sales contracts from dealers. The court found that plaintiff was a "duly accredited lending institution."

After delivery of the document to plaintiff and before any money was advanced by it, plaintiff's manager, Mr. Owens, struck out the words "Bank of America National Trust and Savings Association or any other accredited lending institution" and substituted "Consolidated Loan Co." Defendant had previously been told that the bank had declined a loan and that plaintiff had accepted the guaranty and would handle the financing; defendant said this was all right. He was also told that Consolidated would put its own name on the guaranty, and he made no objection thereto. This having been done, conditional sales contracts were purchased from Frosty Foods by plaintiff. Frosty Foods soon went into bankruptcy, owing plaintiff $6,014.16, for which amount judgment was rendered in favor of plaintiff against Harman. Defendant knew of the fact of plaintiff's advancing moneys from time to time on the strength of the guaranty.

[1, 2] An alteration of a written instrument made after delivery and without previous consent vitiates the obligation, at the option of the other party, if the alteration pertains to a material matter,—if it enlarges or diminishes the obligation, but not where it merely identifies the intended obligee. 2 Am.Jur. § 60, p. 642; 3 C.J.S. Alteration of Instruments § 30 b, p. 940. The original guaranty in this case ran in favor of an alternative class,—"any other accredited lending institution," and plaintiff, being within that class, was named as an anticipated obligee. When the instrument was so changed as to eliminate all other potential obligees and to confine the obligation to the one institution which advanced money, the alteration did not rise to the dignity of a material one.

Section 1700, Civil Code, provides that a "material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act." Section 1982, Code of Civil Procedure: "The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise."

[3] The test of materiality of the alteration is whether it changes the rights or duties of the parties, or either of them. "The old rule was that any change in a written contract, made by a party thereto without the knowledge or consent of an obligor thereon, discharged such obligor from liability thereunder. This rule has been much relaxed, and the rule in most jurisdictions now is that the change must be a material change. The materiality of the change, however, does not depend upon whether or not the party not consenting thereto will be benefited or injured by the change, but rather upon whether or not the change works any alteration in the meaning or legal effect of the contract. Turner v. Billagram, 2 Cal. 520; Humphreys v. Crane, 5 Cal. 173. A material alteration is one that works some change in the rights, interests, or obligations of the parties to the writing." Lasky v. Bew, 22 Cal.App. 393, 395–396, 134 P. 358, 360. "'A material change or alteration of an instrument is one which causes it to speak a language different in legal effect from that which it originally spoke.' * * * Any change made in a document after its execution, which merely expresses what would otherwise be supplied by intendment is immaterial, and the document is in effect unaltered by it." Cavitt v. Raje, 29 Cal.App. 659, 660–661, 156 P. 519. To the same effect are, Coleman v. Dawson, 110 Cal.App. 201, 208, 294 P. 13; Houk v. Williams Bros., Ltd., 58 Cal.App. 2d 573, 578, 137 P.2d 737; 3 Cal.Jur.2d § 2, p. 198, § 10, p. 203; 3 C.J.S. Alteration of Instruments §§ 4, 19, pp. 905, 925.

Appellant's reliance upon Woodard v. Grover, 156 Cal. 581, 105 P. 736, is misplaced. In that instance the name of E. S. Grover had been substituted for that of M. A. Grover as one of the parties of the second part to a contract; this was done after delivery and without the consent of the other party. It was held to be a material alteration which destroyed the obligation of the parties of the second part. That is far different from the situation at bar. The guaranty when delivered ran in favor of "Bank of America National Trust and Savings Association or any other accredited lending institution." This was an offer to guarantee indebtedness incurred in favor of any lender who came within the general description of "accredited lending institution." When one such company accepted the guaranty and advanced money on it the described class then narrowed to that one lender. When that company substituted its own name in place of the general language describing a class, it did not make the writing speak in any different way. Had it remained in its original form the lender could have recovered upon it after advancing the money. Following the change it had the same right, a recovery of no more and no less money than it would have taken had the change not been made.

[4] Appellant argues that plaintiff is not an "accredited lending institution" because it is not licensed under the Bank Act. The record affords no basis for that conclusion. Plaintiff is licensed as a money lender under the Personal Property Brokers License Act (now Financial Code Annotated Div. 9, Ch. 2, § 22200 et seq.). Such a license issues only after investigation by the commissioner as to financial responsibility, experience, character and general fitness of the applicant. Financial Code Annotated § 22206.[1] "Accredited" is not a technical term, nor was it so used in this instance. According to Webster's New International

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[1] Financial Code Annotated § 22206. "Upon the filing of the application and the payment of the fees and the approval of the bond, the commissioner shall investigate the facts, and if he finds that the financial responsibility, experience, character, and general fitness of the applicant, and its members if the applicant is a copartnership or association, and its officers and directors if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this division, he shall issue and deliver a license to the applicant to engage in business in accordance with the provisions of this division, at the location specified in the application."

Dictionary, Second Edition, it means: "1. Publicly or officially sanctioned or authorized; provided with credentials; also, accepted as valid or credible. * * * 2. Officially vouched for or guaranteed as conforming to a prescribed or desirable standard; as, an accredited school or college * * *." Primarily, the business of Frosty Foods was selling home freezers to consumers on conditional sales contracts, which were then transferred by it to the lending institution with recourse against Frosty Foods in case of default by the vendee. That is a business more appropriate to a personal property broker than a bank. See Financial Code Annotated §§ 22009 and 22050. The court's holding with plaintiff in this regard was well grounded.

Defendant being apprised of the change in the written guaranty and of the advancing of moneys by plaintiff on the strength of same, made no objection whatever; he enjoyed the full benefit of plaintiff's reliance upon the altered instrument in that his wife's firm received and used plaintiff's advances until Frosty Foods went into bankruptcy.

Houk v. Williams Bros., Ltd., supra, 58 Cal.App.2d 573, 137 P.2d 737, 740, declares that a material alteration of a contract without consent of the other party "renders the instrument voidable as to such non-consenting party"; also that the contract thus made voidable may be ratified by subsequent consent. Quoting from 6 Williston on Contracts, Rev. ed., 5319, §§ 1896 and 1897, it is said: "'Ratification, subsequent to the alteration, has as full effect as authority originally granted, and ratification may be shown by any conduct from which assent can fairly be implied. Silence may be enough. It has been well said, "The rule is just and supported by the authorities that, where a document has been altered and notice of such alteration is brought to the attention of the parties affected, it is their duty to disavow it at once, or within a reasonable time after learning thereof, or they are bound by the document as altered."'" 58 Cal.App.2d at page 579, 137 P.2d at page 740. We have that precise type of consent and ratification here.

[5] Appellant argues that a guaranty is a contract required to be in writing (Code Civ.Proc. § 1973, subd. 2), and hence authority of an agent to make a material alteration therein must be in writing (Civ. Code, § 2309). The argument is misplaced. The alteration under discussion was made by plaintiff. The agent to whom counsel refers merely conveyed information to and from defendant. The statute of frauds and § 2309, Civil Code, are not involved in this case.

[6, 7] Appellant's arguments are largely directed to sufficiency of the evidence to support the findings concerning his knowledge and consent to the alteration. Pursuant to the rule governing courts of review we have proceeded on the basis of the evidence and inferences favorable to respondent. The duty rests upon an appellant who asserts insufficiency of the evidence to demonstrate that fact. New v. New, 148 Cal. App.2d 372, 306 P.2d 987. This the appellant has failed to do.

The attempted appeal from order denying a new trial is dismissed.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 561

Matter of the Petition of Lawrence SPEISER and Dennis L. Woodman, for and on behalf of Hilbert E. BAIRD, Jr., for a Writ of Habeas Corpus.

Cr. 3340.

District Court of Appeal, First District, Division 1, California.

April 30, 1957.

Rehearing Denied May 29, 1957.

Hearing Denied June 26, 1957.

Habeas corpus proceeding. The District Court of Appeal, Bray, J., held that where defendant deliberately and intentionally and without lawful or any excuse failed to secure an attorney as suggested by court and to appear at time set for trial on charge of drunken driving, court had right to proceed with trial on date set in defendant's absence.

Writ discharged.

1. Criminal Law ⟾636(1)

Where defendant deliberately and intentionally and without lawful or any excuse failed to secure an attorney as suggested by court and to appear at time set for trial on charge of drunken driving, court had right to proceed with trial on date set in defendant's absence. West's Ann.Vehicle Code, § 502; West's Ann.Pen. Code, §§ 1043, 1148, 1193, subd. 2.

2. Criminal Law ⟾603(2)

Letter by defendant to district attorney stating that due to business beyond his control he had been called out of town and that in regard to his trial he would not be able to be present until later date, could not be considered as request for continuance of trial. West's Ann.Vehicle Code, § 502.

3. Criminal Law ⟾909

Where defendant's main reason for not appearing at his trial on charge of drunken driving was based on belief that if he got out of state he would not be extradited and therefore never would be tried, court was justified in refusing to grant him a new trial. West's Ann.Vehicle Code, § 502.

4. Criminal Law ⟾636(1)

Even if court had power to punish defendant for contempt and to forfeit defendant's bail, such remedies did not preclude court from trying defendant in his absence on a charge of drunken driving. West's Ann.Vehicle Code, § 502; West's Ann.Pen.Code, §§ 1043, 1148, 1193, subd. 2.

5. Constitutional Law ⟾268

Criminal Law ⟾636(1), 641(1)

Trial of defendant on misdemeanor charge for drunk driving in absence of defendant, who deliberately failed to secure an attorney and to appear at time set for trial, did not constitute a denial of due process or of defendant's right to assistance of counsel and to be present at trial. West's Ann.Vehicle Code, § 502; West's Ann. Pen.Code, §§ 1043, 1148, 1193, subd. 2.

6. Constitutional Law ⟾257, 266, 267, 268

Right of defendant to be confronted with witnesses against him, to be brought to trial within 60 days after filing of information, not to be put in double jeopardy, to public trial, to counsel and to trial by jury, may be waived by defendant without affecting due process in the trial. West's Ann.Pen.Code, §§ 686, subds. 1, 3, 1043, 1193.

7. Criminal Law ⟾636(1)

If, once a criminal trial has started, including felony trial, the defendant absconds, trial may proceed in his absence.

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Lawrence Speiser, Staff Counsel, American Civil Liberties Union of Northern California, San Francisco, Dennis L. Woodman, Redwood City, for petitioners.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., Keith Sorenson, Dist. Atty., Robert Carey, Deputy Dist. Atty., Redwood City, for respondents.

BRAY, Justice.

The question raised by this petition for habeas corpus[1] is: Had the court under the circumstances here the right to proceed with the trial of a misdemeanor charge against the defendant, who had no attorney, in the absence of the defendant?

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[1] Ordinarily where, as here, the defendant in the criminal case has a remedy by appeal (the defendant has appealed from the conviction), the general rule is

Record.

[1] December 12, 1956, complaint was filed in the Municipal Court of the Southern Judicial District of San Mateo County charging Hilbert E. Baird, Jr., with violation of section 502, Vehicle Code (drunk driving). January 3, 1957, a jury trial was had in which the jury disagreed. Thereupon, in open court and in the presence of defendant and his then attorney, the matter was reset for trial on January 24th. Immediately thereafter, the attorney in the presence of the defendant requested permission of the court to withdraw as defendant's attorney. Apparently prompted by defendant's uncooperativeness, the attorney had three times previously made similar requests which the court had denied. This time the court permitted the withdrawal. Thereupon the court advised defendant (1) of the date, place and time of trial, (2) of the withdrawal of his attorney, (3) that if he wished to be represented by counsel at the trial to take place on January 24th he would have to obtain such counsel himself, and (4) that the court should be advised of the name of the counsel as soon as obtained.

January 23rd (one day before the date appointed for trial), the District Attorney of San Mateo County received through the mail a letter signed by defendant dated January 19th: "In regards to my trial of which is to take place on January 24 in Redwood City Court House, On the charge of Drunken Driving I will not be able to be there until a later date. Due to business beyond my control I was called out of town. I will get in touch with you when I return. Hoping this to be satisfactory I remain: Sincerely Yours, /s/ Hilbert E. Baird, Jr." No return address appeared on either the envelope or the letter. The letter had been previously mailed to defendant's wife at Palo Alto, who remailed it to the district attorney.[2] A deputy district attorney showed the letter to the judge of the court who instructed him to have the police department search for defendant to assure his appearance in court the next day, a jury having been called for said trial date about ten days previously. The police were unable to locate defendant.

About 9:40 on the morning of the day set for the trial, the judge, having been advised that the defendant could not be located, appointed an attorney to represent defendant and see that the jury was properly impaneled, that the introduction of evidence was proper, and in all respects to protect the legal rights of the defendant. Shortly after 10 a. m., in the absence of the jury, the judge forfeited bail in the sum of $525 theretofore deposited by the defendant and ordered a bench warrant issued for the defendant's arrest. The attorney moved for a continuance to give him an opportunity to investigate the facts of the case and to attempt to consult with the defendant. This motion was denied. The court then ordered the trial to proceed. The attorney actively engaged in the trial, examining jurors particularly as to their attitude if the defendant failed to take the stand. He peremptorily challenged three jurors. The jury were not advised at any time of the fact that the defendant was not personally present nor of any fact regarding defendant's failure to appear. The at-

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that habeas corpus will not lie. In re Seeley, 29 Cal.2d 294, 296, 176 P. 2d 24. However, as there said 29 Cal. 2d at page 296, 176 P.2d at page 26: "But in exceptional cases it may be issued even though other remedies might have been available." It is not necessary in all cases that the defendant exhaust his remedy by appeal. In re Bell, 19 Cal.2d 488, 122 P.2d 22. Under the circumstances of this case, this court exercises its right of discretion to consider the application for a writ of habeas corpus even though the remedy of appeal is available.

[2] The envelope is postmarked Palo Alto 3 p. m. January 22nd. A reasonable inference is that defendant instructed his wife to hold the letter and remail it to the district attorney shortly before the trial.

torney cross-examined witnesses and argued the evidence. The case was given the jury at 1:30 p. m. During the jury's deliberation, one Denney, defendant's bail bondsman, advised the judge that he was bringing the defendant back from Phoenix, Arizona, that evening by airplane. About 2 p. m. the jury returned with a verdict of guilty. The jury then learned for the first time that defendant was not in the courtroom.

On January 23rd the judge notified Denney that if defendant did not appear the next day the bail would be forfeited. The morning of the 24th Denney tried to locate the defendant at the Menlo Park address which the defendant had previously given him. Denney found that defendant had moved and no one there knew of his whereabouts. Denney then contacted a real estate firm where the defendant said he worked part time. They knew him. Denney then contacted an insurance company where the defendant was supposed to be employed. They stated that defendant had left their employment about December 14, 1956. After contacting other persons Denney was given the address of defendant's wife in Los Altos. Talking to her by phone, she first stated that she did not know where defendant was. Denney told her that it would be better for the defendant to return, pay what would probably be a $250 fine, and have the bail refunded, rather than pay Denney the full amount of the bail and eventually to be arrested on a bench warrant. The wife stated that she expected to hear from the defendant by mail by 3 o'clock and that if she did she would have him contact Denney. Denney said he would call her after 3 o'clock. About half an hour after the above conversation Denney received a call from defendant in Phoenix. He stated that he knew that he was supposed to go to court that day, that he had no money for counsel fees or a fine, and did not want to go to jail; that he went to Phoenix to look for a job, and that he felt that he would not be extradicted from Arizona because the charge was only a misdemeanor. Denney stated that he would pay the defendant's fine and defendant agreed to come back if Denney would pay his fare. Defendant would not tell Denney where he was staying, but told him to buy an airlines ticket for him and so notify defendant's wife who would contact defendant as she knew where he was staying. Denney complied with defendant's instructions. Defendant returned that night and was taken by Denney to the San Mateo County jail. The next morning the judge, upon being advised that defendant was in custody, set aside the bail forfeiture and ordered bail exonerated.

Defendant was then brought into court, advised by the judge of what had transpired and told that the time for judgment and sentence was set for Monday. The attorney appointed by the court gave oral notice of motion for new trial on all statutory grounds, and asked leave to withdraw as counsel. Defendant advised the attorney and the court that he desired to waive time for passing sentence and wanted to start serving sentence. The court refused to allow defendant to waive time and set the time for passing on the motion for new trial and for sentence for Monday. On that day defendant appeared in court with counsel of his own choosing. His motion for new trial was denied and he was sentenced to pay a fine of $500 plus $25 for state assessment or in lieu thereof to be confined in the county jail one day for each $15 of the fine. Defendant filed notice of appeal to the appellate department of the superior court from the judgment and order denying new trial.

Trial In Defendant's Absence.

"The defendant must be personally present at the trial; *provided, that in case of a misdemeanor charge, if he absents himself with full knowledge that a trial is to be or is being had, the trial may proceed in his absence.*" Penal Code, § 1043; emphasis added.

The legislative history of this section is interesting.

1. Section 320, Criminal Practice Act (Stats.1851, § 320, p. 246), provided: "If

the indictment be for a misdemeanor, the trial may be had in the absence of the defendant; but if for a felony he must be personally present."

2. Stats.1863, section 15, at page 160, amended the above section to provide: "If the indictment be for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant; *provided,* if his presence be necessary, for the purpose of identification, the Court may, upon application of the District Attorney, by an order or warrant to that effect, require the personal attendance of the defendant at the trial; the defendant shall also be personally present when judgment is pronounced, if the Court may deem it necessary."

3. As enacted in 1872, the section read: "If the indictment is for a felony, the defendant must be personally present at the trial; but if for misdemeanor, the trial may be had in the absence of the defendant; if, however, his presence is necessary for the purpose of identification, the Court may, upon application of the District Attorney, by an order or warrant, require the personal attendance of the defendant at the trial." This statute appears to have been enacted for a grammatical purpose rather than a legal one.

4. The 1880 amendment, near the beginning of the section, referred to the situation if the "'prosecution be' for a felony," etc.

5. The 1951 amendment rewrote the section as it exists today. Section 1148 of the Penal Code provides in part: "If for a misdemeanor, the verdict may be rendered in his absence."

Section 1193 of the Penal Code provides in part: "Judgment upon persons convicted of the commission of crime shall be pronounced, as follows: * * * 2. If the conviction be of a misdemeanor, judgment may be pronounced against the defendant in his absence."

People v. Ebner, 23 Cal. 158, was an action upon recognizance which had been forfeited by the Court of Sessions of Amador County for the defendant's failure to appear when a misdemeanor case was called for arraignment. His attorney had appeared and offered a plea of not guilty, which was refused. Defendants in the bail action contended that under section 259 of the Criminal Practice Act, as the defendant in a misdemeanor case need not be present at the trial, he had a right to appear and plead by his attorney. The court upheld this contention and stated that the court therefore had no power or authority to enter a default or to declare the recognizance forfeited.

People v. Budd, 57 Cal. 349, was also an action against sureties on the forfeited bail of a defendant who did not appear in the county court either in person or by attorney at the time set for his misdemeanor trial. The court after considering the Penal Code sections on the subject, and English authorities, held that the bail was improperly forfeited as defendant's personal presence was not required by law and he could have been tried in his absence. Such was also the rule at common law. This case is an answer to petitioner's contention that it is only where a defendant has an attorney and that attorney is present in court, may the defendant be tried in absentia. In Steele v. Commonwealth, 3 Dana, Ky., 84, one Steele, charged with "unlawfully setting up and keeping a gaming-table," failed to appear for trial. A jury was sworn, trial had, and the jury found him guilty. The court fined him $500. On appeal it was held that it was proper to try the defendant in his absence. Answering petitioners' contention that as the court has the remedy of forfeiture of bail and issuance of a bench warrant, the court may not try a defendant in his absence, is the case of Canada v. Commonwealth, 9 Dana 304, where in holding that a prosecution may proceed in the absence of the accused when he is under recognizance, the court said: "That requisition was only intended to afford to the Commonwealth security for satisfaction in the event of conviction, and, as decided in the case of

Steele v. Commonwealth, 3 Dana 84, we are satisfied that the British practice has been, in fact, recognized and confirmed here by legislative enactments; and that consequently, when, as in this case, the accused has been recognized to appear, he may be tried whether he appear or not." See also Carroll v. Police Court, 66 Cal.App. 66, 225 P. 35; 21 Cal.Law Rev. 484, at 488, first paragraph of footnote 25.

In United States v. Noble, D.C., 294 F. 589, affirmed 9 Cir., 300 F. 689, 692, the defendant and his counsel were not present during portions of the trial. Concerning their absence the court said: "Whether these defendants were tried for misdemeanors or felonies, the law is that, though a defendant is entitled to be present during all the proceedings of the trial, this right may be and is waived, if he on bail voluntarily absents himself during the trial's progress. *For otherwise no trial but could be designedly defeated,* at least where statutes permit bail to be enjoyed throughout the trial." At pages 691–692; emphasis added.

The language in Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 256, 56 L.Ed. 500, dealing with one who voluntarily absents himself from a trial once started, is particularly appropriate here in dealing with one who deliberately and voluntarily refuses to present himself for trial on the day fixed. " 'The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.' " At page 255 of 32 S.Ct.

Tischhauser v. Jarvis, 95 Cal.App. 524, 273 P. 66, answers petitioners' contention that a defendant in a misdemeanor case who absconds may be tried in his absence only if he is represented at the trial by his attorney. That case was an action on an agreement to indemnify plaintiff against loss in executing a bail bond to secure the appearance of one Simon on a misdemeanor charge. At the time set for trial in the justice's court Simon failed to appear and his bail was declared forfeited. After expending considerable money in an endeavor to locate Simon, the plaintiff appointed an attorney to represent Simon. The attorney caused a plea of guilty to be entered and the court fined Simon $100 which the plaintiff paid. Thereupon the court revoked the forfeiture of bail exonerated it. The plaintiff sued to collect from the indemnitor the expenses he had been put to it in attempting to locate Simon and in paying his fine. The portion of the opinion important here is that which held that an absconding defendant in a misdemeanor case has no longer a right to appear by counsel. The court said (95 Cal.App. at page 530, 273 P. at page 68): "It therefore follows that the defendant in the criminal case here, having placed himself without the constructive custody of the court, had no authority to appear either by his own counsel or by counsel substituted for him—at least not until he had surrendered to the actual or constructive custody of the court."

[2, 3] The evidence before the court in our case showed that the defendant deliberately and intentionally, and without lawful or any excuse, failed to secure an attorney as suggested to him by the court, and to appear at the time set for trial of which time he had due notice. Defendant's letter to the district attorney, its delightful indefiniteness as to when, if ever, defendant would contact the district attorney, the lack of any address, the inability of the district attorney and police to get any line on de-

fendant's whereabouts, plus his failure to appear, were sufficient to justify the court in determining that his failure to appear was deliberate and that defendant absented himself with full knowledge that a trial was to be had. Penal Code, § 1043. Nor can the letter be considered to be, as interpreted by petitioners, a mere request for a continuance of trial. It was a definite statement that defendant did not intend to be tried on the date set, and whether or not he would ever be tried was for defendant to determine. Later, it appeared that defendant's main reason for not appearing was his idea that if he got out of the state he would not be extradited and therefore never would be tried. Thus the court was justified in refusing to grant him a new trial. Any other conclusion than that defendant was properly tried here in absentia, would, as said in People v. Mathews, 139 Cal. 527, 531, 73 P. 416, 417, where the defendant on bail purposely absented himself while the jury were viewing the premises of the crime, "be in fact, allowing the defendant to take advantage of his own wrong and misconduct, which is violative of one of the maxims of the law." Petitioners' fears that a determination by us that a misdemeanant may be tried in absentia under the circumstances here, might result in the later trying of one who might have a good excuse for not appearing the day of the trial, are without foundation, first, because the trial court would not try a defendant in absentia unless, as here, the circumstances showed that the defendant was deliberately and without excuse absenting himself, and secondly, on motion for new trial the court would undoubtedly set aside the conviction if the defendant's absence were legitimate.

[4] Petitioners contend that the municipal court had two other remedies to meet the situation and for that reason the court had no power to try defendant in his absence. These, they claim, were the power to punish defendant for contempt, and secondly to forfeit defendant's bail. It is very doubtful if these remedies were open to the court. Would contempt lie in view of the cases holding that defendant may be tried in absentia? Moreover, to find him in contempt the court would probably as a practical matter have to try him in absentia (if contempt can be so tried), as a defendant who deliberately refused to appear for trial would not present himself for contempt proceedings. As to forfeiture of bail, People v. Ebner, 23 Cal. 158, and People v. Budd, 57 Cal. 349 (both supra), hold that forfeiture is not proper inasmuch as defendant can be tried in absentia. However, Pacific Indemnity Co. v. Superior Court, 102 Cal.App. 566, 283 P. 345, seems to hold to the contrary. Moreover, under the Vehicle Code certain consequences attach to conviction under section 502 such as possible suspension of operator's license, consequences of a second similar offense, etc. Limiting the remedy here to a forfeiture of bail would mean that a defendant could by his own wrong obviate the consequences following a conviction.

Moreover, assuming that both of the above mentioned remedies were open to the court, they are and should be in nowise exclusive of the right under the circumstances here to try defendant in absentia.

[5, 6] There was no denial of due process here, nor of defendant's right to assistance of counsel, and to be present at the trial. The court gave defendant ample time to get counsel. Therefore People v. Avilez, 86 Cal.App.2d 289, 194 P.2d 829, and In re McCoy, 32 Cal.2d 73, 194 P.2d 531, do not apply.[3] As to the right to be present at the trial defendant voluntarily refused to exercise that right and thereby waived it. A defendant in a criminal case has many rights, the denial of which to him would constitute a denial of due process, and yet the defendant may waive such

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[3] The appointment by the court the day of the trial of an attorney to represent defendant, while not necessary under the circumstances, evidenced the desire of the court to protect defendant's interests as far as it reasonably could in view of defendant's deliberate failure to appear.

rights without it affecting due process in the trial. Thus, section 686, subdivision 3, Penal Code, provides that a defendant is entitled to be confronted with the witness against him. This right can be waived. People v. Wallin, 34 Cal.2d 777, 781, 215 P.2d 1. The right of a defendant to be brought to trial within 60 days after the filing of the information, may be waived. People v. O'Leary, 130 Cal.App.2d 430, 436, 278 P.2d 933. No person shall be twice put in jeopardy for the same offense. Failure to raise the plea is a waiver. In re Hess, 45 Cal.2d 171, 176, 288 P.2d 5. The right to a public trial, Penal Code, § 686, subd. 1, may be waived. People v. Stanley, 33 Cal.App. 624, 628, 166 P. 596. The right to defend with counsel may be waived. People v. Justice, 125 Cal.App.2d 572, 575, 270 P.2d 859. The right to trial by jury may be waived. Judgment may, in a proper case, be pronounced in the defendant's absence. Penal Code, § 1193.

[7] We deem it unnecessary to discuss the cases which in some other jurisdictions hold that under no circumstances may a defendant be tried in a misdemeanor case in his absence without his express consent.[4] The rule in California is otherwise. Penal Code section 1043 expressly says so. While it is true that at common law an absconding misdemeanant could not be tried in his absence unless the misdemeanor was punishable solely by fine, we find no such limitation in this state. Petitioners concede that the rule is, and cite many cases supporting it, that once a criminal trial is started, even felony trials, and the defendant absconds, the trial may proceed in his absence.[5] We see no practical difference between such a situation and the one here, where the defendant instead of attempting to stop the progress of a trial by absconding, attempts by the same process to prevent the trial starting. By so doing he waives his right to be present.

The writ is discharged and the defendant remanded to custody.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

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[4] For example, in Gray v. State, 1929, 158 Tenn. 370, 13 S.W.2d 793, it was held that even in a misdemeanor case, the defendant may not be tried in his absence. (There, however, the defendant's absence was excusable due to the serious illness of a member of his family.) To the same effect, State ex rel. Underwood v. Brown, 1951, 193 Tenn. 113, 244 S.W.2d 168; Stuart v. State, 1911, 6 Okl.Cr. 27, 115 P. 1026; Lawn v. People, 1888, 11 Colo. 343, 18 P. 281; Love v. State, 1913, 71 Tex. Cr.R. 259, 158 S.W. 532; People v. Beck, 1922, 305 Ill. 593, 137 N.E. 454; State v. Young, 86 Iowa 406, 53 N.W. 272; Cole v. State, 1926, 35 Okl.Cr. 50, 248 P. 347; People v. Perkins, 1828, 1 Wend., N.Y., 91; United States v. Shelton, D.C., 1925, 6 F.2d 897.

Contra, holding that a misdemeanant may be tried in absentia, are Henderson v. Town of Murfreesboro, 1915, 119 Ark. 603, 178 S.W. 912; State v. Eskew, 1945, 211 S.C. 565, 34 S.E.2d 767; Shifflett v. Commonwealth, 1894, 90 Va. 386, 18 S.E. 838; Tate v. Lamb, 1954, 195 Va. 1005, 81 S.E.2d 743.

1 Bishop's New Criminal Procedure, 233, recognizes the lack of uniformity in American cases on this subject.

[5] This is the majority rule in the United States. See 14 Am.Jur. p. 905, § 199; 23 C.J.S., Criminal Law § 975(a), p. 309; 100 A.L.R. 480; see also Diaz v. United States, supra, 223 U.S. 442, 445, 32 S.Ct. 250. In spite of petitioner's concession, the question of whether California follows the majority rule has not yet been determined.

150 Cal.App.2d 312

Vido ARTUKOVICH and Artukovich Bros., Inc., Plaintiffs,

v.

ST. PAUL-MERCURY INDEMNITY COMPANY, Inc., a corporation, and Industrial Indemnity Company, a corporation, Defendants,

ARTUKOVICH BROS., Inc., Plaintiff, Respondent,

v.

ST. PAUL-MERCURY INDEMNITY COMPANY, Inc., a corporation, Defendant, Appellant.

ARTUKOVICH BROS., Inc., Plaintiff, Appellant,

v.

INDUSTRIAL INDEMNITY COMPANY, a corporation, Defendant, Respondent.

Civ. 21886.

District Court of Appeal, Second District, Division 3, California.

April 19, 1957.

Hearing Denied June 12, 1957.

Assured's action for declaration of rights under policies. The Superior Court of Los Angeles County, Roy L. Herndon, J., rendered the judgment challenged by appeals. The District Court of Appeal, Vallée, J., held that quoted phrase, in liability policy exception as to bodily injury to any employee of assured "while engaged in the employment" of the assured encompassed both "arising out of" and "in the course of" employment; and held that tort action determination that employee's injuries had not arisen out of and occurred in course of his employment was conclusive against liability insurer.

Affirmed.

1. Insurance 🔑616½

Where employee's tort action against assured was defended on ground that Workmen's Compensation Act was a bar, determination therein that assured's employee had not sustained any injury arising out of and occurring in course of his employment was res judicata, whether right or wrong, and was binding on liability insurer in assured's subsequent action for declaration of rights under policy; but insurer could still insist on any defenses not necessarily inconsistent with tort action determination.

2. Insurance 🔑616½

Liability insurer is bound by any material finding of fact essential to judgment of tort liability which is also decisive of question of coverage.

3. Workmen's Compensation 🔑610

Under California law, an injury "arises out of" employment when it is incidental to, or has some causal connection with, employment. West's Ann.Labor Code, § 3600(a-c).

See publication Words and Phrases, for other judicial constructions and definitions of "Arises Out Of".

4. Workmen's Compensation 🔑615

Quoted phrase, in Labor Code section imposing liability on employer for injuries arising out of and "in the course of" employment, has reference to time and place. West's Ann.Labor Code, § 3600(a-c).

See publication Words and Phrases, for other judicial constructions and definitions of "In the Course Of".

5. Insurance 🔑146(3)

Exceptions and exclusions in insurance policy are to be construed strictly against insurer and liberally in favor of assured.

6. Insurance 🔑146(1, 3)

The understanding of an ordinary person is standard used in construing contract of insurance, and any ambiguity in language must be resolved against insurer.

7. Insurance 🔑146(3)

Liability insurance contract should, if possible, be construed so as not to be a delusion to those who have bought them.

8. Insurance 🔑435

Neither fact that tort victim was an "employee" of assured nor fact that he was on its premises at time of altercation resulting in his injury established that he was "engaged in the employment" of the assured for purposes of liability policy exception.

9. Insurance ⚷435, 616½

Quoted phrase, in liability policy exception as to bodily injury to any employee of assured "while engaged in the employment" of the assured, included concept that employee was at his place of employment during working hours and that he was occupied in employment at time of injury and encompassed both "arising out of" and "in the course of" employment; and tort action determination that employee's injuries had not arisen out of and occurred in course of his employment was conclusive against liability insurer in assured's subsequent action for declaration of rights under policy. West's Ann.Labor Code, § 3600(a–c).

10. Insurance ⚷612(2)

In absence of waiver or estoppel, if liability policy makes compliance with a "notice of injury, claim or suit" provision a condition precedent to liability, no recovery can be had unless provision has been complied with if the prejudice to the insurer has resulted.

11. Insurance ⚷668(14)

Whether assured has complied with a "notice of injury, claim or suit" requirement is a question of fact.

12. Insurance ⚷646(9)

There is a presumption that prejudice occurred from assured's failure to comply with notice requirements of policy, and burden of proving an excuse for failure to give notice of suit to insurer rests on assured.

13. Insurance ⚷539(5)

Failure of assured to comply with "notice of injury, claim or suit" provision of policy was nonetheless a breach of duty owed to insurer, notwithstanding fact that insurer had notice of injury and appeared in proceeding before Industrial Accident Commission.

◆

Spray, Gould & Bowers, Los Angeles, for appellant St. Paul-Mercury Indemnity Co., Inc.

Collins & McKenna and John F. McKenna, Jr., Los Angeles, for appellant and respondent Artukovich Bros., Inc.

Hunter & Liljestrom and Harold J. Hunter, Los Angeles, for respondent Industrial Indemnity Co.

VALLEE, Justice.

The question to be decided is whether either or both of two casualty insurance policies cover a loss sustained by the insured, Artukovich Bros.

St. Paul-Mercury Indemnity Company, to be called St. Paul, issued its liability policy in which it agreed to pay on behalf of the insured all sums which insured "shall become obligated to pay by reason of the liability imposed upon the insured by law or contract for damages arising out of occurrences. * * * Bodily injury * * * sustained by any person or persons"; except liability for bodily injury to "any employee of the Insured * * * while engaged in the employment of the Insured, or to any obligation for which the Insured may be held liable under any workmen's compensation law."

Industrial Indemnity Company, to be called Industrial, issued it standard "Workmen's Compensation and Employers' Liability Policy" in which it agreed "[t]o pay promptly benefits as required by the Workmen's Compensation Laws of the State of California to any person entitled thereto" and "[t]o pay all sums which the Employer, as an Employer, shall become obligated to pay for damages * * * because of bodily injury, * * * sustained within California. * * *"

While these policies were in force and on March 19, 1951 Artukovich Bros. was engaged in a construction job in Kern County. Vido Artukovich, an employee, stockholder, and officer of Artukovich Bros., was job foreman. Vido was the superior of Orville Clark, also an employee of Artukovich Bros. On March 19, 1951 Clark was injured in an altercation with Vido.

On May 29, 1951 Clark brought an action in the Superior Court of the County of Los Angeles against Artukovich Bros. and Vido, titled Clark versus Artukovich and numbered 586886. The basis of the action was an alleged assault and battery committed March 19, 1951 by Vido on Clark. The cause of action against Artukovich Bros. was on the theory of respondeat superior. The complaint alleged that Clark was an invitee on the property on which the alleged assault took place and that Vido was the employee of Artukovich Bros., acting within the scope and course of his agency, authority, and employment at the time. St. Paul assumed and controlled the defense of that action.

On August 13, 1951 Clark instituted a proceeding before the Industrial Accident Commission against Artukovich Bros. for an award of compensation for injuries sustained in the altercation of March 19, 1951. Industrial defended the proceeding on behalf of Artukovich Bros. The commission found that on March 19, 1951 Clark was employed by Artukovich Bros. and that "he did not sustain any injury or injuries arising out of and occurring in the course of said employment."[1] The order of the commission became final.

Thereafter action 586886 came on for trial in the superior court before Judge Houser. As a second affirmative defense in that action the answer of Artukovich Bros., prepared by St. Paul's attorneys, alleged that Clark was in the employ of the defendants and acting in the course and scope of his employment at the time of the alleged assault; that the defendants were subject to the Workmen's Compensation Act, Labor Code, § 3201 et seq., as was Clark; that by the terms of the Workmen's Compensation Act Clark was barred from maintaining any action for damages by reason of the alleged assault and he was confined to proceedings under the Act. The attorneys for St. Paul moved for a separate trial of the issues raised by the second affirmative defense. The motion was granted. After the separate trial Judge Houser found that the order of the Industrial Accident Commission was res judicata on those issues; Clark was not barred from maintaining the action for damages; and the superior court had jurisdiction to try the issues made by the complaint and answer. Trial was then had of the other issues before a jury, resulting in a judgment in favor of Clark against Artukovich Bros. and Vido which became final. St. Paul and Industrial refused to pay the judgment. To avoid execution Artukovich Bros. paid it.

Plaintiffs Artukovich Bros., Inc., and Vido then brought this action against St. Paul and Industrial for a declaration of their rights under the policies.[2] The complaint alleged the foregoing facts, prayed that the rights of the parties under the policies be declared and that each insurer be ordered to pay the judgment in action 586886. St. Paul answered, pleading: it was not required to pay when injury was sustained by "any employee of the Insured * * * while engaged in the employment of the Insured"; it assumed the defense of action 586886 under a reservation of rights in the event Clark was determined to be an employee; it thereafter came to the conclusion Clark was an employee and it tendered the defense to Industrial; Industrial failed to accept the defense and St. Paul continued with it, keeping its reservation of rights in effect. Industrial answered, pleading: the award of the Industrial Accident Commission is res judicata; the defense of action 586886 was not tendered to it; its policy did not insure against the judgment in that action. St. Paul filed a cross-complaint in which it alleged Clark was an employee of Artukovich Bros. and was working as such employee during the altercation; on June 22, 1951 it tendered the defense of action 586886 to Industrial; it paid the expense of defending that action; Artukovich Bros. had refused to reimburse it. The prayer was for judgment against Artukovich Bros. for such expense.

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[1] The findings and award of the commission were:

"1. Orville W. Clark, born November 24, 1913, was employed as a bulldozer operator on March 19, 1951, at Bakersfield, California, by Artukovich Bros., Inc., a corporation, whose compensation insurance carrier covering the claim herein was Industrial Indemnity Company, a corporation, and both the employer and the employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Laws of the State of California.

"2. Applicant did not sustain any injury or injuries arising out of and occurring in the course of said employment.

"Award

"Now, Therefore, it is ordered that the applicant take nothing from defendants by reason of the claim herein asserted."

[2] Vido Artukovich was named originally as a party plaintiff. He dismissed below.

This action was tried before Judge Herndon who found the facts as we have stated them and that on June 15, 1951 St. Paul delivered a letter to Artukovich Bros. stating, "We are pleased to be able to defend you and we expect that you will shortly receive a communication from our attorneys requesting your signature to an answer or possible [sic] some other pleading" and that "In the event it becomes established that the plaintiff Orville W. Clark was an employee at the time of the alleged assault our policy, of course, would not cover for such an injury. Your contract with Industrial Indemnity carries an employers liability coverage and the entire matter will at that time be referred to that carrier for appropriate handling"; at the time the letter was dispatched St. Paul had established by its preliminary investigation that Clark was an employee of Artukovich Bros. on March 19, 1951; at no time did St. Paul make any reservation of its rights under its policy other, or broader in scope, than the reservations contained in the letter to Artukovich Bros.; the application to the Industrial Accident Commission and action 586886 referred to one and the same altercation.

Judge Herndon concluded: 1. The finding of the Industrial Accident Commission that Clark did not sustain any injury arising out of and occurring in the course of his employment is binding on Artukovich Bros. and on its privies, who include St. Paul and Industrial. 2. The findings and judgment in action 586886 that Clark did not sustain any injury arising out of and occurring in the course of his employment are binding on Artukovich Bros. and on St. Paul as its privy and indemnitor. 3. The acts and conduct of St. Paul in controlling the defense of action 586886 and procuring a finding that Clark sustained no injury arising out of and occurring in the course of his employment estop it from attacking said finding and from urging a different finding or set of facts in the case at bar. 4. By restricting its notice of reservation of rights under its policy to the ground of a contested exclusion applicable by reason of Clark's employment, and by failing to allege any other policy defenses, St. Paul waived and is estopped now from claiming any other different or additional defenses to this action. 5. St. Paul's policy is a general liability policy and includes coverage for all liabilities of the insured except those specifically excepted. The language of the exclusion of coverage for employees "while engaged in the employment of the insured" excludes coverage in a case where a claimed injury arises out of and occurs in the course of an injured employee's employment, and does not exclude coverage in a case where the injuries do not arise out of and occur in the course of the injured person's employment and in which liability is imposed solely on the theory of respondeat superior. 6. Industrial's policy obligates it to pay sums which Artukovich Bros. becomes obligated to pay for injuries which arise out of and occur in the course of an injured employee's employment, and does not include coverage for injuries which do not so arise and in which liability is imposed on the insurer solely on the theory of respondeat superior. 7. Liability in action 586886 was imposed on Artukovich Bros. solely on the theory of respondeat superior. Clark's injuries did not arise out of and occur in the course of his employment, nor was he at the time the injuries were sustained engaged in the employment of Artukovich Bros.

within the meaning of any exclusion contained in St. Paul's policy. 8. There was no valid or collectible insurance available to Artukovich Bros. on March 19, 1951 other than St. Paul's policy.

Judgment was that Artukovich Bros. is entitled to indemnity from St. Paul for the liability imposed in action 586886; it has no right to indemnity from Industrial; Artukovich Bros. recover the amount of the judgment in action 586886 from St. Paul. St. Paul appeals from the judgment against it in favor of Artukovich Bros. Artukovich Bros. appeals from that part of the judgment which denies it relief against Industrial.

The Appeal of
St. Paul-Mercury Indemnity Company

St. Paul contends the finding of the Industrial Accident Commission that Clark did not sustain any injury "arising out of and occurring in the course of said employment" was not an adjudication he did not sustain injuries "while engaged in the employment of the Insured." St. Paul further contends the findings and judgment in action 586886 are not binding on it and it is not estopped from contending for the nonbinding character thereof; it is not estopped to claim the benefits of the exclusionary provisions of its policy by reason of the fact it assumed the defense of action 586886.

[1, 2] It is unnecessary to determine whether the order of the Industrial Accident Commission is binding on St. Paul. The finding in action 586886 that the findings and award of the Industrial Accident Commission "constitute a full and complete determination of the issue raised by the" second affirmative defense and is res judicata on those issues—i. e., that Clark did not sustain any injury arising out of and occurring in the course of his employment—is res judicata in this action and, whether right or wrong, is binding on St. Paul. St. Paul will not be permitted to relitigate in this action a question of fact on which the tort judgment was predicated. Ordinarily the insurer is bound by all facts and matters necessarily adjudicated in the original action. Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 469, 297 P. 110, 298 P. 57; Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 631, 40 P.2d 311; New York Casualty Co. v. Superior Court, 30 Cal.App.2d 130, 133, 85 P.2d 965. It is bound by any material finding of fact essential to the judgment of tort liability which is also decisive of the question of coverage. East v. Fields, 42 Wash.2d 924, 259 P.2d 639, 640; Rest., Judgments, 293, § 68. The rule is stated in Miller v. United States Fidelity & Casualty Co., 291 Mass. 445, 197 N.E. 75, 77:

> "Where an action against the insured is ostensibly within the terms of the policy, the insurer, whether it assumes the defense or refuses to assume it, is bound by the result of that action as to all matters therein decided which are material to recovery by the insured in an action on the policy."

Jones v. Zurich General Accident & Liability Ins. Co., 2 Cir., 121 F.2d 761, 763, was an action against an insurer after the plaintiff had recovered a judgment against the insured which was unsatisfied. The insurer had defended the action against the insured. As a defense to the action against it the insurer pleaded "that plaintiff was when injured an employee of the insured at work as such on premises described in the policy; and also that she was an employee injured in the course of her employment by the assured and to whom it was liable under the New York Workmen's Compensation Law." A summary judgment was granted the plaintiff. On review, after stating that "[e]very material fact determined by the state court in that action was conclusively settled by the final judgment 'so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action' " and that the insurer and insured were in privity, the court on rehearing said, 121 F.2d at page 764:

> "[T]here was an alternative reason, originally pleaded, argued on appeal, and mentioned in our opinion, which we

could have chosen for affirming the district court's judgment.

"This reason was that the judgment recovered by plaintiff against the insured in the state court foreclosed against defendant the question of plaintiff's and insured's relationship. That question was necessarily involved in the original suit. N. Y. Workmen's Compensation Law, §§ 10, 11, Consol. Laws, c. 67. It is true that this defendant, acting for the insured, did not originally plead it; but it did seek to raise it by motion to amend, and argued it on appeal. Recovery in such circumstances conclusively settles against the defendant all defenses which might have been pleaded and proved, as well as those which actually were. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329; Grubb v. Public Utilities Commission, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972. Defendant here, although not a nominal party in the original action, is likewise bound as the person ultimately liable. Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 16 S.Ct. 564, 40 L.Ed. 712; Oceanic Steam Navigation Co. v. Campania Transatlantica Espanola, 144 N.Y. 663, 39 N.E. 360."

It was held in Muise v. Century Indemnity Co., 319 Mass. 172, 65 N.E.2d 98, that the finding in a prior action against an insured that the decedent was a guest and not an employee of the insured was equivalent to finding that the decedent's presence in the insured automobile at the time of the accident had no causal relation to employment of the decedent by the insured, and that the finding was binding on the insurer.

It follows St. Paul cannot deny the fact that Clark did not sustain any injury arising out of and occurring in the course of his employment. But it can still insist on any defenses not necessarily inconsistent with that fact. Sweeney v. Frew, 318 Mass. 595, 63 N.E.2d 350, 351; 1 Freeman on Judgments, 5th Ed., 991, § 450. The question is whether the defense now insisted on—that Clark sustained injuries "while engaged in the employment of the insured"—is inconsistent with the finding that he did not sustain any injury arising out of and occurring in the course of his employment. We have concluded it is.

Generally, exclusionary clauses in liability policies use the words "engaged in the business" of the insured. Some use the words "engaged in the employment" of the insured as does St. Paul's policy. The courts have split as to whether to apply the decisions construing the language of workmen's compensation statutes as to "arising out of and in the course of the employment," and conflicting results have been reached in determining whether an employee was engaged in the employer's business or was engaged in the employer's employment under particular circumstances.[3]

[3, 4] Labor Code, section 3600, imposes liability on an employer for any injury sustained by his employee "arising out of and in the course of the employment."[4] The

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[3] Cases said to construe the term "arising out of and in the course of his employment," as used in workmen's compensation statutes and holding the term is not controlling on the question of the construction of the phrase "engaged in the business * * * of the insured" as used in the exclusionary clause of a liability policy: B. & H. Passmore Metal & Roofing Co., v. New Amsterdam Casualty Co., 10 Cir., 147 F.2d 536, 538; Getlin v. Maryland Cas. Co., 9 Cir., 196 F.2d 249, 50 A.L.R.2d 73.

[4] Labor Code, section 3600: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

parties agree that under California law an injury "arises out of" the employment when it is incidental to, or has some causal connection with, the employment. They also agree that "in the course of" the employment refers to time and place.

Madin v. Industrial Acc. Comm., 46 Cal.2d 90, at page 93, 292 P.2d 892, at page 894, says:

> "Consonant with those principles it has been held in various situations that injuries occurring in the course of employment also arise out of the employment and hence were compensable although the factor which put in motion the force causing the injury was something over which the employer had no control and with which he had no connection."

Also see Truck Insurance Exchange v. Industrial Acc. Comm., 147 Cal.App.2d 460, 305 P.2d 55.

In Satchell v. Industrial Acc. Comm., 94 Cal.App.2d 473, at page 478, 210 P.2d 867, at page 870, this court held:

> "It is too well settled to admit of question that an injury is compensable if the employee is at the time *engaged in doing something he might reasonably have been expected to do while in the performance of his duty.*" (Emphasis added.)

The word "engaged" means occupied; employed. Webster's New Inter. Dict., 2d Ed. To be "engaged in employment" means to be rendering service for the employer under the terms of the employment. State ex rel. Kusie v. Weber, 72 N.D. 705, 10 N.W.2d 741, 745; Francis v. Scheper, 326 Mich. 441, 40 N.W.2d 214, 217. City of St. Petersburg v. Cashman, Fla., 71 So.2d 733, 734, holds "engaged in employment" means doing a thing necessary and incidental to the work.

In I-L Logging Co. v. Manufacturers & Wholesalers I. Ex., 202 Or. 277, 273 P.2d 212, 275 P.2d 226, the policy contained the identical exclusionary clause found in St. Paul's policy. It was contended the words "engaged in the employment of the Insured" do not mean the same as "arising out of and in the course of his employment" as those words occur in the Workmen's Compensation Law. After an exhaustive review of the authorities the court stated, 273 P.2d at page 224:

> "We have encountered no decision which endeavors to disclose any difference in meaning between 'engaged in the employment' and 'arising out of and in the course of his employment.' The practical affairs of life, according to our belief, would gain nothing of consequence if a court should undertake to discover a difference in the connotation of those two groups of words. We do not believe that the Passmore decision [B. & H. Passmore Metal & Roofing Co. v. New Amsterdam Casualty Co., 10 Cir., 147 F.2d 536] holds that the two terms actually differ in meaning, but indicates that courts, in determining whether a workman was 'engaged in his employment', are more inclined to answer 'no' than when they inquire whether he was engaged 'in the course of his employment.' The difference is one of judicial attitude rather than one of difference in phraseology. The difference has its origin in the fact that in the one case a contract of insurance is the subject of attention and in the other an item of remedial legislation. We can see merit in the distinction. In all other respects we embrace the Lumber Mutual opinion [Lumber Mutual Casualty Ins. Co. of New York v. Stukes, 4 Cir., 164 F.2d 571]."

It was held in Moss v. St. Paul-Mercury Indem. Co., La.App., 35 So.2d 867, 869, that since the employee's injury did not

> "(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

> "(c) Where the injury is proximately caused by the employment, either with or without negligence * * *."

arise out of and in the course of his employment, it did not occur "while engaged in the employment * * * of the insured." Also see Cardinal v. United States Casualty Co., 195 Misc. 309, 90 N.Y.S.2d 772, affirmed 302 N.Y. 853, 100 N.E.2d 47.

[5–7] Exceptions and exclusions in a policy of insurance are to be construed strictly against the insurer and liberally in favor of the insured. Arenson v. National Automobile & Cas. Ins. Co., 45 Cal. 2d 81, 83, 286 P.2d 816; Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 769, 214 P.2d 392. The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in the language must be resolved against the insurer. Arenson v. National Automobile & Cas. Ins. Co., supra. It has been held that the phrase "engaged in the employment" is ambiguous. Francis v. Scheper, 326 Mich. 441, 40 N.W. 2d 214, 217. Cf. Elliott v. Behner, 150 Kan. 876, 96 P.2d 852, 855. Liability insurance contracts should, if possible, be construed so as not to be a delusion to those who have bought them.

[8] The liability on which Clark recovered in action 586886 was not a liability based on the relation of employer and employee or because Clark was engaged in the employment of Artukovich Bros. at the time of the altercation. It was a liability growing out of the relationship between Artukovich Bros and Vido—respondeat superior. The fact that Clark was not engaged in the employment of Artukovich Bros. was essential and indispensable to the judgment against the latter in action 586886. Neither the fact that Clark was "an employee" of Artukovich Bros. nor the fact that he was on its premises at the time of the altercation establishes that he was engaged in his employment at that time. Everyone who is engaged in the employment of the insured would be its employee, but not every employee is engaged in the employment of the insured all the time. See Moss v. St. Paul-Mercury Indem. Co., La.App., 35 So.2d 867; Green v. Travelers Ins. Co., 286 N.Y. 358, 36 N.E.2d 620; Hardware Mutual Casualty Co. v. Ozmun, 217 Minn. 280, 14 N.W.2d 351.

[9] Applying the rule that an exclusionary clause should be construed strictly against the insurer, we are of the opinion that the defense now insisted on by St. Paul—that Clark sustained injuries "while in the employment of the insured"—is inconsistent with the finding in action 586886 that he did not sustain any injury arising out of and in the course of his employment. The phrase "while engaged in the employment of the Insured" encompasses both "arising out of" and "in the course of" the employment. The term "engaged in" connotes more than time and place—occurring in the course of the employment; it also connotes "occupied in"—arising out of the employment. The phrase "while engaged in the employment of the Insured" includes the concept that the employee was at his place of employment during working hours and that he was occupied in the employment at the time of injury, i. e., that the injury was incidental to the employment. We agree with the Supreme Court of Oregon that there is no difference in meaning between "engaged in the employment" and "arising out of and in the course of the employment." Undoubtedly, the run-of-the-mill person, by whose understanding the exclusionary clause must be construed, would not discern any difference in meaning. It would be a curious result if St. Paul, having pleaded in action 586886 in effect that Clark was engaged in the employment of Artukovich Bros. at the time of the altercation, and having lost on that issue, could now defend versus Artukovich Bros. on the same ground. The court correctly held that Artukovich Bros. is entitled to indemnity from St. Paul for the liability imposed in action 586886.

The Appeal of Artukovich Bros.

This appeal is from that part of the judgment in favor of Industrial. Counsel for Artukovich Bros. do not press its appeal wholeheartedly. With commendable candor they say, "We feel in all fairness, however, that the pattern of coverage indicates that where one coverage ends the other begins." In other words, if St. Paul's policy covers, Industrial's does not. Since we have held that St. Paul's policy covers the loss sustained by Artukovich Bros., it would appear in view of this concession that Industrial's does not. There is another reason why the judgment for Industrial must be affirmed. Its policy contains this condition:

> "Conditions * * * F. Notice of Injury, Claim or Suit. Written notice of any such injuries, with the fullest information available, and of any claim or suit resulting therefrom, and every demand, notice, summons or other process served upon the Employer shall be forwarded as soon as practicable, to the Company by the Employer. * * *"

It is conceded that Artukovich Bros. did not comply with this provision in any particular. No one representing it ever requested Industrial to appear for it in action 586886, and it did not appear in that action. No suit paper was forwarded to it. The evidence is uncontradicted that at no time did Artukovich Bros. take the position that Industrial was required to or should defend that action. The court in the action at hand found: "At no time did defendant Industrial Indemnity Company assume or undertake any part of the defense of said action. At no time did plaintiff personally, through any of its officers or employees, tender the defense of said action to defendant Industrial Idemnity Company, or demand that said defendant undertake the defense of said action," and concluded: "In failing personally to give written notice of, or to demand or tender the defense of said action 586886 to defendant Industrial Indemnity Company, plaintiff failed to comply with a material and substantial condition of its said policy and contract of insurance with said defendant."

[10] In the absence of waiver or estoppel it is well settled that if a liability policy makes compliance with a "Notice of Injury, Claim or Suit" provision such as that in Industrial's policy a condition precedent to liability, no recovery can be had where the provision has not been complied with if prejudice to the insurer has resulted. Abrams v. American Fidelity & Cas. Co., 32 Cal.2d 233, 195 P.2d 797; Gibson v. Colonial Ins. Co., 92 Cal.App.2d 33, 206 P.2d 387; Aronson v. Frankfort etc. Ins. Co., 9 Cal.App. 473, 475–478, 99 P. 537. See cases collected 76 A.L.R. 23, 182, 123 A.L.R. 950, 981, 139 A.L.R. 771, 781, 18 A.L.R.2d 443, 452. There is no claim of waiver or estoppel.

[11–13] Whether an insured has complied with a "Notice of Injury, Claim or Suit" is a question of fact. Reed v. Pacific Indemnity Co., 101 Cal.App.2d 151, 159, 225 P.2d 255. There is a presumption that prejudice occurred. The presumption is not a conclusive one. The burden of proving an excuse for a failure to give notice of suit, and to forward the complaint, process, and other suit papers to the insurer rests on the insured. (8 Appleman, Insurance Law and Practice, 145, § 4746.) No such proof was made. "The ultimate conclusion in each case must depend on its own facts." Abrams v. American Fidelity & Cas. Co., supra, 32 Cal.2d 239, 195 P.2d 800. The failure of Artukovich Bros. to comply with the "Notice of Injury, Claim or Suit" provision of Industrial's policy is nonetheless a breach notwithstanding the fact the company had notice of the injury and appeared in the proceeding before the Industrial Accident Commission. Potter v. Great American Idemnity Co., 316 Mass. 155, 55 N.E.2d 198, 199. Pertinent evidence was introduced and the trial court found in accordance with the presumption that prejudice resulted. We cannot say as a matter of law that the finding is unsupported.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

150 Cal.App.2d 720

Betty Lou SMITH, Plaintiff and Appellant,

v.

CITY OF LONG BEACH, a municipal corporation, Defendant and Respondent.

Civ. 22248.

District Court of Appeal, Second District,
Division 1, California.
May 8, 1957.

Action for personal injuries against city on ground that defect in street caused plaintiff's electric automobile to be thrown out of control. The Superior Court of Los Angeles County, Fred Miller, J., entered order granting new trial after jury verdict for plaintiff and plaintiff appealed. The District Court of Appeal, Fourt, J., held that there was no abuse of discretion in granting new trial on ground that justice had not been done by verdict of jury.

Affirmed.

1. New Trial 🔑71

In passing upon a motion for new trial, trial judge is not bound by conflicts of evidence and in effect sits as a thirteenth juror with the duty of reviewing the evidence and passing on its sufficiency.

2. New Trial 🔑70

In action for personal injuries against city on ground that defect in street caused plaintiff's electric automobile to be thrown out of control and forced against an obstruction, where jury returned verdict in favor of plaintiff, there was no abuse of discretion in granting a new trial on ground of insufficiency of evidence as to street defect and other matters to support verdict.

◆

Clyde A. Jones, Long Beach, for appellant.

Walhfred Jacobson, City Atty. of Long Beach, John R. Nimocks, Deputy City Atty., Long Beach, for respondent.

FOURT, Justice.

This is an appeal from an order granting a motion for a new trial.

The testimony taken at the trial evidenced, among other things, the following: That the plaintiff is a paraplegic girl, having normal use of the upper part of her body and arms, the lower part of her body and legs having been useless for many years; that on October 26, 1954, at about 4:15 o'clock p. m., she was driving an electric autoette, which is an electric car with two wheels in the rear and one in front. It is steered by a bar or handle extending directly up and back from the front wheel. There are no gears involved and, as the bar or handle is moved from one side to the other, it turns the front wheel and thereby steers the vehicle. An accident occurred as the plaintiff proceeded west on Seaside Walk, a few feet west of South Magnolia Avenue in Long Beach. Seaside Walk is about thirty feet wide, constructed of concrete, and used by pedestrians and by trucks making deliveries during restricted hours of the day. The place of the accident was immediately to the west of the area known as the Amusement Zone, sometimes spoken of as "The Pike". To the south of Seaside Walk is a seawall, and to the south of the wall is the beach and playground. The plaintiff testified that as she proceeded west on Seaside Walk, the front wheel of her autoette struck at right angles a defect in the sidewalk, which in turn forced the steering bar or handle from her hand, causing her to fall to the floor of the autoette, and this in turn caused her left hand to release the speed control thereby increasing the speed of the vehicle out of control. The vehicle then circled and finally struck the seawall and injured the plaintiff.

The plaintiff caused a picture of the so-called defect to be introduced into evidence. The defendant also introduced pictures of what supposedly was the same alleged defect, but the two sets of pictures, apparently, depicted quite different situations; the one set showed the condition to be of some consequence, and the other set showed the condition to be of little, if any, consequence. The trial court indicated that there was a substantial difference between what the pictures represented and noted that it did not seem, from the pictures, to be even the same location.

A police officer of the city investigated the accident and examined the condition complained of immediately after the accident occurred. His testimony was in decided conflict with that of the plaintiff. The plaintiff contended in substance, throughout, that the defect consisted of a two-inch vertical right-angle rise in the walk. There was testimony in behalf of the defendant that the rise was very much less than two inches. There was also a conflict in the testimony of the officer and that of the plaintiff as to the plaintiff's sobriety; and there was a difference in the testimony as to the speed of the vehicle, the plaintiff stating that she was travelling about three-quarters of a mile per hour, while the officer estimated her speed at twenty to twenty-five miles per hour.

There was also testimony by the plaintiff that she had travelled past the scene of the accident 150 times before the accident without any trouble whatsoever. Such evidence might very well have been important as bearing on the question of the negligence of the plaintiff herself under the circumstances.

It appears that there is substantial evidence in the record which, if believed, would have supported a verdict for the defendant. The height of the defect, so far as the plaintiff's side of the case is concerned, was at least two inches. The defendant produced evidence which, if believed, would put the alleged defect in or close to that class of defects which is not dangerous or defective as a matter of law. If the officer had been believed it might well have been established that the plaintiff was under the influence of intoxicating liquor, and that such condition proximately contributed to the accident and injury. In fact, there is evidence in the record which might well have convinced the court that the plaintiff's description of how the accident occurred was inherently improbable or contrary to the laws of nature.

At the conclusion of the testimony in the plaintiff's case, the defendant made a motion for a non-suit, which was denied. At the conclusion of all of the testimony the defendant made a motion for a directed verdict, which was denied. A verdict was thereafter returned in favor of the plaintiff.

Defendant then presented a motion for judgment notwithstanding the verdict and a motion for a new trial if the former motion was denied. Pursuant to stipulation, one argument was had, addressed to both motions, with the agreement that if the motion for judgment notwithstanding the verdict was denied, the court could then determine without further hearing the motion for a new trial. The motion for a judgment notwithstanding the verdict was denied and the motion for a new trial upon the grounds of insufficiency of the evidence to sustain the verdict was granted, and a proper formal written order was signed by the trial judge and filed.

The appellant asserts that the question involved is, "Whether or not the defect in said sidewalk was a dangerous or defective condition as required by the Public Liability Act?" We believe, however, that the question so far as we are concerned is, has the appellant demonstrated a clear abuse of discretion on the part of the trial judge in granting respondent's motion for a new trial?

[1, 2] It has repeatedly been held that the trial judge, in passing upon a motion for a new trial, is not bound by conflicts in the evidence and that, in effect, he sits as a thirteenth juror with a duty of reviewing the evidence and passing upon its sufficiency. Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774; Grover v. Sharp and Fellows, etc., Co., 66 Cal.App.2d 736, 737, 153 P.2d 83.

This court stated in Hargrave v. Acme Tool & Tester Co., 145 Cal.App.2d 469, 302 P.2d 592, 594:

"After the jury's verdict for the plaintiff, the trial judge, as he is required to do upon a motion for a new trial, considered the credibility of the witnesses and the weight of the evidence, drew his own inferences, and made his independent conclusions therefrom. The fact that he considered the evidence sufficient to justify his denial of defendants' motions for nonsuit, for directed verdict and for judgment notwithstanding the verdict did not preclude the trial judge from granting defendants' motions for a new trial upon his own appraisal of the evidence. Woods v. Walker, 57 Cal.App.2d 968, 971, 136 P.2d 72; Kalfus v. Fraze, 136 Cal.App.2d 415, 430, 288 P.2d 967.

* * * * * *

"An order granting a new trial will not be reversed on appeal unless an abuse of discretion on the part of the trial judge is affirmatively shown or manifestly appears. Brooks v. Metropolitan L. Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689. No such showing has been made in the instant action, and it would serve no useful purpose to discuss the many reasons shown by respondents why a new trial was properly granted."

In Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, at pages 358–359, 170 P.2d 465, at page 467, the court stated: "All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citing cases.] The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062."

Substantially the same language is used in Richardson v. Ham, 44 Cal.2d 772, at page 775, 285 P.2d 269, at page 270.

As we view it, the trial court reviewed and appraised the conflicting testimony, of which there was a great deal, and determined that justice was not done by the verdict of the jury, and thereupon granted the motion for a new trial. There was no abuse of discretion.

The order granting the motion for a new trial is affirmed.

WHITE, P. J., and DORAN, J., concur.

150 Cal.App.2d 494

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Earl E. BLACK, Defendant and Appellant.

Cr. 5769.

District Court of Appeal, Second District, Division 2, California.

April 26, 1957.

Hearing Denied June 19, 1957.

Defendant was convicted on five counts of incest. The Superior Court, Ventura County, Atwell Westwick, J., entered judgments, and defendant appealed. The District Court of Appeal, Ashburn, J., held that trial judge's misconduct, directed at defendant and his counsel, worked a miscarriage of justice, entitling defendant to reversal of judgments of conviction.

Judgments reversed.

1. Witnesses 🔑344(2)

In incest prosecution, it was not improper for defendant's counsel to ask prosecutrix if it was her testimony that she had never had acts of intercourse with persons other than the defendant.

2. Witnesses ⚷280

In incest prosecution, defendant's counsel had the right, within reasonable limitations, to choose the language of his own inquiries on cross-examination.

3. Witnesses ⚷282

In incest prosecution, it was proper for defendant's counsel to lead 13 year old witness with respect to the penalty for telling a falsehood, after trial court had put to the witness a question of law obviously impossible for the witness to answer.

4. Criminal Law ⚷1166½(12)

In incest prosecution, trial judge's misconduct, directed at defendant and his counsel, worked a miscarriage of justice and required reversal of judgments of conviction.

5. Criminal Law ⚷1043(3)

Where trial counsel of defendant, in efforts to formulate a theory of admissibility for certain evidence in incest prosecution, never hit on certain theory, defendant was in no position to urge such theory on appeal.

6. Incest ⚷13

In incest prosecution, evidence concerning alleged general delinquency of prosecutrix was not admissible.

7. Incest ⚷13

In incest prosecution, evidence that prosecutrix allegedly had intercourse with some person other than defendant would be admissible to corroborate denial of defendant that he had intercourse with prosecutrix.

◆

Kaiser & O'Neill, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura County, Albert J. Holzhauer, Chief Criminal Deputy Dist. Atty., Ventura, for respondent.

ASHBURN, Justice.

Defendant appeals from judgments of conviction upon five counts of incest committed through intercourse with his minor daughter, Carol Ann Black, on June 2, 1955, December 13, 1955, December 15, 1955, December 26, 1955 and January 7, 1956. The evidence showed that such acts began in 1952, when she was 11½ years of age, and continued at intervals until ended by her pregnancy at the age of 15 years and by defendant's ensuing arrest. A first trial was had upon an information making the single charge of a crime committed on January 7, 1956. The jury disagreed. During that trial evidence of the acts committed upon the 1955 dates above mentioned was disclosed, and after the mistrial an indictment was procured charging those additional crimes. The information and indictment were consolidated for trial, which resulted in conviction upon all five charges.

Appellant's present counsel make no claim of insufficiency of the evidence for the obvious reason that there was a square conflict therein. The daughter, Carol Ann Black, testified to each of the alleged acts and defendant flatly denied them. At no stage of the case has he admitted guilt. His claim on appeal is twofold, (1) that there was prejudicial error in the exclusion of certain evidence, and (2) that there was misconduct on the part of the trial judge, directed at defendant and his counsel, which worked a miscarriage of justice. We are persuaded that the last mentioned ground is meritorious.

Most of the objectionable animadversions of the trial judge grew out of defendant's efforts to introduce evidence which, generally speaking, related to various types of delinquency on the part of the complaining witness without approaching the level of proof of intercourse with anyone other than the father. Mr. Wallace Hatcher (now deceased) had been assigned by the court the task of defending Black, who averred himself to be without funds. Mr. Hatcher, so far as the record shows, was respectful toward the court and reasonably tractable to suggestions from that source.

He clung as best he could to an untenable theory of admissibility of the evidence in question but the basis of his argument seems to have been poorly defined in his own mind and he was therefore inept in its presentation as well as in other matters. The judge took a captious attitude toward him which made the presentation of his ill-defined views unnecessarily difficult for him.

[1, 2] Early in the trial counsel in cross-examination of Carol asked: "Is it your testimony, Carol, that you stayed out all night without ever having anybody have intercourse with you? A. That's true." The court overruled an objection and then added: "You say, 'Is it your testimony?' What does that mean? The jury has heard her testimony and now you ask her what her testimony is. Mr. Hatcher: Well, I will just frame it in a different way, your Honor." Shortly after that, in examination of the same witness, the following occurred:

> "Q. Now, is it your testimony, Carol, that you say you never had any act of intercourse with anyone besides your—
>
> "The Court: She testified and the jury have heard it and you are asking her: 'What is your testimony?' It is an improper question. Why not ask her directly? Mr. Hatcher: Q. Is that your testimony, that you never had acts of intercourse—
>
> "The Court: Don't answer the question.
>
> "Mr. Hatcher: I am sorry, your Honor.
>
> "The Court: The testimony of the girl is in. The jury have heard it."

There was nothing really objectionable about these questions; counsel has a right within reasonable limitations to choose the language of his own inquiries. The judge's attitude reflected more of irritation than a quest for the truth.

On another occasion counsel was reproved for calling his own client "Earl" and was directed to do so no more:

> "Q. Where were you stationed overseas, Earl? A. Antigua, British West Indies.
>
> "The Court: When you say 'Earl', you are referring to the defendant, are you?
>
> "Mr. Hatcher: Yes, Earl E. Black.
>
> "The Court: Mr. Black?
>
> "Mr. Hatcher: Earl E. Black.
>
> "The Court: Well, I think perhaps you better use his name. Call him 'Mr. Black' rather than become so familiar. It is hardly the place for it, I think."

This is one of those cases in which the charge is easily made and difficult to refute for the reason, among others, that the nature and fact of accusation are so revolting as to inflame the minds of ordinary men. The complaining witness, then about 15½ years old, was five months pregnant when on the witness stand. Having no direct proof that any other person was father of the expected child defendant was driven to an attempt to establish the fact by circumstantial evidence. (While parentage was not the legal issue, it would loom large in the mind of each juror.) When counsel apparently was trying to build up from "dating of boys" to direct or circumstantial proof of intercourse outside the family circle, the following occurred in cross-examination of Mrs. Eleanor I. Black, divorced second wife of defendant:

> "Mr. Hatcher: Q. Did Carol talk to you, Mrs. Black, at any time about her sex affairs or—
>
> "The Court: You mean actual sexual conduct with males?
>
> "Mr. Hatcher: Well, her dating of boys?
>
> "The Witness: Yes.
>
> "Mr. Holzhauer: Object to that as incompetent, irrelevant and immaterial.
>
> "The Court: Oh, I think this is very unfair for you to assume that her dating boys amounts to something in the nature of sexual activities.

"Mr. Hatcher: Your Honor—

"The Court: Have you proof of any such fact?

"Mr. Hatcher: Your Honor, I think those remarks are improper.

"The Court: Well, it is immaterial to me whether you think they are improper or not.

"Mr. Hatcher: I am just making the record.

"The Court: I am not going to permit you by intimation to beat this girl down unless it is proper.

"Mr. Hatcher: And I don't have that intention.

"The Court: When you talk about relations with boys and assign it as sexual activity, you are obviously misleading.

"Mr. Hatcher: I have no intention of doing that, your Honor.

"The Court: Well, then, watch your language. Let's frame the question so that that will obviously not be your purpose.

"Mr. Hatcher: I take it—

"The Court: You asked this lady about the girl's discussions with her or her sexual activities with boys. It presumes one thing, does it not?

"Mr. Hatcher: I take it that we are entitled to show her activities.

"The Court: You are entitled to do it properly. Now, let's proceed from this point forward to do it properly, if you don't mind.

"Mr. Hatcher: I am doing the very best I can, your Honor.

"The Court: You can do better, and you must do better. Now, let's proceed with the orderly trial of this case in the proper manner. You are familiar with what it proper and what is not, I am sure, but if you are not, I propose to tell you as we go along.

"Mr. Hatcher: I would like to make an objection as we go along in the record, just for the purpose of the record, to the Court's remarks. Mrs. Black—

"The Court: All right. Now, you better do that properly. You are assigning my remarks as being misconduct, are you not?

"Mr. Hatcher: Yes.

"The Court: And improper and you are moving now, because if you don't, you see, it will get you nowhere, you are moving for a mistrial on the ground that I have improperly ordered you not to use language which by implication assumes that this girl did have sexual relations with boys. Now, isn't that your—

"Mr. Hatcher: No, your Honor.

"The Court:—position?

"Mr. Hatcher: That wasn't my purpose.

"The Court: All right, let's get along. I have made your record for you. Let's get along with the trial of this case and let's do it properly. And I might add that this is the last time I am going to admonish you on this subject.

"Mr. Hatcher: Very well, your Honor, I will conduct it as best I know how.

"The Court: You will do better than you have been doing, I assure you, or there will be trouble. I have warned you, as I say, for the last time."

Though counsel's line of inquiry was objectionable, People v. Wilson, 79 Cal.App. 709, 713, 250 P. 879; People v. Stratton, 141 Cal. 604, 607, 75 P. 166, and the ruling essentially proper, the judge's remarks were inescapably prejudicial. Counsel was accused of unfairness and told that he would not be permitted "by intimation to beat this girl down unless it is proper." The whole defense was that the girl was telling a falsehood and this remark undoubtedly conveyed to the jurors a judicial stamp of approval upon her story. There was nothing wrong with the form of the question "Did Carol talk to you, Mrs. Black, at any time about her sex affairs or * * * her dating of boys?", but the judge termed it unfair and further said: "When you talk about relations with boys and assign it as sexual activity, you are obviously misleading. Mr. Hatcher: I have no intention of doing that, your Honor. The Court: Well, then, watch your language. Let's frame the question so that that will obviously not be your purpose." The judge himself raised the matter of misconduct on his part and concluded with the threat of dire consequences if his admonitions were not heeded. The whole incident was precipitated by the judge, was highly improper and inevitably prejudicial to defendant because of obvious bias in favor of the complaining witness and disapproval of the halting efforts of defendant's counsel.

[3] When the defense attorney was trying to qualify a 13 year old girl as a witness, and having little success, the court asked her: "Aside from this idea of God punishing you if you failed to tell the truth here, what penalties or punishment are imposed; do you know?" She replied: "God would punish me and so would my mother." Of course no child of that age would be likely to answer the judge's question. Mr. Hatcher asked: "Do you know that it is in violation of the law to tell a falsehood, too?" She replied in the affirmative and then the court said: "I think that it is quite obvious that the girl knew no such thing but she will answer your leading questions." This stricture upon counsel's questioning was improper; the circumstances rendered it not inappropriate for him to lead the child after the court had put to her a question of law obviously impossible for her to answer.

At the first trial Carol testified that her father stopped at a motel in Needles when driving her to the East, and that he there had intercourse with her. Defendant denied that they had stopped at a motel in Needles or any other place. Between the two trials the officers aided the girl in locating the motel which was in Barstow, not Needles, and they there found the register bearing defendant's signature. When proof along that line was tendered Mr. Hatcher said: "Your Honor, I object to this testimony. We have admitted and have always stated that they stayed at Barstow." And the court asked: "Do you mean by that, that you admit that the girl made a mistake, and an honest one?" Again the judge advised the jury of his belief in the honesty of the complaining witness.

Carol testified that defendant, upon his return from the Leeward Islands on December 13, 1955, found her alone in the house, told her he had not seen a white woman since the latter part of October, demanded and had intercourse with her. In an attempt to impeach her on this point counsel asked a defense witness: "State whether or not there were any white women at the Leeward Islands where you were stationed? A. Yes, sir." Objection being made, the following occurred:

> "Mr. Holzhauer: Well, your Honor, in any event it is certainly a collateral issue.
>
> "Mr. Hatcher: He saw fit to bring it up and I want to impeach the witness on that.
>
> "The Court: All right. Overruled.
>
> "Mr. Hatcher: I don't want to ask for any evidence I am not entitled to.
>
> "The Court: Let's get along. I am going to rule on objections as we go along and I would appreciate it if you would make no further remarks of this sort at all. I am perfectly aware of your purpose and I am ordering you to desist. I will rule on the objections in the usual, orthodox way.
>
> "Mr. Hatcher: Very well, your Honor.
>
> "The Court: I need no comment on your intent or purpose. None. Let's proceed."

The Canons of Judicial Ethics adopted by the Conference of California Judges contain the following: "A judge should be temperate, attentive, patient, impartial * * *. A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court. * * * A judge may properly intervene during the trial of a case where this appears reasonably necessary in order to expedite proceedings, for clarification of any point, or to prevent injustice. He should remember that while, primarily, it is the function and right of attorneys to present the case of their respective clients, it is the ultimate function of the judge to see that no party appearing before him suffers an injustice which he can prevent. Litigants, witnesses and attorneys alike are entitled to have a court function as a court of justice in fact as well as in theory. In exercising the firmness necessary to the dignity and efficient conduct of court proceedings, a judge's attitude should not reflect undue impatience or severity toward either counsel, litigant, or witnesses. * * * Justice should not be moulded by the individual idiosyncracies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. * * *" The rudeness exhibited in the above quotations from the record was far removed from the standards of conduct resting upon trial judges, voluntarily imposed upon themselves in the interests of substantial justice. See, also, Etzel v. Rosenbloom, 83 Cal.App.2d 758, 765, 189 P.2d 848.

Toward the end of the trial the deputy district attorney asked Carol: "Carol, I want you to tell this jury just how you feel about your father." Defendant's counsel objected and the court said: "Overruled. You see, you have assumed that the girl is telling a story. Your tone of voice indicated it and everything else. Now you can't beat her down and then prevent her from explaining an answer to a question like that. Overruled. Mr. Hatcher: Your Honor, I don't mean—The Court: Overruled. I don't want any argument about it. We have had enough of this sort of unusual conduct in this case." Of course counsel had assumed that the girl was telling a false story and it was his duty to prove it, if possible, by direct or indirect evidence. There was no impropriety in such assumption on his part. "Now you can't beat her down" plainly implies sympathy for the girl and criticism of the attorney. The remark, "Now you can't beat her down and then prevent her from explaining an answer to a question like that," was misplaced. The question put to her by the prosecutor did not call for an explanation of any answer she previously had given. Counsel for defendant had made no attempt to show that she was hostile to her father or prejudiced against him. The court's remarks were without good cause and plainly critical of the efforts of counsel. The overall effect of the many strictures upon his way of presenting the case was an obvious distrust of his motives and purposes, which the jury could not miss and which the record did not justify. Ignorance or ineptness does not spell lack of probity and the jury should not have been given the impression that they do.

There were numerous other instances of mistreatment of defendant's attorney, though not so aggravated as the ones above mentioned.

Carol testified that her father knew she had missed her menstrual period before he left for the West Indies and had asked her to write him when she learned whether she was pregnant; also that he told her that if she was found to be so she should say that she had been raped by an unidentified stranger. When on the witness stand he had denied this and had said he first heard of her pregnancy in a letter in which she told him of the rape. On rebuttal Carol, being on the witness stand, testified as follows: "Mr. Holzhauer: Q. What did you tell your father when you wrote that letter? A. I told him what happened Sunday and why I was staying at the Ericksons and I told him that Thursday or Friday I went to the clinic and took the frog test and the following Monday I would know if I was pregnant or not. I also told him that I had told the story that he had told me to tell, if anyone should ask why I was pregnant." The trial was almost over; the defense had failed in its effort to point the finger of paternity at anyone but defendant; all the breaks had been against him; his attorney had been berated repeatedly in the presence of the jury; he must have realized that the prison doors were opening before him, and out of his particular hell issued this desperate cry: "Carol, you know that is a lie." The judge, on motion for new trial, referred to it as "bellowing" and his own attorney as an "outcry." Loud it may have been, for it issued from a soul in agony, and it was met by unusual severity. The judge represented all the authority of the State; Black was but a lone defendant, his attorney not even allowed to call him "Earl"; and the court laid on the whip of authority without restraint. Immediately following defendant's exclamation this occurred:

> "The Court: If that happens once more—look at me, sir. If that happens again in the course of these proceedings, you will regret it. You know better than that. Mr. Bailiff, gag this man if there is any necessity for it. Do you want to sit here with a gag in your mouth?
>
> "The Defendant: No, sir.
>
> "The Court: You know better than to do a thing like that. Don't let it happen again. And I would suggest that it might be better for you to cease your staring at her continuously also. All right. The jury will disregard entirely the statement that was last made by the defendant. It was unwarranted and it has no place in these proceedings or in this courtroom at all."

Not once in four days of trial had defendant given previous offense in any way; not once had he transgressed the rules of decorum which normally govern a trial. There was no justification or excuse for this outburst on the part of the judge. The jury could only have gotten the impression that the judge was unalterably set against defendant and his case.

This court, in reversing because of misconduct of the trial judge, said in People v. Williams, 55 Cal.App.2d 696, 703, 131 P.2d 851, 854: "There is never an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant, or jurors. Judges presiding at a trial should conduct the trial in a fair and impartial manner and refrain from making any unnecessary comments or remarks during the course of the trial which may tend to a prejudicial result to a litigant. Remarks such as those made by the trial judge in the instant case and in the cases cited above tend to bring the administration of justice into disrepute and serve as a basis for appeals. Such remarks deflect the minds of jurors from the evidence actually before them and cause them to reach conclusions based upon feeling, bias, and prejudice, rather than upon the evidence which has been properly received and from which alone they should arrive at verdicts under the law." The Supreme Court, in People v. Sarazzawski, 27 Cal.2d 7, 11, 161 P.2d 934, 936, said: "When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4½ of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand. [Citations.] That section was not designed to 'abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'" People v. Lyons, 47 Cal.2d 311, 303 P.2d 329, 336: "[In the circumstances the conviction cannot be supported by section 4½ of article VI of the state Constitution, for the denial of a fair trial is a miscarriage of justice. (People v. Sarazzawski (1945), 27 Cal.2d 7, 11, 161 P.

2d 934; People v. Hooper (1949), 92 Cal. App.2d 524, 531, 207 P.2d 117; People v. Mason (1946), 72 Cal.App.2d 699, 716, 165 P.2d 481.)]" To the same effect, see People v. Mahoney, 201 Cal. 618, 623, 626, 258 P. 607; People v. McKay, 37 Cal.2d 792, 798, 236 P.2d 145.

[4] Because defendant did not have a fair trial the judgment must be reversed. In view of the necessity of a further trial, we also address ourselves to appellant's claim of error in excluding evidence.

[5] The judge's exasperation with defendant's attorney seemed to stem from his own uncertainty about the admissibility of the evidence in question. Defendant sought to show that, beginning at the age of seven, more than four years prior to the alleged incest, Carol was incorrigible in various ways,—instanced by testimony that beginning at the age of seven she would drop and break dishes when asked to clear the table; would wet the bed when not permitted to listen to the radio; that in later years she would absent herself from school; ran away from home on numerous occasions; stole clothes from her school; was in Juvenile court some six times; committed to a parochial school on one occasion; had boy friends in the car and sitting with her on the couch for hours. It is now contended that the purpose of presenting this evidence, originally received and later stricken, was to show motive and bias on the part of Carol prompting her to falsely blame her father for her condition. The record shows, however, that trial counsel in his efforts to formulate a theory of admissibility never hit upon this one. Hence appellant is in no position to urge the point. "The materiality or relevancy of the question asked of the defendant was not apparent, and counsel for the defendant did not attempt to explain the purpose of the question or offer to show how an answer might be relevant. In the absence of such a showing no prejudice appears." People v. Carmen, 43 Cal.2d 342, 347, 273 P.2d 521, 524. To the same effect are People v. Reyes, 194 Cal. 650, 652, 229 P. 947; People v. Brown, 43 Cal.App.2d 430, 433, 110 P.2d 1059.

[6, 7] Initially counsel seems to have had the theory that Carol was a congenital and pathological prevaricator. Then he shifted to a theory of destroying credibility through showing a "pattern of conduct" of general delinquency. This was rejected by the judge who ruled as follows:

> "The Court: All right, I will permit the evidence to be introduced on the theory that it again indicates or tends to indicate the girl may have such a personality that she is unable to tell the truth or the difference between truthfulness and untruthfulness. For that limited purpose you may answer.
>
> "Mr. Hatcher: I wasn't offering it for that purpose.
>
> "The Court: I know. I am telling the witness that he may answer for that purpose."

Ultimately the judge changed his mind and struck all such testimony. There was no prejudicial error in any of this, for the evidence was not admissible in the first place and properly was stricken. The issue was, did defendant have intercourse with his minor daughter? Unchastity of Carol with respect to other men was not in issue, nor was paternity of the child. Consent or non-consent to the father's acts was likewise aside from the issue. That is not to say that conduct with other boys which would tend to prove directly or circumstantially the fact of intimacy with them would not be admissible, for proof that Carol had had intercourse with some person other than defendant was a practical necessity to his defense by way of corroboration of his denial of the charges against him. But the evidence at bar did not rise to that level and counsel did not claim that it did. That the evidence was properly stricken follows from such cases as People v. Wilson, supra, 79 Cal.App. 709, 713, 250 P. 879; People v. Stratton, supra, 141 Cal. 604, 607, 75 P. 166; People v. Burrows, 27 Cal.App. 428, 431, 150 P. 382; People v. Kruvosky, 53 Cal.App.

744, 751, 200 P. 831; People v. Murphy, 53 Cal.App. 474, 481, 200 P. 484; People v. Nichols, 2 Cal.App.2d 99, 101–102, 37 P.2d 710; People v. Adams, 76 Cal.App. 178, 185, 244 P. 106.

The judgments of conviction are reversed.

MOORE, P. J., and FOX, J., concur.

150 Cal.App.2d 663

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harry Dwight SMITH, Defendant and Appellant.

Cr. 3283.

District Court of Appeal, First District, Division 1, California.

May 6, 1957.

Defendant, who had been convicted of first-degree burglary, filed a petition for writ of error coram nobis. The Superior Court, Alameda County, Edward J. Smith, J., entered an order denying the petition, and the defendant appealed. The District Court of Appeal, Peters, P. J., held that contention of defendant that he was not guilty of burglary because he had permission to enter the apartment, which was allegedly burglarized, could not be considered on petition for writ of error coram nobis, since points that could have been raised in the trial court or on appeal cannot be later considered on a writ of error coram nobis.

Order affirmed.

1. Criminal Law ⚷997(2)

Contention of defendant, who had been convicted of burglary, that he was not guilty of burglary because he had permission to enter apartment which was allegedly burglarized, could not be considered on writ of error coram nobis, since points that could have been raised in trial court or on appeal cannot be later considered on writ of error coram nobis.

2. Criminal Law ⚷997(11)

It is incumbent on petitioner seeking writ of error coram nobis to plead and prove that facts on which he relies were not known to him and could not, with due diligence, have been discovered prior to filing petition.

3. Criminal Law ⚷997(12)

Unexplained delay of 12 years in filing petition for writ of error coram nobis was fatal.

4. Criminal Law ⚷997(6)

A writ of error coram nobis does not lie to correct errors of law.

5. Criminal Law ⚷1043(3)

On appeal from judgment denying petition for writ of error coram nobis, petitioner cannot change his theory.

◆

Harry Dwight Smith in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

In 1944, defendant, then represented by counsel, pleaded guilty to burglary, and the offense was found to be of the first degree. No appeal was taken. In May of 1951 a petition for a writ of error *coram nobis* was filed by defendant in the superior court and denied. This denial was affirmed on appeal. People v. Smith, 108 Cal.App.2d 696, 239 P.2d 466. In June of 1956 the present petition for a writ of error *coram nobis* was filed. It, too, was denied. Defendant appeals.

In these proceedings, for a variety of reasons, it has been the contention of defendant that he did not commit the burglary to which he pleaded guilty. In the first *coram nobis* proceeding he averred that the stolen property was placed in his room without his consent and that his guilty plea was induced by threats of the police. In the present petition it is averred that the guilty plea was induced by the threats of an accomplice. In his briefs on the present appeal these contentions are abandoned, and it is claimed, for the first time, that, while he hid the stolen property in his room where it was discovered, he, in fact, had permission to enter the apartment which was allegedly burglarized.

[1–3] The appeal is without merit. The claimed facts that appellant wishes to show were obviously at all times known to him. Points that could have been raised in the trial court or on an appeal cannot be later considered on a writ of error *coram nobis*. People v. Smith, 108 Cal.App.2d 696, at page 699, 239 P.2d 466, at page 468, and cases cited. It is incumbent upon the petitioner in such a proceeding to plead and prove that the facts upon which he now relies were not known to him and could not, with due diligence, have been discovered prior to filing the petition. There is no showing that these facts were not known to him at the time of trial or that they could not, with due diligence, have been discovered long prior to the filing of the petition. No explanation of the more than 12-year delay is given. On the prior appeal a 7-year unexplained delay was held to be fatal. It is certainly fatal now.

[4] It should also be mentioned that the alleged "fact" now sought to be proved —that entry made with the possessor's knowledge is not burglary—is in truth a rule of law. The writ of error *coram nobis* does not lie to correct errors of law. People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354; People v. Hayman, 145 Cal.App.2d 620, 302 P.2d 810; People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Darcy, 79 Cal.App.2d 683, 180 P.2d 752.

[5] It should also be mentioned that the sole point now relied upon—that he had permission to enter the burglarized apartment—was not set forth in his petition for the writ, nor otherwise presented to the trial court. Such a change in theory on appeal is not permitted. Ernst v. Searle, 218 Cal. 233, 22 P.2d 715.

The order appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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150 Cal.App.2d 650

Grace SCHUSTER, Plaintiff, Cross-Defendant and Respondent,

v.

Edward SCHUSTER, Defendant, Cross-Complainant and Appellant.

Civ. 9093.

District Court of Appeal, Third District, California.

May 2, 1957.

Divorce proceeding. The Superior Court, Yuba County, R. T. Manwell, J., held that property held in joint tenancy was community property of spouses, and husband appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence sustained finding that property held in joint tenancy by husband and wife was community property of spouses.

Affirmed.

1. Divorce 🔑253

Where wife's complaint for divorce asked that community property and separate property be determined and divided, husband's answer and his cross-complaint alleged that husband and wife each owned a separate one-half interest in property held in joint tenancy, and there was no objection made to introduction of evidence concerning character of property, failure of wife's answer to deny allegation in cross-complaint did not remove issue as to character of property.

2. Husband and Wife ⚷14(3), 254

Property acquired under a joint tenancy deed may be shown to be actually community property or separate property of one of spouses according to intention, understanding or agreement of parties, and question whether evidence is sufficient to rebut presumption that husband and wife are joint tenants is one of fact.

3. Husband and Wife ⚷264

In divorce proceeding, evidence sustained finding that property held in joint tenancy was community property of spouses.

4. Divorce ⚷286

Weight and effect of evidence as to whether property held by husband and wife in joint tenancy was community property was matter for trial court to determine.

Brown & Smith, Oakland, for appellant.

Steel & Arostegui, Marysville, for respondent.

WARNE, Justice pro tem.

Plaintiff and defendant were married on the 21st day of August, 1948. At the time of the marriage, the plaintiff had $6,000 in cash which she had inherited from her former husband's estate and other small amounts in various savings institutions. The defendant did not have any savings or bank account in 1948. The $6,000 was used to purchase a home in Berkeley, California. Title to the home was taken in the names of plaintiff and defendant as joint tenants. The title remained in joint tenancy until 1951, when there was a separation between the parties. At the time of this separation, a property settlement agreement was made between the parties by which the husband transferred his interest in the Berkeley home to his wife, and she in turn released to him approximately $3,000 in cash. In June, 1952, the parties became reconciled. During the time of separation, plaintiff sold the Berkeley home for approximately $7,000, receiving approximately $4,500 in cash and a promissory note secured by a deed of trust on the property for the balance. As of the date of trial, the note and deed of trust still remained in the wife's name alone. From June, 1952, when the parties reconciled, until February, 1955, when they again separated, they acquired and disposed of the following pieces of real property: (1) A house at 632 Olivehurst Street, Olivehurst, Yuba County, California. The property is unencumbered and its rent brings in about $50 a month. (2) Property at 335 Canal Street, Olivehurst. This property was later sold and a note and deed of trust taken in exchange. The note is being paid at the rate of $35 per month. (3) A half interest in a garage and building which was disposed of to the state of California for $5,331. (4) A home known as the home place at 124 East Ninth Street. This property is mortgaged. (5) Three lots adjoining the home place. This property was also mortgaged. (6) A house at 270 East 11th Street. This is also mortgaged. It is rented. Prior to the marriage Edward had entered into a conditional sales contract to purchase certain real property. He paid one-sixth of the down payment, to wit, $200, and his brother paid the rest. The brother has made all the payments on this property. Title is in Edward's name alone. In each instance, with the exception of the last mentioned parcel, title to the property was taken in the name of both parties as joint tenants.

In June of 1955 Grace filed for divorce charging extreme cruelty. She asked that the community and separate property be determined and be divided equitably. Edward answered the complaint and alleged that he and plaintiff each owned a separate one-half interest in the property held in joint tenancy. Edward also filed a cross-complaint for divorce. In so far as is pertinent to the issue presented by this appeal, Edward in his cross-complaint alleged in substance that each spouse held a separate one-half interest in the following pieces of property which they held in joint tenancy: (1) Family home and three surrounding lots, value $6,500 with a mortgage of $3,128.81; (2) House and lot at 632 Olivehurst Ave., Olivehurst, California, approximate value $4,500, no mortgage, and (3) Another house and lot, approximate value $2,200 and a mortgage of $470.28. In her answer to the cross-complaint, Grace did not deny this allegation.

[1] Appellant contends that under the pleadings in the case the character of the real property was not an issue in the case since respondent in her answer to his cross-complaint did not deny that the real property specifically mentioned in his cross-complaint and standing in their names as joint tenants was one-half his separate property and one-half her separate property. In support of his contention, he cites Odone v. Marzocchi, 34 Cal.2d 431, 444, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109, and Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626. We do not believe that the rule of those cases applies here, for the reason that notwithstanding the technical effect of the pleadings, assuming that on the face of the pleadings the status of the property is admitted, there is real doubt as to the effect of the failure of respondent to deny the allegations in the cross-complaint respecting the character of the property. Since the appellant's answer to respondent's complaint raised the same issue, and the court's attention was not called to the claimed admission in the pleadings, nor was any objection made to the introduction of evidence concerning the character of the property, there is no merit in this contention. Where a case is tried as though no admission had been made and the issue as to whether the property was community or separate property of the spouses is submitted without objection to the court for determination, the rule of the above cases does not apply. Polizzi v. Porcaro, 110 Cal.App.2d 395, 399, 242 P.2d 949.

Appellant also contends that the evidence is insufficient to support the finding that the property was community property.

[2] Property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one of the spouses according to the intention, understanding or agreement of the parties. The question as to whether the evidence is sufficient to rebut the presumption that the husband and wife are joint tenants is one of fact. Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656.

[3, 4] The evidence shows that when the first parcel of property was purchased with respondent's funds, appellant told her that if she would put his name on the deed they would go "50-50 on everything." In reliance upon appellant's promise, respondent had the property conveyed to both parties as joint tenants. Following up this agreement, they acquired and disposed of several pieces of real property, the title in each instance being taken in their names as joint tenants. However, they always dealt with the property as if it were community in character. There is nothing in the record to show that they considered it to be the separate property of either. Even the bank accounts were opened by respondent in the names of respondent and appellant. The weight and effect of the evidence was, of course, a matter for the trial court to determine. We feel that there is substantial evidence which will support the court's findings concerning the character of the property. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

150 Cal.App.2d 554

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Henry FALLS, Defendant and Appellant.

Cr. 1134.

District Court of Appeal, Fourth District, California.

April 29, 1957.

Prosecution for robbery while armed with a deadly weapon together with a charge of prior conviction for burglary. The Superior Court of San Bernardino County, A. D. Mitchell, J., entered judgment of conviction and order denying new trial and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained conviction and there was no error in admission of testimony.

Affirmed.

1. Robbery ⚷24(1)

Evidence sustained conviction of robbery while armed with a deadly weapon, a ball-peen hammer.

2. Criminal Law ⚷741(2)

In prosecution for robbery while armed with a deadly weapon, victim's identification of defendant presented issue for the jury.

3. Criminal Law ⚷1170½(1)
Witnesses ⚷350

In prosecution for robbery while armed with a deadly weapon together with a charge of a prior conviction for burglary, cross-examination of defendant as to whether he had been previously convicted of a burglary was proper and no prejudicial error was committed by allowing prosecution to ask at what location the burglary had taken place.

4. Robbery ⚷23(1)

In prosecution for robbery while armed with a deadly weapon, no error was committed in admitting in evidence certain purchases made by defendant the day after offense was committed without prior evidence he was not in possession of funds before commission of offense where there was also evidence that he had not worked for about a month before robbery occurred.

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Joseph A. Katz, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Herschel T. Elkins, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with robbery while armed with a deadly weapon, a ball-peen hammer. He was also charged with a prior conviction for burglary. He admitted the prior conviction and a jury found him guilty of robbery, and also found that at the time of the commission of the offense he was armed with a deadly weapon. He has appealed from the judgment and from an order denying his motion for a new trial.

During the early morning hours of December 22, 1955, Earl Wood was working alone as an attendant at a service station in San Bernardino. About 3:00 A.M. he counted the money in the cash register and found there about $55 in bills and four or five dollars in coin. Between 3:30 and 3:45 A.M. the defendant approached Mr. Wood carrying a five-gallon gasoline can, blue in color, with a white stripe near the bottom. He asked for some gasoline and Wood filled the can. As he was hanging up the hose he was struck on his head and rendered unconscious. He next recalled being helped into the station house by the defendant who told him to open the cash register, which he did. The defendant removed the money from the till, and was then holding a ball-peen hammer in his hand. The hammer did not belong to the service station. The defendant then tore out the telephone wires and told Wood to go to the men's room and stay there. Wood saw the defendant walking away carrying the gasoline can, and asked a passerby to call the sheriff's office. Later, Wood served a customer, and found there was no money left in the cash register. Wood was treated at a hospital for injuries to his head, his face showed bruises and cuts, and he was bleeding from his mouth. At the time of the trial he still had a scar above his right ear.

About 8:30 A.M. on December 23 a deputy sheriff asked the defendant why he did not admit this robbery, and the defendant stated: "I guess we will have to do it the hard way, I will go to Court and if the jury finds me guilty it is the truth and if they do not you will have to let me go." The defendant testified that he did not strike Mr. Wood; that he was not in this filling station at the time in question; and that from 2:00 A.M. to 7:00 A.M. on December 22 he was at his sister's house in Fontana playing poker with several other men. In rebuttal it was shown that his sister had left her house a couple of days before and that the lights in that house had been turned off during the night in question.

[1, 2] The appellant first contends that there were inconsistencies in Mr. Wood's testimony, particularly as to how and where he identified the appellant; that his testimony was inconsistent with one statement made by one of the officers who testified; and that these inconsistencies were sufficient to raise a question as to whether the appellant was the man who committed this robbery. Mr. Wood positively identified the appellant at the trial. He had previously identified a picture of the appellant, and identified the appellant in a line-up. The record discloses no inconsistency in Wood's testimony with respect to the identification of the appellant, and there is no inconsistency between his testimony and that of the officer. This positive identification of the appellant was somewhat corroborated by the testimony of a Mr. Curry, a friend of the appellant, who testified that the appellant came to his house about 3:30 A.M. on this night and asked him for a can "to get some gasoline to put in his car". This witness lived about a block from the service station where the robbery occurred, and Curry testified that he gave the appellant a blue can which had a white stripe around it near the bottom. Mr. Wood had had an ample opportunity to get a good look at the appellant, any question about the identification was for the jury, and the evidence is entirely sufficient to support the conviction. People v. Quijada, 124 Cal. App.2d 422, 268 P.2d 745; People v. Shaheen, 120 Cal.App.2d 629, 261 P.2d 752.

[3] It is next contended that the court erred in allowing evidence, during the cross-examination of the appellant, concerning the nature of his prior conviction. It is argued that the prior conviction was totally unrelated to the offense before the court and that the admission of this evidence violated the general rule that evidence concerning other crimes should be excluded. People v. Channell, 136 Cal.App.2d 99, 288 P.2d 326 is cited in support of this contention. During the cross-examination of the appellant he was asked whether he had previously been convicted of a burglary. This question was proper. People v. Cobb, 45 Cal.2d 158, 287 P.2d 752. He was then asked whether the burglary of which he had been convicted "was one that took place on Third Street here in San Bernardino". An objection was overruled and he replied, "Yes". He was then asked whether it was not true that in that prior burglary he had taken money from the victim after striking him on the head over the right ear. An objection to this question was sustained, and no further attempt was made to show the nature of the prior offense. While evidence of this nature was probably admissible for the purpose of showing the same plan, scheme or system used in obtaining money from victims, an objection was sustained and no evidence in that regard was received. Nothing prejudicial appears in this connection.

[4] Finally, it is contended that error appears in that during the cross-examination of the appellant the prosecution brought out evidence concerning certain purchases made by him the day after the offense was committed, without any prior evidence that he was not in possession of funds before the commission of this offense, citing People v. Orloff, 65 Cal.App.2d 614, 151 P.2d 288. It was pointed out in People v. Gardner, 128

Cal.App.2d 1, 274 P.2d 908, that the correct rule is that such evidence is relevant and admissible, but that the weight thereof is for the jury. It may also be said here, as was said there, that "In any event, the admission of the testimony in question would be harmless in view of the fact that the evidence is overwhelmingly sufficient to sustain the judgments of guilty." Moreover, the appellant had testified that he had bought clothes in Fontana at 9:30 A.M. on December 22, and it was proper to cross-examine him with respect to the matters about which he had testified, including what he had paid for the various articles. No objection was made except to a question about buying a shirt and a pair of socks. He also testified, without objection, that he had borrowed $5 from a woman about two weeks before and paid her back on December 22. There was also evidence that he had not worked for about a month before this robbery occurred. No prejudicial or reversible error appears.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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150 Cal.App.2d 681

Annie EDELEN, Plaintiff and Appellant,

v.

Willard EDELEN, Defendant and Respondent.

Civ. 22152.

District Court of Appeal, Second District, Division 1, California.

May 6, 1957.

Child custody case. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered an order adverse to the mother of the children, and she appealed. The District Court of Appeal, Fourt, J., held that record would not sustain mother's contention that minute entry, giving her physical custody of daughter until further order of court, rather than signed, written judgment, providing that she should have physical custody of child only until end of school term, constituted decision.

Affirmed.

1. Divorce 🔑302

Properly construed, interlocutory decree provided that father was to have custody of children but that mother was to have physical custody of one child until end of school term, and that thereafter all of children were to be in physical and general custody of father.

2. Judgment 🔑23

Whether court's remarks at conclusion of hearing are rendition of decision, or whether they are only an announcement of decision court contemplates making by signed judgment, depends upon court's statements and intentions at that time.

3. Divorce 🔑303(3)

In proceeding brought for modification of child custody order, record would not sustain mother's contention that minute entry, giving her physical custody of daughter until further order of court, rather than signed, written judgment, providing that she should have physical custody of child only until end of school term, constituted decision.

◆

Joseph M. Wapner, Los Angeles, for appellant.

James D. Garibaldi and Warren J. Lane, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiff and cross-defendant from an order modifying an interlocutory decree of divorce.

The facts briefly stated are as follows: On April 26, 1956, the trial of the case was had on the merits and evidence was introduced by both parties. At the conclusion of the trial, findings of fact were waived. A minute entry was entered on April 30, 1956, wherein it is set forth that a divorce was granted to the husband who was the cross-complainant, and "[c]ustody of minor children to cross complainant, with physical custody of daughter to cross defendant until further order of court", and "[c]ounsel for cross complainant to prepare judgment. Findings waived". A written form of an interlocutory judgment of divorce was prepared and submitted to the judge and was signed by him and filed on May 15, 1956, and entered May 17, 1956. This judgment provided, among other things, as follows:

> "The custody of the minor children, Darrell Lee, Richard Dean and Sue Ann, is awarded to the defendant and cross-complainant, with the right of reasonable visitation to plaintiff, until further Order of court, provided that the plaintiff shall have physical control of the minor child, Sue Ann, during the school week during the current school year pending further Order of court. During the time that the plaintiff has such physical control of the minor child, Sue Ann, the defendant and cross-complainant shall have the right to have such child with him on week-ends and to visit such child at other reasonable times."

On July 2, 1956, an order to show cause and affidavit in re modification of interlocutory judgment of divorce was filed by defendant and cross-complainant. The hearing was set for July 16, 1956. At the hearing, which was held on August 13, 1956, the judge interpreted the judgment to mean that the "current school year" had expired at the time of the hearing.

It is apparent that the trial judge had in mind, when the judgment was signed in the first instance on May 15, 1956, that all of the children should ultimately be with the father, but that Sue Ann should not be taken out of the school she was attending at that particular time, and shifted to some other school, but she should be permitted to finish that grade, and while doing so, to remain physically with the mother, and upon the school term ending she was to be with her father. When the judge signed the interlocutory decree of divorce it had previously thereto been submitted to the attorney for the wife and he, as her attorney, approved in writing the interlocutory decree as to form.

[1] The appellant contends that there was no showing of a change of circumstances, and therefore, the order was error, and cites as authority therefor Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719 and Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295. The facts in the cases mentioned are in no wise similar to the facts of this case. It is our view that the trial judge determined the custody of the children at the time of the interlocutory judgment of divorce. The decree provided in substance that the husband and father was to have the custody of the children, but that the wife was to have the physical custody of the one child until the end of the school term, and thereafter all of the children were to be in the physical and general custody of the husband and father.

[2, 3] Appellant contends further that the minute entry or order of April 26, 1956, constitutes the decision, and not the signed, written judgment. The question of whether the court's remarks at the conclusion of a hearing are the rendition of a decision, or whether they are only an announcement of a decision the court contemplates making by a signed judgment, depends upon the court's statements and intentions at that time. Here the judge obviously intended, and so ordered, that counsel for the husband should prepare a form of written judgment and submit it to the court for signature, which was done. The attorney for the wife surely did not, at the time the written judgment was presented to him for approval, believe that the minute entry constituted the decision, otherwise he would not have approved in writing the interlocutory judg-

ment as to form to the end that it could be submitted to the trial judge for his signature.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

WEST KEY NUMBER SYSTEM

150 Cal.App.2d 540

Albert DE MIRJIAN et al., Plaintiffs and Respondents,

v.

IDEAL HEATING CORPORATION, a corporation, et al., Defendants, Ideal Heating Corporation, a corporation, Appellant.

Civ. 21909.

District Court of Appeal, Second District, Division 3, California.

April 29, 1957.

Rehearing Denied May 29, 1957.

Hearing Denied June 26, 1957.

Action to recover damages from fire caused by alleged negligence of an employee of the defendant. Judgment for the defendant and from an order of the Superior Court of Los Angeles County granting a new trial, Victor R. Hansen, J., defendant appealed. The District Court of Appeal, Parker Wood, J., held that the evidence authorized the grant of the new trial; and that decisions on prior appeal did not sustain defenses regarding res judicata, law of the case and estoppel.

Order granting new trial affirmed.

1. Negligence 🔑134(4)

In action to recover damages from fire caused by alleged negligence of an agent of the defendant, evidence sustained judgment for the plaintiffs.

2. Appeal and Error 🔑1099(7)

In action for damages from fire caused by alleged negligence of an agent of the defendant, terms of decision on first appeal did not determine the sufficiency of evidence to sustain the judgment.

3. New Trial 🔑69, 72

In passing upon a motion for new trial based on insufficiency of evidence, trial court has exclusive province to judge the credibility of the witnesses, and determine the probative force of the testimony, and weigh the evidence.

4. New Trial 🔑68

Trial court in passing upon a motion for new trial may draw inferences opposed to those accepted by the jury.

5. Appeal and Error 🔑1099(7)

In action for damages from fire caused by alleged negligence of agent of defendant, holding on prior appeal that questions as to the agent's acts were for the jury did not establish as the "law of the case" that a verdict rendered by the jury on the issues would be determinative of such questions and that on a motion for new trial the trial judge could not consider the sufficiency of the evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Law of the Case".

6. Appeal and Error 🔑933(1)

Upon appeal from an order granting a new trial, all presumptions favor the order as against the verdict.

7. Appeal and Error 🔑979(2)

New Trial 🔑70

Granting of a motion for new trial based upon insufficiency of evidence rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears.

8. New Trial 🔑70

In action for damages from fire caused by alleged negligence of an agent of the defendant, granting plaintiff's motion for new trial on the ground of insufficiency of evidence to support the verdict for the defendant was not an abuse of discretion.

9. Courts 🔑99(1)

In action for damages from fire due to alleged negligence of an agent of defendant, findings of trial court judge on first trial were of no effect after the judgment thereon was reversed by the Appellate Court, and such findings were not available to sustain defenses of res judicata, law of the case and estoppel.

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John W. Preston, John W. Preston, Jr., Bordon & Bordon, and Parker, Stanbury & Reese, Los Angeles, for appellant.

Felix H. McGinnis, McBain & Morgan, Los Angeles, and Irving E. Tarson, Beverly Hills, for respondents.

PARKER WOOD, Justice.

Appeal by defendant Ideal Heating Corporation from an order granting plaintiffs' motion for a new trial. The action is to recover damages which resulted from a fire that destroyed part of a building and personal property. The fire was caused by the alleged negligence of defendant Lupella, an employee of defendant Ideal. In a jury trial, judgment was for defendant Ideal. (Lupella did not appear in the action—apparently he was not served with summons and complaint.) The motion for a new trial was granted on the grounds of insufficiency of the evidence, and errors of law.

There have been three trials of the action. The first trial was in 1951, before Judge Nourse without a jury, and judgment was for plaintiffs. That judgment was reversed on the ground that the findings did not support the judgment. De Mirjian v. Ideal Heating Corp., 112 Cal.App.2d 251, 246 P.2d 51. The second trial was in 1953, before Judge Willis with a jury, and judgment on a directed verdict was for Ideal. That judgment was reversed on the ground that there was sufficient evidence to support a verdict for plaintiffs and that the court erred in directing a verdict for Ideal. De Mirjian v. Ideal Heating Corp., 129 Cal. App.2d 758, 278 P.2d 114.

On April 12, 1946, plaintiffs owned a one-story double building in Los Angeles. One-half of the building was leased to and occupied by Ideal, which was engaged in manufacturing floor and wall furnaces and heaters. The other half of the building was occupied by plaintiffs, who were engaged in manufacturing lamps. About 2:30 p. m. on that date a fire, which originated in the part of the building occupied by Ideal, resulted in total damages to plaintiffs in the stipulated sum of $122,081.

The facts as to the cause of the fire are stated in detail in De Mirjian v. Ideal Heating Corp., 129 Cal.App.2d 758, 278 P.2d 114. It may be stated generally that the fire was caused under the following circumstances: Lupella, an employee of Ideal, was on his way to the washroom to use its facilities and to smoke a cigarette. He stopped to fill his cigarette lighter with spatter fluid from a 50-gallon drum which was adjacent to an aisle that was used for access to the washroom. He opened a spigot on the drum until the fluid was dripping. He accidentally pressed the spark button on the lighter and ignited the fluid. He dropped the lighter in a drip pan which was under the spigot, and a blaze started in the pan. The shop foreman told him to shut off the spigot. Lupella's clothes caught fire and the foreman told him to hit the spigot. Lupella hit the spigot with his foot and knocked the spigot off the drum. Then the flow of spatter fluid increased and the fire blazed up to crates which were in the balcony. The crates caught fire and the fires spread beyond control.

Ideal's vice-president testified that the drum, from which Lupella was attempting to fill his cigarette lighter, had been maintained by Ideal as a container for spatter thinner about three years prior to the fire.

Donald J. Lavenbarg, called as a witness by plaintiffs, testified that he is chief of the Fire Department of South Pasadena, and had been a battalion chief of the Fire Department of Los Angeles; that spatter thinner is a "Class 1 flammable liquid"; that at the time of the fire it would have been a violation of Los Angeles City laws to use, on a 50-gallon drum of inflammables inside a building, a spigot of the type used by Ideal; that if a spigot of the type used by Ideal on the drum of thinner were partially opened it would not close automatically when the pressure is taken off but would remain open.

Appellant (Ideal) contends that the court abused its discretion in granting plaintiffs' motion for a new trial.

[1] One argument in behalf of appellant is that the evidence was insufficient to support a judgment for plantiffs. On the second appeal the court said that the evidence at the second trial (before Judge Willis) was of sufficient substantiality to support a verdict in favor of plaintiffs. The evidence at the third trial (involved here) was substantially the same as the evidence at the second trial, except there was testimony by Fire Chief Lavenbarg at the third trial. (He did not testify at the second trial.) His testimony related to the dangerous quality of the liquid, the non-safety of the spigot, and city laws regarding the use of a spigot on a drum of inflammables. The evidence herein was sufficient to support a judgment for plaintiffs.

[2] Appellant argues further that on the first appeal (from judgment of Judge Nourse) the court held that the evidence was insufficient to support a judgment for plaintiffs; and that the trial court (at the third trial) in determining the motion for a new trial was bound by the decision on the first appeal as to the sufficiency of the evidence. On the second appeal the court said, 129 Cal.App.2d at page 764, 278 P.2d at page 117: "The only question presented and necessary for determination on the former [first] appeal and the only question determined was that the findings of fact of the trial court were deficient in one particular and that therefore they did not support the judgment. It was not held that the evidence did not support the findings. All that was decided was that the findings did not support the judgment." The decision on the first appeal did not determine the sufficiency of the evidence.

[3–5] Appellant also argues that since this court held, on the second appeal, that the questions as to whether Lupella's act was done in the course of his employment and whether Ideal exercised ordinary care in maintaining the thinner were questions for the jury, the trial court on the third trial was bound to follow "the law of the case" as announced in that decision and to respect the verdict (in favor of Ideal) upon those questions. On the second appeal the court said, 129 Cal.App.2d at pages 772–773, 278 P.2d at page 122: "[A]n inference can reasonably be drawn from the evidence that Lupella's act was done in the course of his employment. Whether such an inference should be drawn was a question for the jury," and "whether defendant [Ideal] exercised ordinary care in maintaining the highly volatile, inflammable, and dangerous thinner in the manner in which it did was a question for the jury." The second appeal was by plaintiffs from a judgment for defendant upon a directed verdict, and the question on appeal was whether there was evidence of sufficient substantiality to support a verdict for plaintiffs. The decision on that appeal was that there was sufficient evidence to support a verdict for plaintiffs, and that a motion for a directed verdict (upon the evidence at the second trial) should not have been granted. The expressions in the opinion therein that certain questions were questions "for the jury" did not mean that any verdict rendered thereon by a jury would be determinative of those questions, and that on a motion for a new trial the trial judge would not be permitted to consider the sufficiency of the evidence. The decision on the second appeal, with reference to the sufficiency of the evidence upon the motion for a directed verdict, was not applicable as "the law of the case" upon the motion for a new trial, where the judge had the right to consider the credibility of the witnesses and weigh the evidence. "In passing upon a motion for a new trial based on the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence." Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Thompson v. Blum's, Inc., 139 Cal.App.2d 140, 293 P.2d 82. The trial court, in passing upon a motion for a new trial, "may draw inferences opposed to those accepted by the jury." Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 359, 170 P.2d 465, 467.

Appellant argues further that on the second appeal the court held that there was sufficient evidence to support a judgment for either party; and that the trial court in determining the motion for a new trial was bound by "the law of the case" as announced in that decision with respect to the sufficiency of the evidence. This argument is similar, in legal effect, to the argument just discussed, and the statements made with reference to that argument are applicable here.

[6, 7] "Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict." Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, 348. As above stated, the trial judge was authorized to judge the credibility of the witnesses, weigh the evidence, and draw inferences opposed to those drawn by the jury. "The granting of a motion for a new trial based upon insufficiency of the evidence 'rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears.'" Thompson v. Blum's, Inc., 139 Cal.App.2d 140, 144, 293 P.2d 82, 84.

[8] The trial judge did not abuse his discretion in granting the motion for a new trial on the ground of insufficiency of the evidence.

[9] Appellant contends further that the issue of negligence as set forth in the first five causes of action of the second amended complaint were adjudicated in the first trial (before Judge Nourse); that the decision on the first appeal is the law of the case and estops plaintiffs from further prosecuting the first five causes of action. When the first trial commenced the amended complaint consisted of five causes of action which were based upon alleged negligence of Ideal. During the course of that trial the second amended complaint was further amended by adding a sixth cause of action which was based upon alleged negligence of Lupella. The sixth cause of action alleged that the negligence of Lupella occurred while he was acting within the course and scope of his employment. Judge Nourse found, in effect, that the corporation (Ideal) was not "itself a wrongdoer" but that Lupella, an employee of Ideal, was negligent and was acting within the course of his employment. Ideal and the plaintiffs herein gave notice that they appealed from the judgment rendered by Judge Nourse. The parties stipulated, on appeal: "That there was substantial and sufficient evidence before the trial court * * * to sustain the trial court's findings that the defendant, Ideal Heating Corporation, was not itself a wrongdoer and plaintiffs, as appellants, do not complain of, and will not challenge, the trial court's findings to that effect." Appellant argues therefrom that plaintiffs herein did not appeal from the judgment of Judge Nourse on the first five causes of action of the second amended complaint, and that the judgment as to those causes of action has become final. On the first appeal the decision of the reviewing court was as follows: "Judgment reversed." On the second appeal, the court said, 129 Cal.App.2d at page 764, 278 P.2d at page 117: "The effect of the unqualified reversal of the case on [the first] appeal was to remand it for a new trial on all the issues presented by the pleadings." The findings of Judge Nourse on the first trial were of no effect after the judgment on the first trial was reversed. This contention regarding res judicata, law of the case, and estoppel are not sustainable.

Appellant contends further that the issue as to its alleged negligence was adjudicated in De Mirjian v. Ideal Heating Corporation which was filed May 16, 1946. The complaint in that case was entitled "Unlawful Detainer." The action was to recover possession of the property on the ground that the lease under which Ideal held possession was terminated by the fire. Judgment in that case was for Ideal. See DeMirjian v. Ideal Heating Corp., 83 Cal.App. 2d 400, 188 P.2d 834. This contention of appellant was pleaded in its answer herein as a sixth special defense. It might well be that the trial judge, in granting the motion for a new trial, considered that this issue as to res judicata should be retried.

The order granting the motion for a new trial is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; McCOMB, J., dissenting.

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150 Cal.App.2d 691

Alpheus BRIAN, Plaintiff and Respondent,

v.

Everett D. IVEY, Defendant and Appellant.

Civ. 9049.

District Court of Appeal, Third District, California.

May 6, 1957.

Lessee of servient owner brought action against dominant owner for damage to lessee's rice crop from flooding, which occurred when dominant owner used ditch across realty of servient owner to run water to realty of dominant owner. The Superior Court, Colusa County, Ben R. Ragain, J., entered judgment for the lessee, and the dominant owner appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that dominant owner was negligent in running water through the ditch, but that lessee was not entitled to interest on amount of damages because damages could not be computed except on conflicting evidence.

Judgment modified by striking out item of interest, and, as modified, affirmed.

1. Waters and Water Courses 🔑263

In action by lessee of servient owner against dominant owner for damage to lessee's rice crop from flooding which occurred when dominant owner used ditch across realty of servient owner to run water to realty of dominant owner, evidence sustained finding that damage to rice crop was caused by negligence of dominant owner in running water through ditch.

2. Interest 🔑19(3)

Interest is not allowable when damages cannot be computed except on conflicting evidence because of absence of established or reasonable ascertainable market prices or values. West's Ann.Civ.Code, § 3287.

3. Damages 🔑188(1)

Where, in action for damages resulting from flooding of rice crop, there was considerable conflicting testimony as to probable yield of rice crop, quality of crop, and harvesting costs, plaintiff was not entitled to recover interest on amount of damages found to be sustained by plaintiff. West's Ann.Civ.Code, § 3287.

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Keith, Creede & Sedgwick, San Francisco, for appellant.

Robert E. Hatch, San Francisco, and Rutledge & Patton, Colusa, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant for damages sustained as a result of the flooding of plaintiff's rice crop. The case was tried by the court sitting without a jury and judgment was entered in favor of plaintiff for the sum of $14,275, together with interest from December 31, 1953. Defendant's motion for a new trial was denied and he has appealed from the judgment, his principal contentions being that the evidence is insufficient to support the judgment and that the court erred in awarding interest.

It appears from the record that in 1951 one Luchetti bought certain property. The following year, appellant acquired the property adjoining Luchetti on the north side from one Epley. Prior to 1953, neither property was devoted to agriculture, and an artificial lake for duck hunting was created each fall on the Ivey-Epley property and then allowed to dry up during the following spring. The method of getting the water onto the Ivey property was to divert water from the Glann-Colusa Irrigation District ditch (sometimes called "Hunter Creek"), which was on the south side of the Luchetti property; thence through a short ditch known as the "Ivey Ditch." From the northern end thereof the water flowed openly onto and over the Luchetti property to the extent that it became practically entirely flooded, whereupon by gravity it flowed northerly, over and onto the Ivey property. There it was contained in the form of a lake by the natural depression in the land, and by dikes surrounding it. This arrangement was set forth in a formal written easement binding upon Luchetti when the properties were sold.

In 1952 Luchetti decided he wanted to use his land so as to create an income, whereupon he negotiated a lease with the respondent, Brian, for a period of three years, Brian to grow rice on the land.

Since the duck hunting season would commence before the time to harvest rice and it was necessary to have the Luchetti property dry when the harvesting equipment was at work, Luchetti proposed to appellant that he (Luchetti) would construct a dragline ditch along the eastern margin of the Luchetti property, thereby connecting the Ivey ditch with the Ivey property. Dr. Ivey acceded to this arrangement and such ditch in fact was constructed in 1952, solely at Luchetti's expense.

In the fall of 1952 the ditch was used for running water, without causing any flooding of the adjoining Luchetti property. In the spring of 1953, both properties were dry. During April, Brian used the ditch to flood the Luchetti property preparatory to planting the rice, which he did on May 2nd. The Ivey property remained dry by reason of a dike along the common border of the two parcels and a weir or gate in the ditch where it reached that dike. The standard is 157 days from planting to harvest time, bringing the latter due on October 10th. On September 4th Brian stopped the water running into the ditch and commenced draining the entire property by opening the drain at the south end.

During the month of September Brian visited the property several times and found it was drying satisfactorily. During that same time other disinterested persons visited the property and saw that it was dry enough for the harvesting equipment to get in. Brian was only waiting for the rice to fully mature on October 10th.

During the summer of 1953 Luchetti had had a conversation with Dr. Ivey in which Dr. Ivey suggested that he was going to attempt to create a new lake on the westerly end of the Ivey property. The west side of this property was higher than the east side and had always theretofore been dry. Dr. Ivey then made four separate indentations on his property by the use of levees and planned thereby to put water in his east lake and his west lake and then force it into the center, which he would never have been able to do without the canal.

On September 23, 1953, Dr. Ivey wrote a letter to the irrigation district. Therein he requested that arrangement be made, if possible, to enable him to run water through the dragline ditch in the near future and stated his awareness of Brian's rice crop and the need to exercise caution in order that the water not damage the rice. Dr. Ivey sent a copy of this letter to Brian. Somewhere around that time Dr. Ivey started the water running and then departed for Alameda County to take care of his practice, leaving the water flowing and unattended.

On October 1st Brian found his crop inundated. Neither Brian nor Luchetti attempted to turn off the valves. The water was finally shut off on October 12, 1953. Brian testified that he tried to save his crop by the purchase of a full track harvester better able to cope with swampy conditions, at a cost of $10,000, but most of the crop was lost.

In contending for a reversal of the judgment appellant argues that the water which flooded respondent's rice crop escaped from the ditch through cracks and muskrat holes, that the proximate cause of the damage to respondent was respondent's failure to properly construct and maintain the ditch, and that appellant had no duty to ascertain that the ditch was leak-proof or free from muskrat holes. Appellant argues earnestly that where an easement has been altered by the servient owner the duty of maintenance and repairs rests upon such servient owner and that, therefore, respondent as the lessee of the servient owner with knowledge of the pre-existing easement and the substitution therefor of the dragline ditch, was obligated to maintain the ditch in good repair. However, in the instant case, not only does it appear that the appellant as the dominant owner consented to the alteration of the easement, but it also appears that such an alteration was beneficial to the appellant if properly maintained.

In reply respondent points out that there was evidence that the ditch was in good repair when appellant started to use it, that it was used without seepage just before the end of September, 1953, indicating that the muskrat holes were made during appellant's operation of the ditch. Respondent argues that appellant was careless and negligent in turning the water into the ditch and then going away to Alameda County, leaving the water running in the ditch without anyone to watch it, and the trial court found that appellant was careless and negligent and that appellant "well knew or reasonably should have known that by causing or allowing such water to so flow that it would flow over and upon said plaintiff's lands, flooding the same and said rice, and that thereby it would destroy said crop of rice and also make it impossible for plaintiff to harvest and remove any of same from said lands. At said last mentioned time, said Ivey well knew that plaintiff then was not present at or near said plaintiff's lands, that plaintiff did not know of Ivey's said running of water and that plaintiff had no means of protecting and would not be able to protect himself and his said property from said damage."

[1] We are satisfied that there is ample evidence to support the court's finding that the damage to respondent's rice was caused by the negligence of appellant. Under the evidence in the case the court could hardly have held otherwise. The record shows that there were many muskrats in that area and that after water is turned into a ditch muskrats frequently start digging holes, and unless there is someone to fill the hole water will leak out of the ditch. For appellant to start the water running in the ditch and then depart for Alameda County leaving the water flowing and unattended was conduct which the court was fully justified in finding to be careless and negligent.

Appellant's final contention that the court erred in allowing interest on the amount of damages must be sustained. Section 3287 of the Civil Code provides:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. * * *"

[2] In Lineman v. Schmid, 32 Cal.2d 204, 212, 195 P.2d 408, 413, interest was disallowed prior to judgment on breach of a contract to deliver flour. The court stated:

> "* * * The rule appears to be uniform * * * that interest is not allowable when damages cannot be computed except on conflicting evidence * * * because of the absence of established or reasonably ascertainable market prices or values. In such cases, since the amount of damages cannot be resolved except by accord, verdict or judgment, interest prior to judgment, is not allowable."

In California Lettuce Growers, Inc., v. Union Sugar Co., 45 Cal.2d 474, 289 P.2d

785, 49 A.L.R.2d 496, the action was by the seller against the buyer for the sugar beets sold and delivered. It was held that interest prior to judgment was not allowable where the plaintiff stated in its complaint that the value of the sugar beets was $45,000, but the actual judgment was for only $25,768.34, which conformed to the buyer's interpretation of the price. The court stated 45 Cal.2d at page 488, 289 P.2d at page 794:

> "* * * Difficult questions of the intention of the parties as to price and their prior dealings * * * would have to be tried out before it could be said with certainty what the price of the beets delivered should have been."

[3] The record shows that there was considerable conflicting testimony as to the probable yield of respondent's rice crop, the quality of the crop, and as to harvesting costs. It is clear that the damages could not be computed except on conflicting evidence and it was therefore error for the court to allow interest.

The judgment is modified by striking out the item of interest in the sum of $1,436.83. As so modified the judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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150 Cal.App.2d 665

The PEOPLE of the State of California, Respondent,

v.

Raymond H. JEHL, Defendant and Appellant.

Cr. 3266.

District Court of Appeal, First District, Division 2, California.

May 6, 1957.

Defendant was convicted of conspiracy to give or offer bribes to executive officers, of conspiracy to violate section of the Penal Code dealing with extortion, and on two counts of conspiracy to violate section of the Penal Code dealing with gaming. The Superior Court, County of Santa Cruz, James L. Atteridge, J., entered judgment, and defendant appealed. The District Court of Appeal, Draper, J., held that where third persons refused to pay bribes or submit to extortion, and they were intended victims of conspiracy and not participants therein, they were not "accomplices" and their testimony could be used by the prosecution to corroborate testimony of defendant's accomplice.

Judgment affirmed.

1. Criminal Law 🔑510

Uncorroborated testimony of an accomplice will not support a conviction. West's Ann.Pen.Code, § 1111.

2. Criminal Law 🔑511(10)

The testimony of one accomplice cannot serve to corroborate that of another accomplice. West's Ann.Pen.Code, § 1111.

3. Criminal Law 🔑507(1), 511(10)

If third persons knowingly aided or promoted conspiracy, they were principals, and thus accomplices, and their testimony could not serve to corroborate the testimony of accomplice of defendant. West's Ann.Pen.Code, §§ 31, 971, 1111.

4. Criminal Law 🔑507(1)

Where third persons refused to pay bribes or submit to extortion, and they were intended victims of conspiracy and not participants therein, they were not "accomplices", and their testimony could be used by the prosecution to corroborate testimony of defendant's accomplice. West's Ann.Pen.Code, §§ 31, 971, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

5. Criminal Law 🔑747

Where evidence is conflicting on an issue, the issue is for determination by the jury on proper instructions.

6. Criminal Law ⚷1144(14)

Where defendant did not challenge instructions or bring them before District Court of Appeal on appeal, District Court of Appeal was required to assume adequacy of instructions.

7. Criminal Law ⚷741(5)

In prosecution for conspiracy to violate gaming statute, weight of evidence to corroborate testimony of accomplices was for jury. West's Ann.Pen.Code, §§ 330, 1111.

8. Criminal Law ⚷1171(1)

Alleged misconduct of prosecuting attorney in examination of witnesses did not prejudice defendant.

9. Witnesses ⚷240(2)

The trial court has broad discretion in permitting leading questions. West's Ann.Code Civ.Proc. § 2046.

10. Witnesses ⚷242

A witness may be examined in an attempt to refresh his recollection by inconsistent statements made by him, when there is surprise. West's Ann.Code Civ. Proc. §§ 2049, 2052.

11. Criminal Law ⚷1170½(1)

Where prosecutor was surprised by testimony of hostile witness, and the witness was held in contempt for calling the prosecutor a liar, defendant was not prejudiced because prosecutor questioned witness in an attempt to refresh his recollection by inconsistent statements made by him. West's Ann.Code Civ.Proc. §§ 2046, 2049, 2052.

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Raymond G. Callaghan, Peter Anello, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., San Francisco, for respondent.

DRAPER, Justice.

Defendant was charged by indictment with four felony counts, as follows:

1. Conspiracy with Sam Miano to violate section 67 of the Penal Code (giving or offering bribes to executive officers).

2. Conspiracy with Sam Miano to violate section 518 of the Penal Code (extortion).

3. Conspiracy with Bartolme Losada to violate section 330 of the Penal Code (gaming).

4. Conspiracy with Meredith Nice to violate section 330 of the Penal Code (gaming).

A jury found him guilty on all four counts and he was sentenced to prison, the terms to run concurrently. He appeals.

The action against Miano (counts 1 and 2) was dismissed under Penal Code Section 1099 and he became a principal witness for the prosecution. The first two counts are related. That charging extortion concerns establishment of a protection racket involving operation of pinball machines in Santa Cruz County. The bribery count involves amounts paid by Miano to appellant in connection with the protection racket. There is evidence involving Charles L. Moore, Jr., then District Attorney of Santa Cruz County, although it is not contended that any bribe was actually accepted by him.

Miano, an operator of pinball machines, testified that appellant told him that there was a new district attorney, that Miano's machines were illegal, that he would have to pay for the right to continue in operation, and that he should secure specified amounts from Moncovich, Riggs and Cooper, other pinball operators, and pay to appellant the total, $4,000. Miano paid this sum to appellant and attempted, by threats made both by himself and appellant, to force the others to contribute. These occurrences, extending over a period of months, were punctuated by occasional seizing of machines and by inspections of machines by the district attorney or his employees. Riggs and Moncovich refused to make any payment for protection.

[1–6] Appellant does not deny that the testimony of Miano, if believed, shows conspiracy to bribe and to extort. He does contend that there is insufficient corroboration of this testimony. Clearly, Miano was an accomplice. As such, his uncorroborated testimony will not support the conviction. The testimony of Riggs and Moncovich amply corroborates that of Miano. Appellant does not controvert this view, but argues that they, too, are accomplices. The testimony of one accomplice cannot serve to corroborate that of another (People v. Clapp, 24 Cal.2d 835, 151 P.2d 237). Thus the question is whether Riggs and Moncovich were accomplices. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given" (Pen.Code, § 1111). Of course, if Riggs and Moncovich knowingly aided or promoted the conspiracy, they are principals, and thus accomplices (Pen.Code, §§ 971, 31; People v. Goldstein, Cal.App., 303 P.2d 892). It seems apparent, however, that Riggs and Moncovich were not accomplices. They refused to pay bribes or to submit to extortion. They were intended victims of the conspiracy, not participants, however remotely, in it. But even if there be merit to appellant's contention that there is a basis for inference that these witnesses were accomplices, it cannot avail him here. At most, his argument is that the evidence is conflicting upon this issue. In such a case, the issue is for determination by the jury upon proper instructions (People v. Goldstein, supra; People v. King, 30 Cal.App.2d 185, 85 P.2d 928). Appellant does not challenge the instructions nor has he brought them before this court. We must assume their adequacy (People v. Jackson, 88 Cal.App.2d 747, 199 P.2d 322).

[7] Count 3 deals with conspiracy with Losada to open and operate a gambling house near Davenport. Appellant supplied $1,500 for the operation, and was to receive one-third of the profits. The principal witnesses were Losada, the named co-conspirator, and Tabasa. Both were accomplices and here, again, appellant contends that corroboration is lacking. But Miano, who was not an accomplice as to the gambling operation, gave testimony subject to the construction that appellant had admitted to him his interest in this establishment. Also, there is testimony that Moore told Jehl of a proposed raid by the sheriff upon this establishment, and that it was closed before the raid occurred. Also, there was evidence of telephone calls and of other incidents which could amount to sufficient corroboration. Again, in the absence of any attack on the instructions, we must assume that the issue of corroboration as to this count was properly submitted to the jury and decided against appellant. The weight of the corroborative evidence is for the jury (People v. Trujillo, 32 Cal.2d 105, 112, 194 P.2d 681).

Appellant rented the garage of his home to Nice and Fine, at an extremely high rental, for the gambling operation charged in count 4. The testimony of these lessees establishes the conspiracy, but they were accomplices. Appellant himself testified that he rented the garage to another for operation as a cardroom, and that appellant agreed to furnish the labor for alteration of the garage for this purpose. He also admitted that the material for this alteration was bought by and invoiced to Nice, but that appellant, for purposes of trial, procured an invoice naming him, rather than Nice, as buyer. These are circumstances which the jury could well have found to be sufficient corroboration.

Appellant complains that, after impaneling of the jury, but before any witness was called, the court on its own motion dismissed juror Hawk and seated an alternate juror in his place. All the contentions in this regard, including claimed inadequacy of the grounds for the court's action and the absence of appellant from chambers at the time of examination of the dismissed juror, have been decided adversely to appellant in People v. Abbott, Cal., 303 P.2d 730. This decision, filed after appellant's brief herein, is determinative.

[8] Appellant also asserts misconduct of the prosecuting attorney in examination of witnesses. Many of the points now raised were not made the subject of objection at trial. When requested, and occasionally when not, the court admonished the jury that the statements of counsel are not evidence, and are to be disregarded. While we do not commend the conduct of the prosecution in all the instances cited by appellant, we cannot, upon the whole record, find that they prejudiced appellant (People v. Watson, 46 Cal.2d 818, 834 et seq., 299 P.2d 243; People v. Coakley, 108 Cal.App.2d 223, 238 P.2d 633).

[9–11] It is contended that the court erred in permitting the prosecution to ask leading questions of District Attorney Moore. The trial court has broad discretion in permitting leading questions (Code Civ.Proc. § 2046; People v. Mason, 86 Cal. App.2d 445, 455, 195 P.2d 60). Where the witness is hostile, there is but little danger in leading questions, as the witness is unlikely to follow the suggested lead (People v. Bliss, 41 Cal.App. 65, 71, 182 P. 63). Appellant also objects that the prosecuting attorney was permitted to "impeach" Moore. But the questioning in fact was an attempt to refresh the witness' recollection by inconsistent statements made by him. Such examination is allowed (Code Civ.Proc. §§ 2049, 2052) when there is surprise (People v. Spinosa, 115 Cal.App.2d 659, 668, 252 P.2d 409). Here the prosecutor claimed surprise, and the circumstances rather clearly showed it. Also, there was a clear showing of the hostility of the witness Moore. This witness was held in contempt for calling the prosecutor a liar. Under all the circumstances, we cannot hold the examination of Moore so prejudicial as to require reversal.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

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150 Cal.App.2d 621

Irwin H. MANDEL, Plaintiff and Appellant,

v.

GREAT LAKES OIL & CHEMICAL COMPANY, a corporation, et al., Defendants and Respondents.

Civ. 5601.

District Court of Appeal, Fourth District, California.

May 1, 1957.

Rehearing Denied May 20, 1957.

Hearing Denied June 26, 1957.

Action to quiet title to a mining claim on land which had previously been withdrawn from location by the government but was restored for entry on a certain date. Judgment for defendant in the Superior Court of Kern County, Norman F. Main, J., and the plaintiff appealed. The District Court of Appeal, Griffin, J., held that there was sufficient ratification of the acts of location by defendants' agents; that defendants had previously to the time of plaintiff's discovery made a valid bona fide discovery at the time the notice of location was posted; and that evidence sustained finding that the plaintiff's actions were in bad faith.

Judgment affirmed.

1. Mines and Minerals ⟹38(2, 14)

Plaintiff has the burden of proof in a quiet title action involving the possessory right to mining claims, and must stand upon the strength of his own title, and not upon any weakness of his adversary.

2. Mines and Minerals ⟹9

Location of a mining claim is not valid and is of no effect, unless lands and minerals involved are at time of such location in fact subject to appropriation under the mining laws.

3. Mines and Minerals ⟹9

A mining location would be void ab initio if made at a time when area covered by the location was included in a withdrawal which operated to preclude location, entry, and purchase, under the mining laws. West's Ann.Public Resources Code, § 2301.

4. Mines and Minerals ⚷14(1)

As between the government and the claimed locator the right to possession under the mining laws comes only from a valid location, and if there is no location, there can be no possession under it.

5. Mines and Minerals ⚷19(1)

In action to quiet title to a mining claim to lands that had previously been withdrawn from entry by the government but were restored on June 3, 1955, at 10 A.M. where defendants' notices of location were actually signed by witnesses and defendant locators a few minutes before 10 A.M. but the act of posting them was made by the locators or their authorized agent and was in the presence of the witnesses who signed on the day indicated, such was a sufficient ratification of their acts, and there was a substantial compliance with the law, and a valid notice of discovery was posted. Federal Power Act, § 24 as amended 16 U.S.C.A. § 818; West's Ann.Public Resources Code, § 2301; 30 U.S.C.A. § 23.

6. Mines and Minerals ⚷38(17)

In action to quiet title to a mining claim on land which had been withdrawn from entry by the government but was restored for entry on June 3, 1955, at 10 A.M. where defendants previous to plaintiff's valid and bona fide discovery of a vein or lode had made a valid bona fide discovery and produced uncontradicted evidence of such a discovery at the time the notice of location was posted, the defendants were entitled to prevail. Federal Power Act, § 24 as amended 16 U.S.C.A. § 818; West's Ann.Public Resources Code, § 2301; 30 U.S.C.A. § 23.

7. Quieting Title ⚷15

In a quiet title action, plaintiff should not be aided when the court finds upon sufficient evidence that he acted in bad faith.

8. Mines and Minerals ⚷38(15)

In action to quiet title to a mineral claim on land which had been withdrawn from entry by the government but had been restored at a certain time, evidence sustained finding that plaintiff's actions were clandestine and that he was acting in bad faith. Federal Power Act, § 24 as amended 16 U.S.C.A. § 818; West's Ann.Public Resources Code, § 2301; 30 U.S.C.A. § 23.

9. Mines and Minerals ⚷38(15)

In action to quiet title to a mining claim, refusing to admit as immaterial plaintiff's proffered exhibits constituting the plaintiff's location notices posted upon claims other than the one involved, was proper.

George L. Hecker and Nathan Schoichet, Beverly Hills, for appellant.

Charles L. Gilmore, Sacramento, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant Irwin H. Mandel brought this action against defendants and respondents Great Lakes Oil & Chemical company, a corporation (hereinafter referred to as Great Lakes) et al., to quiet title to a certain mining claim known as triumph No. 1, consisting of uranium and other oil-bearing minerals. This claim was mainly superimposed over No. 1 and No. 5 of ten such claims designated as Kergon Nos. 1 to 10, inclusive, previously located by defendants Jack Kernes and W. T. Waggoner in 1954 on Government lands in Kern County, at a time when said lands had been, for power site purposes, "reserved from entry, location, or other disposal under the laws of the United States until otherwise directed". Federal Power Act of June 10, 1920, Sec. 24, 41 Stat. 1075, 16 U.S.C.A. § 818. This land was restored for entry on April 28, 1955, effective June 3, 1955, at 10 a. m. The fact that it had been withdrawn was not discovered until the locators had otherwise fully complied with the law in reference to location, discovery work, building monuments, setting up corner posts, recording notices of such claims, had entered upon the claims, particularly No. 1 and No. 5, and had tunneled, drilled holes into and alongside a uranium-bearing vein extending partially through these two claims, and over which plaintiff's claim was subsequently placed on June 3, 1955.

On October 14, 1954, there was assigned to defendant Great Lakes the leasehold interest of Kerns and Waggoner in said property having an alleged value of $1,000,000. Great Lakes entered upon the claims, and fenced portions of them. Uranium ore was mined and deposited in a dump which was about 12 to 25 feet from the main highway passing by said mining property. There were other improvements installed and erected, which were valued at $80,000 at the time of trial. Practically all of these improvements were plainly visible to persons viewing the property from the road or entering upon the premises.

Upon discovery of the fact that this land was not open to location at the time, and since the government needed and was contracting for the output of all uranium, Great Lakes was instrumental in having the land restored so defendants' rights and interests could be protected. Accordingly, an order was obtained under the Federal Power Act for restoration of said lands for disposition under the Public Land Laws, as of June 3, 1955, at 10 a. m. Defendants then made prearranged, definite plans to locate or relocate these same ten claims on the date and hour fixed. Kerns and Waggoner, in order to remove any technical objections that might arise, had prepared by defendant Great Lakes, in its office in Los Angeles, in advance of June 3, a separate notice of location of each claim, 1 to 10, inclusive, describing them in particular, and they were forwarded to Kerns and Waggoner, who were at the claims. Shortly before 10 a. m. these notices were signed by two witnesses and then by Kerns and Waggoner. Defendants had obtained two watches, accurately set, and had arranged for a blast of dynamite to discharge exactly at 10 a. m. so these notices could be placed on the respective locations on the exact minute. The same discovery monuments previously set up as the points of discovery were used. Respondent Kerns was in the County Recorder's office in Bakersfield, about 30 minutes driving time from said claims, at the hour of 10 a. m. of said day and recorded copies of the notices posted. No trespassing signs were erected.

Plaintiff learned that this land was being restored on June 3, 1955, at 10 a. m. and apparently learned of defendants' predicament. He, with several others, started out a day or two before with a Nucleometer (a radiation detection instrument) to locate uranium ore bearing land. He claims he detected high readings in this area and made a griding of them; that on June 2, he had taken some rock out of the same area which had fluoresced and which he recognized as autunite; that some months before February, 1955, he had been on the same land and had picked up some mineral bearing ore on which he had a radiometric assay made and he claimed that he had found a type of uranium-bearing ore in place; that he was able to read a Nucleometer and such instruments and had staked out previous uranium claims; that he had in mind the fact that the area immediately surrounding his claim here involved had been developed for uranium mining and that uranium had been found and was being mined in the area; that he returned on June 3rd, five or six minutes before 10 o'clock, walked upon the property, took further readings, compared them, and determined the point of discovery. This point was about 40 or 50 feet from the deposit of uranium ore placed there by the mining operations. He claims that at 10 a. m. he dug a post hole, signed a notice of location, had it witnessed by two witnesses, attached a can to a 4 x 4 post placed in the hole, and placed a notice in the can "a few minutes" thereafter.

It further appears that plaintiff made some error in the description of the property claimed which was later discovered. On June 15, he filed and recorded an amended location notice and within 60 days after June 3rd, by stipulation of respective counsel and order of the court, plaintiff went upon the ground, marked the boundaries of his alleged claim, dug his discovery pit, and filed a statement of the marking of the boundaries and the performance of discovery work in the County Recorder's office on September 1, 1955. Each accused the other of claim jumping. It also developed that defendants found other notices posted by others the day before, but they were dated June 3, 1955, at 10 a. m., and hidden in cans in various places on the property. They were removed by defendants on June 2nd. Plaintiff left the property, drove to the County Recorder's office and recorded a copy of his notice of location. Thereafter defendants displaced plaintiff's 4 x 4 post and threw away his notice.

Apparently defendant Waggoner, the corporation agents and many deputy sheriffs and officers were present witnessing these proceedings. It rather indicates that plaintiff, or other persons, alerted the television and moving picture operators in this area of the contemplated action. They were all present and pictures were taken. The officers were successful in maintaining peace. Defendants' attorneys advised defendants not to interfere with plaintiff's activities up until 10 a. m., and after defendants had posted their notices, they could consider plaintiff a trespasser. Much publicity followed this occurrence with the headline: "Claims Staked—Courts Next." Such is the result.

Plaintiff's main contentions on this appeal are (1) That the location and occupancy of defendants, prior to the effective date of the restoration order, were ineffective to give defendants any superior or possessory rights, citing such authority as Minner v. Sadler, 59 Cal.App.2d 590, 139 P.2d 356; Hendrickson v. California Talc Co., 55 Cal.App.2d 467, 130 P.2d 806; Kendall v. San Juan Silver Mining Co., 144 U.S. 658, 12 S.Ct. 779, 36 L.Ed. 583; 16 U.S.C.A. § 818; and Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735. (2) That plaintiff made a sufficient discovery preceding the location of his claim, sufficient to meet the requirements of the law, and that defendants failed in this respect. He argues that defendants could not base their claim on a relocation or adoption of prior discovery, citing Public Resources Code Sec. 2301; Cascaden v. Bortolis, 9 Cir., 162 F. 267; and Kramer v. Gladding, McBean & Co., 30 Cal.App.2d 98, 85 P.2d 552. (3) That as between conflicting claims, priority of location, not posting, is the determining factor, citing Creede v. Cripple Creek Mining & Milling Co., 196 U.S. 337, 25 S.Ct. 266, 49 L.Ed. 501; Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735; Union Oil Co. of California v. Smith, 249 U.S. 337, 39 S.Ct. 308, 63 L.Ed. 635; and Duffield v. San Francisco Chemical Co., 9 Cir., 205 F. 480. (4) That defendants are in court with unclean hands and lacking in good faith. (5) That the trial court erred in refusing to admit in evidence two exhibits offered (Nos. 29 and 30). And (6) That the evidence is not sufficient to support the findings and that those made were predicated upon unconflicting evidence and are against the law.

It is defendants' position: *1.* That when land of the United States is in the possession of one who is mining it, a third party may not intrude to locate a mining claim upon it, citing such authority as Cosmos Exploration Co. v. Gray Eagle Oil Co., 9 Cir., 112 F. 4, 13, affirmed 190 U.S. 301, 23 S.Ct. 692, 47 L.Ed. 1064; Hendrickson v. California Talc Co., 55 Cal.App.2d 467, 130 P.2d 806; and Capron v. Van Horn, 201 Cal. 486, 497, 258 P. 77. *2.* That to establish the validity of a lode mining claim, it is necessary that there be proven a discovery by the locator of a vein or lode of rock in place bearing valuable minerals, citing such authority as Gwillim v. Donnellan, 115 U.S. 45, 47, 5 S.Ct. 1110, 29 L.Ed. 348; Tuolumne Consolidated Mining Co. v. Maier, 134 Cal. 583, 585, 66 P. 863; Garibaldi v. Grillo, 17 Cal.App. 540, 120 P. 425; and 30 U.S.C.A. § 23. *3.* That plaintiff's attempted location was invalid and defendants' location was valid and prior in point of time to that of plaintiff. And *4.* That the land was not vacant public land and plaintiff, under the circumstances, was lacking in good faith in coming upon the property and attempting to locate his mining claim, citing Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 74 P. 444; Newhall v. Sanger, 92 U.S. 761, 763, 23 L.Ed. 769; Tweedy v. Parsons, 217 Cal. 447, 19 P.2d 497; Little Sespe Consolidated Oil Co. v.

Bacigalupi, 167 Cal. 381, 385, 139 P. 802; and Noonan v. Caledonia Gold Mining Co., 121 U.S. 393, 7 S.Ct. 911, 30 L.Ed. 1061.

[1] The trial court found generally in favor of defendants and that plaintiff had not met the burden of establishing his title or right of possession to the claim as against these defendants. It is a well-established rule of law that plaintiff has the burden of proof in a quiet title action involving the possessory right to mining claims and must stand upon the strength of his own title and not upon any weakness of his adversary. McInerny v. Allebrand, 107 Cal. App. 457, 467, 290 P. 530. The court specifically found that plaintiff's posting and locating of the claims involved on June 3, 1955, was at a time at least 8 minutes subsequent to 10 a. m.; that plaintiff's allegation in his complaint that he was the first and sole discoverer and locator of said claim on said date was untrue; that by reason of the order of restoration plaintiff had the right to go upon the land for the purpose of exploring the same and to locate his mining claim and defendants also had such right; that the "pulling up and carrying away of plaintiff's discovery post and marker was wrongful". The judge stated, however, he considered the facts of the case as though they still remained in the former condition. He then found in respect to the allegations of the answer of Kerns and Waggoner generally that they were true; that these defendants, on June 3, 1955, at 10 a. m. were in actual and lawful possession of said claims, had been in open, notorious and visible possession of them a long time prior thereto, had discovered veins or lodes of uranium bearing materials, had mined and stockpiled the ore, and had previously located and performed all necessary work required by the State necessary to comply with the law in reference to these claims had the land been open for location; that defendants did, on June 3, 1955, re-discover and locate at exactly 10 a. m. of said day all of the lands described in plaintiff's complaint, duly recorded notice thereof, performed in discovery work required by law, properly marked and designated all boundary lines, and did erect proper boundary markers and end line markers. It then found defendants' allegation that plaintiff's entry upon said claims was not in good faith to be true; and that he made no discovery of any vein or lode or other material than the observation of the stored ore and material upon the surface of the ground previously extracted through the efforts of defendants. The finding then was that defendants now properly assert ownership and possession and have been the owners thereof since June 3, 1955, at 10 a. m.; that the entry of plaintiff upon the ground at that time was not authorized, was clandestine and not made in good faith. Judgment went for defendants.

[2–4] The general principle of law, as drawn from the authorities above cited, is that the location of a mining claim is not valid and is of no force and effect unless the lands and minerals involved are, at the time of such location, in fact subject to such appropriation under the mining laws, and that a mining location would be void ab initio if made at a time when the area covered by the location was included in a withdrawal which operated to preclude location, entry and purchase, under the mining laws, and that before such withdrawn lands can be made subject to location, entry and purchase under the mining laws, they must be restored from the withdrawal and returned to the original status as vacant, unwithdrawn, and unappropriated public land. Defendants concede this general rule. As between the government and the claimed locator the right to possession comes only from a valid location and if there is no location there can be no possession under it. Belk v. Meagher, 104 U. S. 279, 284, 26 L.Ed. 735. The question here presented was considered by this court in Hendrickson v. California Talc Co., supra, [Hearing denied]. It was there said, 55 Cal.App.2d at page 471, 130 P.2d at page 809:

> "There is no question that the attempted location of this claim * * was void as between the locators and

> the government * * * and that the same would be void as to third parties who acquired rights in the land. * * Even in such cases the general rule is that until a valid entry is made by another a mere occupancy of a mining claim, continued in good faith, may lead to a valid location and only the government can complain of such occupancy. * * * Even as against third parties the rights of an occupant were recognized in Capron v. Van Horn, 201 Cal. 486, 258 P. 77, 82. In that case the defendant settled upon land at a time when an order withdrawing it from entry was in force. The court there said: 'However, the fact that defendant's entry upon the land was unauthorized would not prevent his occupancy from becoming lawful, if, *before any right could vest in a third person,* the withdrawal order should be revoked and the land again restored to settlement and entry while occupied by the defendant.'" (Italics ours.)

Donley v. Van Horn, 49 Cal.App. 383, 391, 193 P. 514, 518, is to the same effect, and it is there said:

> "But if, during the occupancy of land that, for any reason, has been withdrawn from settlement and entry, it again is thrown open to settlement, the settler's occupancy ceases to be unlawful, it immediately becomes lawful, he no longer is a trespasser or intruder, and the land so occupied by him immediately ceases to be within the category of 'vacant' land."

See also Capron v. Van Horn, 201 Cal. 486, 497, 258 P. 77; Capron v. Montgomery, 114 Cal.App. 631, 300 P. 149; Capron v. West, 114 Cal.App. 633, 300 P. 149; Noonan v. Caledonia Gold Mining Co., supra; Butte & Superior Copper Co. v. Clark-Montana Realty Co., 249 U.S. 12, 39 S.Ct. 231, 63 L.Ed. 447; and Kendall v. San Juan Silver Mining Company, supra.

The determining question, therefore, as we view it, relates to the time and the sufficiency of defendant's claimed discovery and proof as compared to that of the plaintiff. As to the time, there is substantial evidence to support the finding of the trial court that defendants were first in point of discovery and posting of notice of discovery, as well as the recordation of such notice.

[5] Although it appears that defendants' notices of location were actually signed by the witnesses and defendant locators a few minutes before 10 a. m., the act of posting them was made by the locators or their authorized agent and was in the presence of the witnesses who signed on the day indicated. There was sufficient ratification of their acts. 17 Cal.Jur. p. 300, sec. 16, and cases cited. For all intents and purposes there was a substantial compliance with the law and a valid notice of discovery was posted. 17 Cal.Jur. p. 330, sec. 33; 17 Cal.Jur. p. 325, sec. 30, and cases cited.

[6] While it may be questioned whether plaintiff actually made a valid and bona fide discovery of a *vein or lode* within the meaning of Section 2301 of the Public Resources Code, West's Annotated California Codes, prior to his claimed location, it is apparent that defendants had previously made a valid bona fide discovery and produced uncontradicted evidence of such a discovery at the time the notice of location was posted. Platt v. Bagg, 77 Ariz. 214, 269 P.2d 715; Gwillim v. Donnellan, 115 U.S. 45, 47, 5 S.Ct. 1110; 29 L.Ed. 348; Tuolumne Consolidated Mining Co. v. Maier, 134 Cal. 583, 66 P. 863; King v. Amy & Silversmith Consolidated Mining Co., 152 U.S. 222, 14 S.Ct. 510, 38 L.Ed. 419; Garibaldi v. Grillo, 17 Cal.App. 540, 542, 120 P. 425.

[7–9] After considering the facts found, plaintiff's claim that defendants were guilty of bad faith falls with its own weight. The court's finding that plaintiff's actions were clandestine and that he was acting in bad faith is supported by the showing made. Plaintiff, through a quiet title action in equity, should not be aided when the court finds, upon sufficient evidence, that he acted in bad faith. Ehrhart v. Bowling, 36 Cal.App.2d 503, 508, 97 P.2d 1010. The court did not err in refusing to admit into evidence as immaterial plaintiff's proffered Exhibits numbers 29 and 30 for identification. They were plaintiff's location notices posted upon claims other than the ones here in question. This sufficiently disposes of the other questions raised on this appeal.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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150 Cal.App.2d Supp. 829

SOUTHERN CALIFORNIA EDISON COMPANY, etc., Plaintiff and Appellant,

v.

Lloyd S. COLEMAN, Jr., et al., Defendants and Respondents.

Civ. A. 9266.

Appellate Department, Superior Court,
Los Angeles County, California.
April 29, 1957.

Electric power company brought action against owners of airplane for damage to wires, poles, and equipment as result of collision of airplane with the wires when downdraft caused airplane to drop during approach for a landing. The Municipal Court of The Los Angeles Judicial District, Arthur S. Guerin, J., entered judgment adverse to the company, and the company appealed. The Appellate Department of the Superior Court, Swain, J., held that a pilot, whose plane falls and collides with ground installations, is not absolutely liable for damage thus caused, but is liable only in case he was guilty of negligence, which proximately caused the collision.

Judgment affirmed.

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A pilot, whose plane falls and collides with ground installations, is not absolutely liable for damage thus caused, but is liable only in case he was guilty of negligence, which proximately caused the collision.

Renwick, Woodbury & Barry, by David N. Barry, III, Los Angeles, for appellant.

Henshey & Beeman, by John A. Beeman, Hollywood, for respondents.

SWAIN, Judge.

The plaintiff appeals from a judgment on the merits in favor of the defendants. Plaintiff sued for damages to its wires, poles and equipment caused by defendants' airplane colliding with those wires a short distance south of an airport which defendants were approaching for the purpose of making a landing. The complaint alleges that the defendants were negligent. The implied finding of the trial court is that this allegation is untrue. Appellant argues that respondents were trespassers when they struck appellant's electric line and are therefore liable. Respondents argue and the court impliedly found that the trespass, if any, was unavoidable and the result of an act of God. The claimed act of God was a downdraft which caused the plane to drop to the level of the wires when it was too late for the pilot to avoid a collision.

The case presents this one important question of law. Is a pilot whose plane falls and collides with ground installations absolutely liable for damage thus caused or is he liable only in case he was guilty of negligence which proximately caused the collision? In Gallin v. Poulou, 1956, 140 Cal.App.2d 638, at page 645, 295 P.2d 958, at page 962, the court stated: "* * * in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity." This was not an airplane case but it compels us to consider the law of extrahazardous activity. In Johnson v. Central Aviation Corp., 1951, 103 Cal.App.2d 102, at page 111, 229 P.2d 114, at page 120, the court said: "It is true that the law formerly looked upon aviation as an ultra-hazardous activity and the Uniform Aeronautics Act which was once adopted in many states did impose absolute liability on the owner as well as the operator or lessee of every aircraft for any damage to person or property caused by its operation unless there was contributory negligence on the part of the injured person. However, this view has come to be modified and now it is considered that properly handled by a competent pilot an airplane is not an inherently dangerous instrument."

In Boyd v. White, 1954, 128 Cal.App.2d 641, 276 P.2d 92, Mr. Justice Peters sets out the history of the attempts to introduce into California statute law the concept of absolute liability of owners and operators of planes. All such attempts failed. At page 651 of 128 Cal.App.2d, at page 98 of 276 P.2d, he states: "'* * * the trend of decisions established it to be the general rule that, properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that in the absence of statute the ordinary rules of negligence control, and the owner (or operator) of an airship is only liable for injury inflicted upon another when such damage is caused by a defect in the plane or its negligent operation.'"

In Smith v. O'Donnell, 1932, 215 Cal. 714, 12 P.2d 933, the plaintiff was a passenger in defendant's airplane which collided in the air with the plane of one Ebrite. The court held that res ipsa loquitur applied against the defendant owner whose plane was being operated by a pilot in his employment at the time of the accident. It further held, 215 Cal. at page 723, 12 P.2d at page 936: "If the defendants successfully established under proper instructions that they were not guilty of any negligence, and that the accident occurred solely by reason of the negligence of Ebrite, then the defendants were not answerable in damages."

In San Diego Gas & Electric Co. v. United States, 9 Cir., 1949, 173 F.2d 92, the plaintiff sued for damages which were caused by a Coast Guard plane operated by a Coast Guard pilot striking the wires of the plaintiff electric company. The complaint alleged that the pilot was negligent. At the conclusion of plaintiff's evidence the trial court dismissed the action. The Circuit Court reversed the judgment holding (1) that the evidence would warrant the trial court in finding that there was negligence, and (2) that res ipsa loquitur applies. On page 94 it said:

> "The court further held that appellant's evidence did not bring the case within the doctrine of res ipsa loquitur. We do not know what the defendant's witnesses may show and this ruling may be invoked on the continuance of the trial which we order.
>
> "The Tort Claims Act, 28 U.S.C. § 931 (now § 1346), requires that the law of the place where the act complained of was done governs the liability of the United States. In California that doctrine applies where the complaint, as here, alleges negligence generally. * * In Smith v. Pacific Alaska Airways, 9 Cir., 89 F.2d 253, we applied the doctrine in an airplane case. The California supreme court also applied the doctrine in an airplane case, Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933 * * *."

There is no California case which holds that the pilot of a plane is liable for collision damage independent of negligence. The judgment is affirmed.

BISHOP, P. J., and KAUFFMAN, J., concur.

150 Cal.App.2d Supp. 823

PEOPLE of the State of California, Plaintiff and Appellant,

v.

Samuel I. TUROFF, Defendant and Respondent.

Cr. A. 3611.

Appellate Department, Superior Court, Los Angeles County, California.

April 17, 1957.

Prosecution for violation of business and profession code by allegedly hiring unregistered and unlicensed person to perform cosmetological services. The Municipal Court of the Los Angeles Judicial District, Harold C. Sheperd, J., entered judgment dismissing action on ground that statute was unconstitutional and state appealed. The Superior Court, Appellate Department, Swain, J., held that statute requiring that only registered and licensed persons practice cosmetology was not unconstitutional on ground that it was not of uniform application because of certain exceptions therein stated.

Reversed.

Constitutional Law ⚿205(5), 275(1)
Licenses ⚿7(3)
Statutes ⚿72

Statute requiring person performing cosmetological service to be duly registered and licensed by the State Board of Cosmetology, making certain exceptions as to persons demonstrating cosmetics and employed to render cosmetological services in the course of theatrical productions and the like, is not unconstitutional for lack of uniform application. West's Ann.Bus. & Prof.Code, §§ 7322–7324; West's Ann. Const. art. 1, §§ 11, 21; U.S.C.A.Const. Amend. 14.

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Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for appellant.

Thomas Higgins, Jr., Harold J. Ackerman, Los Angeles, for respondent.

SWAIN, Judge.

The People appeal from a judgment which dismissed the action without trial on the ground that Business and Professions Code, § 7383 is unconstitutional. The defendant was charged with four violations of said section. Count I of the complaint, which is identical with counts II, III and IV except for the name of the employee or the date, is as follows: "That on or about August 31, 1956, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 7383 of the Business and Professions Code of the State of California was committed by Samuel I. Turoff (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully at 610 South Broadway, in said City of Los Angeles, employ, allow to be employed, and permit to work, in and about a cosmetological establishment as a hairdresser and cosmetician and cosmetologist, as a junior operator, as a permanent waver, as an electrologist, as a junior electrologist and as a manicurist, a person, to wit: W. J. Wingate, who was not then and there duly registered and licensed by the State Board of Cosmetology." Respondent claims that the section is unconstitutional because it is not of uniform application as required by the 14th amendment of the United States Constitution and is discriminatory in violation of article 1, sections 11 and 21 of the Constitution of California. Article 1, of section 11 of the Constitution of the State of California provides: "All laws of a general nature shall have a uniform operation." Article 1, section 21, provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Respondent's claim that the section in question is not of uniform application and is discriminatory is based on the fact that Business and Professions Code, §§ 7322, 7323 and 7324 exempt certain persons from the licensing requirements of chapter X of that Code. These exemptions in brief are (1) Business and Professions Code, § 7322: "the domestic administration of any practice without compensation"; (2) Business and Professions Code, § 7323: "the recommendation, demonstration, administration or sale of cosmetics by any person not claiming himself to be a cosmetician."; (3) Business and Professions Code, § 7324: "Employees employed to render cosmetological services in the course of * * * theatrical, radio, television or motion picture production industry."

Respondent's position is untenable. Under number (1) above, respondent would have the legislature require a mother to be licensed if she washes her son's neck and ears or dresses her daughter's hair. Under number (2) above, respondent would have the legislature require that every store clerk or other person who demonstrates or sells cosmetics must be licensed as a cosmetologist or cosmetician. Under number (3) above, respondent would have the legislature require that a make-up artist in a theater, etc., be licensed, although the purpose of the work of such a person is very different from work in a beauty parlor. Furthermore, we may assume that a make-up artist would not be employed by a movie studio unless he is skilled in his art. It is obvious that the exempted persons are in inherently different classes from operators in a cosmetological establishment. 11 Cal.Jur.2d, 702, § 263: "General laws are those which operate alike upon all persons to whom they apply and apply equally to all persons in the same category within the jurisdiction of the lawmaking power. To be general in its scope an act need not include all classes of individuals; it answers the constitutional requirement if it relates to and operates uniformly upon the whole of any single class validly selected. Nor is an act rendered special by the mere fact that it does not cover every subject which the legislature might conceivably have included in it. It is enough that the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that they require special treatment." We decline, however, to be drawn into the position, on this appeal, of approving every provision of the Cosmetology Act, for it is clear to our minds that if the provision is valid, forbidding one to employ, for example, an unlicensed electrologist, then it was error to dismiss the action, as we have no difficulty in concluding that the Act constitutionally requires a license for an electrologist, even though it exempts him from certain of its provisions.

The judgment is reversed.

BISHOP, P. J., and KAUFFMAN, J., concur.

48 Cal.2d 526

Charles B. CASE, Petitioner,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

L. A. 24535.

Supreme Court of California,
In Bank.
May 8, 1957.

Prosecution for grand theft. After reversal of a judgment of conviction, trial court granted defendant's motion to reduce bail, and then vacated its order on ground of lack of jurisdiction, and defendant petitioned for a writ of mandate to compel trial court to restore its order reducing bail. The Supreme Court, McComb, J., held that section of penal code providing that court in which a charge is pending may increase or reduce amount of bail after a defendant had been admitted to bail upon indictment or information, authorized trial court to reduce, for good cause, amount of bail upon which a defendant could be released pending determination of his appeal from a judgment of conviction.

Writ issued.

Bail ⚷53

Section of Penal Code providing that court in which a charge is pending may increase or reduce amount of bail, after a defendant had been admitted to bail upon indictment or information, authorized trial court to reduce, for good cause, amount of bail upon which a defendant could be released pending determination of his appeal from a judgment of conviction. West's Ann.Pen.Code, § 1289.

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Cantillon & Cantillon, Beverly Hills, for petitioner.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This is a petition for a writ of mandate to compel the trial court to restore its order setting bail in the sum of $1,000.

Chronology

i. March 29, 1956, petitioner was convicted of grand theft in the superior court.

ii. May 3, 1956, petitioner filed a notice of appeal from the judgment of conviction, and the trial court fixed bail on appeal in the sum of $5,000.

iii. January 8, 1957, the District Court of Appeal reversed the judgment of conviction. People v. Case, 305 P.2d 694.

iv. January 9, 1957, the trial court granted petitioner's motion to reduce bail pending appeal to $1,000.

v. January 15, 1957, the trial court vacated its order reducing bail by a minute order stating that the action was taken "on the grounds of lack of jurisdiction."

vi. March 5, 1957, this court granted a hearing after decision of the District Court of Appeal and transferred the cause here for further proceedings.

This is the sole question presented for our determination: *Did the trial court have jurisdiction to make the order of January 9, 1957, reducing bail pending appeal to $1,000?*

Yes. Section 1289 of the Penal Code reads, in part, as follows: "After a defendant has been admitted to bail upon an indictment or information, the Court in which the charge is pending may, upon good cause shown, either increase or reduce the amount of bail."

The foregoing section authorized the trial court to either increase or reduce, for good cause, the amount of bail upon which petitioner could be released pending determination of his appeal from the judgment of conviction. (Cf. Frankfort v. Superior Court, 71 Cal.App. 357, 360 [2], 235 P. 60; see, also, 7 Cal.Jur.2d (1953), Bail and Recognizance, § 21, p. 568.) Therefore, the trial court was in error in holding that it lacked jurisdiction to make the order of

January 9, 1957, reducing petitioner's bail to $1,000.

The trial court is directed to vacate its order of January 15, 1957. Let a peremptory writ of mandate issue accordingly forthwith.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

48 Cal.2d 509

James Parks BRADLEY, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Frances (Bradley) Lane, Real Party in Interest.

S. F. 19646.

Supreme Court of California,
In Bank.

May 7, 1957.

Rehearing Denied June 5, 1957.

Contempt proceeding. The Superior Court, City and County of San Francisco, William T. Sweigert, J., adjudged defendant to be in contempt and, on his petition, a writ of certiorari was issued for purpose of reviewing order. The Supreme Court, Schauer, J., held that since it had been judicially determined that payments defendant was required to make, under settlement agreement incorporated in divorce decree, were an inseverable part of an integrated adjustment of all property relations of the parties and not a severable provision for alimony, enforcement of such payments by contempt proceeding was forbidden by constitutional prohibition against imprisonment for debt.

Order annulled.

Traynor, J., dissented.

1. Appeal and Error 🔑1008(3)

Even where conflicting extrinsic evidence is presented, reviewing court will adhere to interpretation placed by trial court on writings and conduct of parties if there is evidence, including inferences which it could reasonably draw, which supports trial court's interpretation.

2. Appeal and Error 🔑1008(3)

Mere fact that evidence had been presented by affidavit rather than orally would not require that it be weighed by reviewing court.

3. Husband and Wife 🔑279(1)

In contempt proceeding, evidence sustained finding that parties had not intended term "net income", in property settlement agreement incorporated in divorce decree, to mean "net income" as computed for income tax purposes, or that one-half of community income of husband and any subsequent wife should be excluded in computing percentage of "net income" payable to divorced wife.

4. Assignments 🔑11

Contract settling property rights of husband and wife did not constitute an "assignment" of wages or salary, within provisions of Labor Code section limiting such assignments, notwithstanding provision therein for payment by husband to wife of percentage of his net income. West's Ann.Labor Code, § 300.

See publication Words and Phrases, for other judicial constructions and definitions of "Assignment".

5. Divorce 🔑245(1), 254, 309

Decree is subject to modification if payments therein provided are for alimony, maintenance or support, even though based on property settlement agreement, but not if they are, in themselves, an integral part of adjustment of property rights.

6. Constitutional Law 🔑115, 116

Neither court nor legislature may impair obligation of valid contract, and court cannot lawfully disregard provisions of such a contract or deny to either party his rights thereunder. West's Ann.Const. art. 1, §§ 1, 16.

7. Constitutional Law ⚷83(3)

In construing constitutional provisions against imprisonment for debt, all doubts should be resolved in favor of liberty of citizen. West's Ann.Const. art. 1, § 15.

8. Constitutional Law ⚷83(3)

Notwithstanding constitutional inhibition against imprisonment for debt, court may punish by imprisonment, as a contempt, willful act of spouse (or former spouse) who, having ability and opportunity to comply, deliberately refuses to obey valid order to pay alimony or allowance for support of other spouse (or former spouse). West's Ann.Const. art. 1, § 15.

9. Divorce ⚷236

Merely adding consensual element of agreement to pay support does not obliterate existing legal duty, and in absence of waiver by contracting spouses of reciprocal rights to support other than as provided in agreement, either party may properly seek to enforce, in divorce proceeding, obligations imposed by law as incidents of marriage.

10. Divorce ⚷236, 269(1)

Where spouses bargain with each other and agree that terms of their contract shall thereupon and thenceforth grant, delimit and exclusively define their rights and obligations inter se, then it is to the contract alone, and to conventional civil proceedings for enforcement of contract rights, that they must look for remedy in event of breach; and while inclusion of such contract in judgment of divorce may furnish basis for subsequent proceedings leading to issuance of writ of execution, it cannot support commitment to imprisonment for failure to pay judgment debt. West's Ann.Const. art. 1, § 15.

11. Divorce ⚷231, 269(1)

The term "alimony" does not contemplate a settlement of property interests or general endowment of wealth, and it is solely to attain object of providing food, clothing, habitation, and other necessaries for support that law imposes such obligation, which is regarded as something other than a "debt" and which may be enforced by contempt proceeding upon appropriate showing. West's Ann.Const. art. 1, § 15.

See publication Words and Phrases, for other judicial constructions and definitions of "Alimony" and "Debt".

12. Constitutional Law ⚷83(3)

Obligation to make payments, provided in property settlement agreement, which are found to constitute adjustment of property interests, rather than severable provision for alimony, falls within constitutional proscription against imprisonment for "debt". West's Ann.Const. art. 1, § 15.

13. Constitutional Law ⚷83(3)
Divorce ⚷237, 245(1), 247
Husband and Wife ⚷283(1, 4), 299(3)

Payments which fall into category of law-imposed alimony or separate maintenance are based upon statutory obligation of marital support; may be modified by court upon proper showing; ordinarily terminate with death of either party; and may properly be held not to constitute a "debt" within meaning of constitutional provision. West's Ann.Const. art. 1, § 15.

14. Constitutional Law ⚷83(3)

Where it had been judicially determined that payments husband was required to make, under settlement agreement incorporated in divorce decree, were an inseverable part of an integrated adjustment of all property relations of the parties and not a severable provision for alimony, enforcement of such payments by contempt proceeding was forbidden by constitutional prohibition against imprisonment for debt. West's Ann.Const. art. 1, § 15; West's Ann. Labor Code, § 300; West's Ann.Civ. Code, § 139.

◆

Sullivan, Roche, Johnson & Farraher and James Farraher, San Francisco, for petitioner.

No appearance for respondent.

Aaron N. Cohen, Sidney Rudy and Ted Finman, San Francisco, for real party in interest.

SCHAUER, Justice.

A writ of certiorari was issued for the purpose of reviewing an order of the superior court adjudging petitioner to be in contempt for refusing to make certain payments to his former wife in accordance with the provisions of their property settlement agreement and decree of divorce, and directing that petitioner be imprisoned if he fails to comply with the court's order of payment. We have concluded that although upon the record before us certain of petitioner's contentions concerning interpretation of the provisions of the property settlement agreement cannot be upheld, the order directing his imprisonment for contempt upon his continued failure to make payment should nevertheless be annulled as in violation of the constitutional prohibition against imprisonment for debt. (Cal.Const., art. I, § 15.)

In May, 1946, petitioner and his then wife, Frances, entered into a property settlement agreement in which it is declared that the parties owned both community and separate property, and that they desired to agree to a separation and to settle and determine their respective property rights and to provide for the care and custody of their two minor children. The agreement further declares that it "is intended as a Property Settlement Agreement and to *refer only to property rights.* * * *" (Italics added.) The wife then instituted divorce proceedings in the state of Nevada and in June, 1946, was awarded a default divorce decree. Such decree by its terms purports to order, among other things, that the written property settlement agreement between the parties dated May 14, 1946, is "hereby approved, ratified, confirmed and adopted by the Court, and by reference made a part of this judgment and decree * * * and each of the parties is hereby ordered to carry out * * * each and all of the provisions by him or her respectively required under the terms of said agreement * * *".

In September, 1952, the Nevada decree was established in California as a decree of respondent superior court and such California decree declares that "the parties are hereby ordered to perform each and every obligation provided for by" the Nevada decree. The California decree was affirmed on appeal and became final in June, 1954. (See Lane v. Bradley (1954), 124 Cal.App.2d 661, 268 P.2d 1092.)

Under the property settlement agreement petitioner agreed, among other things, to transfer certain real and personal property to the wife, Frances, and to place in escrow as security for performance of his obligations under the agreement certificates evidencing 40,000 shares of stock of Bradley Mining Company, which stock is the property of petitioner; under certain circumstances the stock could be sold with the proceeds going to Frances. Petitioner further agreed to pay to Frances "forty per cent. (40%) of his net income, commencing January 1st, 1947, exclusive of capital gains and losses and distributions out of capital, but before deduction of income taxes or charitable contributions, less one per cent. (1%) of such net income for each 1,000 shares of said 40,000 shares of capital stock of Bradley Mining Company placed in escrow which have been sold with the consent of First Party [Frances] pursuant to * * * this contract."

Following the Nevada divorce, petitioner remarried in March, 1948, and Frances remarried in October, 1948. For four and one-half months after his remarriage petitioner computed his payments to Frances on the theory that half his income belonged to his new wife as community property and that therefore he was obligated to pay to Frances forty per cent of only his one-half of such community income. Petitioner was then advised by the attorney *who had represented both parties in preparing the property settlement agreement* that his apportionment theory was erroneous in that his remarriage did not affect the computation of the amounts accruing under his obligations to Frances. Thereafter, from August, 1948, until he secured independent counsel in March, 1950, petitioner computed his payments to Frances without any adjustment based on his remarriage. Then such independent counsel advised petitioner that in his opinion petitioner was obligated to pay to Frances only forty per cent of one-half of the community income of petitioner and his new wife, and, further, that the words "net income" as used in the property settlement agreement meant net income as computed for income tax purposes (that is, gross income less certain deductions not theretofore taken by petitioner in computing his payments to Frances). Relying upon such advice petitioner paid Frances only $1,800 during the year 1950. (The factual data used for computing such amount are not shown in the present record.)

Thereafter, in April, 1951, petitioner consulted different independent counsel and was advised that the remarriage of Frances terminated petitioner's obligations to pay to her forty per cent of his net income and that he had already overpaid her under the terms of the property settlement agreement. Petitioner thereupon ceased all such payments, and in June, 1951, Frances commenced the action[1] by which the Nevada divorce decree was established as a decree of the California superior court. Petitioner defended the action on the ground that the provision for payment to Frances of forty per cent of his net income was an alimony provision and therefore was terminated by the remarriage of Frances. The trial court made its findings and conclusions to the effect that petitioner's obligation to make payments to Frances was a continuing one which "has not terminated or been diminished by reason of the remarriage of plaintiff [Frances] or for any other reason." Judgment was entered awarding Frances recovery of the sums accrued to that date on the theory indicated in the above mentioned findings and conclusions, and establishing the Nevada decree in this state. As hereinabove mentioned, the judgment, which became final in June, 1954, also ordered the parties "to perform each and every obligation provided for by" the Nevada decree.

In February, 1955, Frances instituted the present contempt proceeding, asserting that since June 16, 1951, petitioner has wilfully failed and refused to pay to her forty per cent of his net income, except for a payment of $15,000 on account, and that as of February, 1955, he owed her an additional $37,969.30. Petitioner defended on the ground that the term "net income" should be construed so as to permit him to make various deductions and that one-half his salary (i. e., one-half of the community income of himself and his present wife) should be excluded on the theory that it was not his income but belonged to such wife.

The evidence which was presented to the trial court consisted in part of the judgment roll in the California action. In addition testimony was submitted in the form of affidavits. The court found that in using the term "net income" the parties had not intended that petitioner be allowed any of the deductions for which he contended or that a half of the community income be excluded in case he remarried. Judgment was rendered accordingly, and petitioner was held in contempt and ordered imprisoned unless he made installment payments to Frances pursuant to a schedule set forth in the order of contempt and commitment. This petition for review followed.

[1, 2] Petitioner, contending that the trial court erred in its finding as to the meaning of the term "net income," cites (Messenger v. Messenger (1956), 46 Cal.2d 619, 626 [4], 297 P.2d 988) and quotes the rule that "In the absence of conflicting extrinsic evidence as to the meaning of the agreement, the trial court's interpretation of it is not binding on this court." But

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[1] Hereinafter for brevity referred to as the California action.

where, as here, conflicting extrinsic evidence was presented, the quoted rule does not apply. On the contrary, under such circumstances if there is evidence which supports the trial court's interpretation, including inferences which it could reasonably draw, the court on appeal will adhere to the interpretation placed by the trial court on the writings and conduct of the parties. (Quader-Kino A. G. v. Nebenzal (1950), 35 Cal.2d 287, 294 [1], 217 P.2d 650, and cases cited therein; Abbott v. Hauschild (1952), 113 Cal.App.2d 383, 387 [2], 248 P.2d 41.) Petitioner's suggestion, that because in the present case the evidence was presented by affidavit rather than orally it will be weighed by an appellate court, is without merit. (See Riley v. Turpin (1956), 47 Cal.2d 152, 301 P.2d 834.)

[3, 4] Following the rule stated, it appears that the evidence supports the trial court's interpretation of the agreement here involved, based upon its finding as to the intent of the parties. Such supporting evidence consists of affidavits of Frances and of the attorney who drafted the agreement, the language of the agreement itself, and petitioner's own conduct. Inasmuch as petitioner argues the weight of the evidence rather than seriously urging that there is no evidence whatsoever supporting the trial court's construction of the agreement, no useful purpose would be served by here relating the evidence in detail.[2] Petitioner's argument

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2. The following portions of the oral opinion rendered by Judge Sweigert ably summarize much of the evidence which supports his (the trial court's) decision: "[T]here is no better place to look for enlightenment than to the conduct of the parties themselves * * * [T]he admissions and the attitude of the defendant husband in litigation and his acquiescence for a long period following the executions of the agreement furnish powerful rebuttal of his present claims. According to the evidence in the present case, the defendant husband from the date of the agreement, May 14th, 1946, to at least March 16th, 1948, the date of his own remarriage, a period of nearly two years, computed his net income and performed the agreement without ever asserting any of the deduction rights which he now claims * * * Now after his remarriage, March 16th, 1948, the defendant did express the opinion that his new wife's community share of his salary should be excluded and he acted on that view for several months until advised to the contrary by * * * the attorney who had represented both parties in the drafting of the agreement. * * * So far as appears no other deduction rights of any kind were ever asserted or even mentioned until March, 1950, when the defendant consulted another counsel * * * who confirmed his view regarding the deduction of the community interest of his wife and who also raised the point, apparently for the first time, that the defendant was further entitled to take all income tax deductions. * * * Thereupon the defendant ceased payments on the theory that he already had overpaid the plaintiff.

"It should be noted, however, that the defendant husband himself concedes that his first belief that he could exclude all income tax deductions was in March, 1950. That appears in defendant's affidavit * * *

"In April, 1951, the defendant husband consulted other and additional counsel who then advised him that all of his obligations under the contract had been terminated by the plaintiff's remarriage of October 21st, 1948. What advice if any was received by him in April, 1951, regarding possible deductions under the contract does not appear. At any rate, when the action to establish and enforce the Nevada decree was commenced in June, 1951, the complaint alleged that between January 1st, 1950, and June 15th, 1951, the defendant's net income had been a given amount, thirty-three thousand some odd dollars. This allegation was admitted by the defendant in his answer, although the fact of the matter was that that amount was, in fact, a computation without regard to any of the deductions now claimed by the defendant. * * * The sole point raised by the defendant in the suit was not formula for net income but the effect of the plaintiff's remarriage upon the contract obligations of the defendant.

"It is rather difficult for a court to see how a man of considerable wealth, accustomed to keeping accounts, conscious of tax and other factors, and having available at all times the advice of accountants and counsel of his own choosing, would continue to pay out under a that since his remarriage his present wife's community (one-half) interest in his earnings must be deducted before computation of the forty per cent payable to Frances, likewise is without merit in view of the trial court's determination that such a deduction was contrary to the intentions of petitioner and Frances at the time they executed their contract. Further, such a contract settling property rights does not constitute an assignment of wages or salary within the provisions of section 300 of the Labor Code, limiting such assignments.

[5–14] Petitioner further contends that to imprison him for failure to make payments to Frances under the property settlement agreement here involved would violate the provisions of the state Constitution forbidding imprisonment for debt. (Cal.Const., art. I, § 15.[3]) This contention is sound. In the California action it was specifically and finally determined, as between the parties, that the payments here involved are "an inseverable part of an integrated adjustment of all property relations of the parties and not * * * a severable provision for alimony," and that therefore section 139 of the Civil Code did not apply so as to terminate, upon the remarriage of Frances, petitioner's obligation to make such payments. (Lane v. Bradley (1954), supra, 124 Cal.App.2d 661, 666–667, 268 P.2d 1092.) And as already mentioned herein, the property settlement agreement itself declares that it "is in-

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contract substantial amounts over and above that which he himself contemplated and intended when the contract was made. In these circumstances such alleged overpayments are not explainable by inadvertence or ignorance; the only reasonable conclusion is that the defendant husband paid out exactly what he believed and originally intended to be his obligations under the terms of the contract until he was advised long after the contract was made that it could be interpreted to mean something different than his own original intent. But in this situation we go even further than that. It appears here that after the defendant husband received express advice concerning a possible interpretation of the contract, even then in a formal lawsuit pending in which his obligations under the contract were involved, [he] makes a formal admission of fact which is counter to the interpretation of the contract which he now claims. For these reasons * * * I have come to the conclusion that even assuming this contract to be susceptible of the interpretation placed on it by the plaintiff wife and also susceptible of the interpretation placed upon it by the defendant husband, and even assuming that the contract is ambiguous in that respect, that the evidence of the conduct and performance of the defendant husband is such that any doubt concerning the meaning of the contract according to its terms must be resolved in accordance with the kind of performance which the defendant rendered under it for a considerable period rather than in accordance with his presently-asserted interpretation of the contract.

"Now for these reasons I will make a ruling * * * that the Nevada decree of June 24th, 1946, as established herein September 26th, 1952, and the property agreement of May 14th, 1946, approved and made a part of the decrees, must be interpreted to express an intention of the parties that the defendant was to pay 40 per cent of his net income * * * exclusive of capital gains and losses and distributions out of capital, but before [the various deductions presently claimed by defendant] * * *

"* * * I have separately considered the question whether or not the defendant's claim that the half-community interest of his present wife in his salary should be deductible under this contract, but I have come to the conclusion that * * * it could not be deducted under any * * * theory of interpretation of the agreement. It seems to me that agreement was negotiated in contemplation of the defendant husband's income at the time of the separation of the parties. It would be unreasonable to assume that the parties had in mind but did not mention a non-existent but possible future event which would suddenly and substantially alter the factors of the defendant's income * * *"

[3] "Sec. 15. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

tended * * * to refer only to property rights. * * *" It is, of course, also the rule that a decree is subject to modification if the payments therein provided are for alimony, maintenance or support, even though based on a property settlement agreement, but not if, as already determined in this case, they in themselves are an integral part of an adjustment of property rights. (Codorniz v. Codorniz (1950), 34 Cal.2d 811, 814, 215 P.2d 32; Hough v. Hough (1945), 26 Cal.2d 605, 612–615, 160 P.2d 15.) Or, as declared in Dexter v. Dexter (1954), 42 Cal.2d 36, 41–42, 265 P.2d 873, "to the extent that they [monthly payments] represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties." Neither the court nor the Legislature may impair the obligation of a valid contract (Cal.Const., art. I, §§ 1, 16) and a court cannot lawfully disregard the provisions of such contracts or deny to either party his rights thereunder. (Majors v. Majors (1945), 70 Cal.App.2d 619, 627 [10], 161 P.2d 494; see also McClure v. McClure (1893), 100 Cal. 339, 343, 34 P. 822; Hensley v. Hensley (1918), 179 Cal. 284, 287–288, 183 P. 445; Miller v. Superior Court (1937), 9 Cal.2d 733, 737 [4], 72 P.2d 868; Hill v. Hill (1943), 23 Cal.2d 82, 90, 142 P.2d 417; Adams v. Adams (1947), 29 Cal.2d 621, 624 [1], 177 P.2d 265; Patton v. Patton (1948), 32 Cal.2d 520, 524, 196 P.2d 909.)

Although, "As in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt" (11 Am.Jur. 1128, § 327; see also id., 670, § 59; 16 C.J.S. Constitutional Law, § 204(1), p. 1004), a court may nevertheless punish by imprisonment as a contempt the willful act of a spouse (or former spouse) who, having the ability and opportunity to comply, deliberately refuses to obey a valid order to pay alimony or an allowance for the support of the other spouse (or former other spouse). It is held that the obligation to make such payments is not a "debt" within the meaning of the constitutional guaranty against imprisonment for debt. (Miller v. Superior Court (1937), supra, 9 Cal.2d 733, 737 [3], 72 P.2d 868; Ex parte Spencer (1890) 83 Cal. 460, 465, 23 P. 395; see also 11 Am.Jur., 1129–1130.)

Where, however, the payments provided in a property settlement agreement constitute an adjustment of property interests, rather than alimony, support, or maintenance, the more generally prevailing rule is stated to be that decrees based thereon are not enforceable by contempt proceedings. (154 A.L.R. 466, 468–469.) The rule in Washington is "that the provisions of such [divorce] decrees, as they relate to the payment of money (as distinguished from alimony or support money for children), cannot be enforced by contempt proceedings. [Citations of Washington cases.] As pointed out in Corrigeux v. Corrigeux, Wash. [1950], 224 P.2d 343, back of these cases is the constitutional provision that there can be no imprisonment for debt (state constitution, Art. I, sec. 17), together with holdings by this court and courts generally that alimony and support money for children is not a debt within the purview of such constitutional provisions." (Robinson v. Robinson (Wash.1950), 225 P.2d 411, 413.) In Maryland it has been held that only modifiable alimony payments may be enforced by contempt, and that both child support and unmodifiable payments based on the parties' written agreement (even though such payments might be characterized as "alimony" in the court's order in the divorce proceedings) fall within the constitutional provision prohibiting imprisonment for debt. (Bushman v. Bushman (1929), 157 Md. 166, 145 A. 488, 491–492; Dickey v. Dickey (1928), 154 Md. 675, 141 A. 387, 390, 58 A.L.R. 634.) Further, it appears that in Michigan "The fact that the court's award, made pursuant to or in accordance with the parties' agreement, includes both alimony and a property settlement (or a settlement in lieu of dower, or other obligation not enforceable by contempt proceedings) commingled in such a way that it does not appear, from the provisions of the decree, what amount of the award is alimony and what amount property settlement (or other obligation), has been deemed to preclude the enforcement of such award by contempt proceedings." (154 A.L.R. 475.)

No California case has been cited or discovered in which the point has been squarely presented and passed on. In Miller v. Superior Court (1937), supra, 9 Cal.2d 733, 737, 72 P.2d 868, enforcement by contempt was allowed of the provisions of a property settlement agreement providing for the payment of $75 a month. However, the court there pointed out (at page 739 of 9 Cal.2d, at page 872 of 72 P.2d) that "The basis of the obligation in the case of an approval [of a property settlement agreement] and order to pay, as in the case of an award of allowance not based on agreement, is the statutory obligation of *marital support* which is not a 'debt' within the meaning of the constitutional provision. We are of the view that the order to *pay a monthly allowance*, even though in accordance with the agreement of the parties, is not a 'debt' within the meaning of the constitutional prohibition." (Italics added.) That is to say, there may be situations in which the fact that a party has agreed to pay some fixed or ascertainable amount as alimony does not change or control the character of the obligation sought to be enforced by the other. Merely adding the consensual element of agreement to pay support does not obliterate an existing legal duty. In the absence of a waiver by the contracting spouses (expressly or by necessary implication) of reciprocal rights to support other than as provided in the agreement, either party may properly seek to enforce in the divorce proceeding the obligations imposed by law as incidents of the marriage. But where the parties bargain with each other and agree that the terms of their contract shall thereupon and thenceforth grant, delimit and exclusively define their respective rights and obligations *inter se*, then it is to the contract alone, and to conventional civil proceedings for the enforcement of contract rights, that they must look for a remedy in the event of breach. Inclusion of such a contract in a judgment of divorce may furnish a basis for subsequent proceedings leading to issuance of a writ of execution but cannot support a commitment to imprisonment for failure to pay the judgment debt.

In In re Lazar (1940), 37 Cal.App.2d 327, 99 P.2d 342, the theory that the payments ordered were analogous to support money was in part relied upon to support enforcement by contempt of a property settlement agreement carried into the divorce decree. It may be also noted that that case, citing Miller v. Superior Court, supra, asserts (at page 331 of 37 Cal.App.2d, at page 343 of 99 P.2d) that compliance with an order "directing the settlement of separate property rights, may be enforced by imprisonment," whereas, as already pointed out, the decision in the Miller case actually rested upon the theory of marital support. Further, the payments provided by the property settlement agreement involved in In re Lazar were, some nine months later, stated by this (Supreme) court to be for alimony, support and maintenance of the wife, rather than as an adjustment of property rights. (Lazar v. Superior Court (1940), 16 Cal.2d 617, 621–622 [5], 107 P.2d 249.) The case of Tripp v. Superior Court (1923), 61 Cal. App. 64, 67, 214 P. 252, also relied upon in In re Lazar, likewise appears to turn in part upon the husband's obligation to make "proper provision for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action." Moreover, no mention of the constitutional provision is made in the Tripp case, and the holding that the property settlement agreement and divorce decree there involved were enforceable by contempt proceedings was reached without citation of authority in support thereof.

It is to be recognized that the term "alimony" does not contemplate a settlement of property interests or general endowment of wealth. "Like the alimentum of the civil law, from which the word was evidently derived, it has for its sole object the provision of food, clothing, habitation, and other necessaries for * * * support." (17 Am. Jur. 406, and cases cited, note 12.) It is to attain that "sole object" that the law imposes an obligation which is regarded as something other than a debt and which may be enforced by contempt proceedings upon appropriate showing. Here the judgment manifestly purports to sanction a negotiated agreement rather than an obligation imposed by law.

We are satisfied that the better view is that payments provided in a property settlement agreement which are found to constitute an adjustment of property interests, rather than a severable provision for alimony, should be held to fall within the constitutional proscription against imprisonment for debt. That is, if the obligation sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations, the remedy must be appropriate to the right asserted. Payments which fall into the category of law-imposed alimony or separate maintenance are based upon the statutory obligation of marital support, may be modified by the court upon a proper showing, ordinarily terminate with the death of either party, and may properly be held not to constitute a "debt" within the meaning of the constitutional provision. No such case for special exemption from the constitutional proscription can be made where the payments represent the result of a bargain negotiated by the parties in adjustment of their respective interests, and any implications to the contrary which may be found in the following cases are disapproved: In re Rasmussen (1922), 56 Cal.App. 368, 205 P. 72; Ex parte Weiler (1930), 106 Cal. App. 485, 289 P. 645; In re Lazar (1940), supra, 37 Cal.App.2d 327, 99 P.2d 342; Seymour v. Seymour (1937), 18 Cal.App.2d 481, 64 P.2d 168; Tripp v. Superior Court (1923), supra, 61 Cal.App. 64, 214 P. 252; Shogren v. Superior Court (1949), 93 Cal. App.2d 356, 364, 209 P.2d 108.

Inasmuch as it has been finally determined, as between these parties, that the payments to be made by petitioner to Frances in the present case constitute "an inseverable part of an integrated adjustment of all property relations of the parties and not * * * a severable provision for alimony" (Lane v. Bradley (1954), supra, 124 Cal.App.2d 661, 666–667, 268 P.2d 1092), we conclude that enforcement of such payments by contempt proceedings is forbidden by the constitutional prohibition against imprisonment for debt. This conclusion makes unnecessary a discussion of other attacks made by petitioner upon the contempt order.

For the reasons above stated, the order holding petitioner in contempt is annulled.

GIBSON, C. J., and SHENK, SPENCE and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the judgment annulling the contempt order and I agree generally with the views expressed in the majority opinion, but since certain decisions of this court, Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988, with which I do not agree are cited and relied upon in the majority opinion, I feel constrained to withhold my unqualified concurrence therefrom.

In the recent case of Herda v. Herda, Cal., 308 P.2d 705, I took occasion in a concurring and dissenting opinion to call attention to the great confusion which now exists in this field of law due to irreconcilable conflicts in the decisions of this court and the appellate courts of this state. Since the main issue in the case at bar involves the interpretation and application of article I, section 15, of the Constitution of California there is no need for further discussion relating to this conflict.

TRAYNOR, Justice.

I dissent.

The majority opinion concedes that an alimony award based on the agreement of the parties is enforcible by contempt, see also, Holloway v. Holloway, 130 Ohio St. 214, 198 N.E. 579, 154 A.L.R. 449, since it is sufficiently related to the statutory duty of support incident to the marriage relationship as to be outside the constitutional prohibition of imprisonment for debt. Cal. Const. art. I, § 15. Rights and duties with respect to property growing out of the marriage relationship and crystallized in a court order are likewise outside the scope of that provision. Such an order has not less a special character because it is based on an agreement of the parties than an alimony award based on such an agreement. Indeed, in some states the very theory underlying use of contempt to enforce awards of alimony is that alimony is itself an adjustment of property rights. Lyon v. Lyon, 21 Conn. 185, 196–197; State ex rel. Cook v. Cook, 66 Ohio St. 566, 64 N.E. 567, 568, 58 L.R.A. 625; West v. West, 126 Va. 696, 101 S.E. 876, 877.

Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252, Petry v. Superior Court, 46 Cal.App.2d 756, 116 P.2d 954, and Seymour v. Seymour, 18 Cal.App.2d 481, 64 P.2d 168, upheld the use of contempt to enforce orders pursuant to property settlements even though they were not in lieu of the statutory duty of support. See also, Sullivan v. Superior Court, 72 Cal.App, 531, 535, 237 P. 782; Ex parte Weiler, 106 Cal.App. 485, 488, 289 P. 645; Shogren v. Superior Court, 93 Cal.App.2d 356, 364, 209 P.2d 108; Young v. Superior Court, 105 Cal.App.2d 65, 67, 233 P.2d 39. Although the court stressed the duty of support as a basis for contempt in Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868, it cited with approval the Seymour and Tripp cases and expressly refused to follow the Maryland cases, Dickey v. Dickey, 154 Md. 675, 141 A. 387, 58 A.L.R. 634; Bushman v. Bushman, 157 Md. 166, 145 A. 488, now invoked by the majority opinion.

Even if the statutory duty of support were the sole justification for enforcing such court orders by contempt, the majority opinion would still be in error in stating that an order to make payments pursuant to an integrated bargain cannot be so enforced, when the wife has not remarried. In Dexter v. Dexter, 42 Cal.2d 36, 41–42, 265 P.2d 873, 876, we stated: "When, as in this case * * *, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. [Citations.] On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseperable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties." So long as the wife has not remarried, the characteristics of the support and maintenance obligation remain and alone justify enforcement by contempt. Such a rule is implicit in the Miller case, where the court took care to point out that the payments were pursuant to a property settlement and could not be changed without the consent of the parties. 9 Cal.2d at page 740, 72 P.2d at page 872 (see also, concurring and dissenting opinion of Carter, J., in Dexter v. Dexter, 42 Cal.2d 36, 45, 265 P.2d 873, 879, "The rule in such a case should be that if the entire agreement is approved by the court and part of its provisions are incorporated in the decree and ordered to be performed, those portions included in the decree may be enforced by contempt proceedings.")

Even if the obligation to make the payments pursuant to the order of the court did constitute a debt within the meaning of the constitutional provision, the obligor's wilful refusal to make them when he is able to do so would be a "case of fraud" within the meaning of the exception in that provision. In sustaining the validity of a criminal statute dealing with nonpayment of wages this court stated: "The historical background of section 15 of article I and similar constitutional guaranties of other states clearly shows that the provisions were adopted to protect the poor but honest debtor who is unable to pay his debts, and were not intended to shield a dishonest man who takes an unconscionable advantage of another. [Citations.] It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due. [Citations.] An employer who knows that wages are due, has the ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee. Such conduct amounts to a 'case of fraud' within the meaning of the exception to the constitutional prohibition and may be punished by statute." In re Trombley, 31 Cal.2d 801, 809–810, 193 P.2d 734, 740; see also, Ex parte Grace, 12 Iowa 208, 213; Ex parte Clark, 20 N.J.L. 648, 650–651.

Whether or not the reasoning of the Trombley case would apply to any wilful refusal to pay a debt when the obligor is able to pay, it clearly applies to obligations arising out of property settlement agreements irrespective of whether the payments are solely alimony. "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code." Adams v. Adams, 29 Cal. 2d 621, 624, 177 P.2d 265, 267, and cases cited. There may be practical considerations for an order that community property, such as a going business, remain intact and that the wife receive her share in periodic payments. Whether such payments are also intended to discharge a duty of support, they may actually be the wife's only means of support. As in the case of wages, the payments may be difficult to collect by repeated executions. The enforcement of the obligation by contempt is no more tantamount to imprisonment for debt than criminal punishment for the wilful refusal to pay wages.

I would adhere to the settled law of this state and affirm the order holding petitioner in contempt.

Rehearing denied; TRAYNOR, J., dissenting.

48 Cal.2d 500

August Maurice NARDONI, Brazell Nardoni, Frank Earl Alexander and Charles August Archambault, Petitioners and Appellants,

v.

F. Britton McCONNELL, Insurance Commissioner of the State of California, Successor to John R. Maloney, Defendant and Respondent.

L. A. 24423.

Supreme Court of California,
In Bank.

May 6, 1957.

As Modified on Denial of Rehearing
June 4, 1957.

Mandamus proceeding brought to compel insurance commissioner to vacate his order of revocation and suspension of licenses of bail agents. The Superior Court, Los Angeles County, Rayard Rhone, J., rendered judgment adverse to petitioners, and they appealed. The Supreme Court, Spence, J., held that since evidence had established that licensed bail agents had acted fraudulently and had done business in a dishonest manner and that they had otherwise violated Insurance Code section subdivisions and Administrative Code sections, commissioner had been authorized to revoke not only their licenses to act as bail agents but also their licenses to act as insurance agents, insurance brokers, and life agents.

Affirmed.

Schauer, J., dissented.

Opinion, 302 P.2d 902, vacated.

1. Mandamus ⚷174

In mandamus proceeding brought to compel Insurance Commissioner to vacate his order revoking and suspending bail agent licenses, trial court was required to exercise its independent judgment in deciding factual issues. West's Ann.Code Civ. Proc. § 1094.-5(c).

2. Appeal and Error ⚷731(5)

Where appellants challenged generally sufficiency of evidence to support material findings, but did not indicate wherein evidence was insufficient or what precise findings were attacked, merits of their objection could not be determined.

3. Licenses ⚷38

Hearsay evidence alone is insufficient to support revocation of license. West's Ann.Gov.Code, § 11513(c).

4. Stipulations ⚷14(7)

In disciplinary proceeding, testimony contained in stipulation was properly received in evidence, notwithstanding its hearsay character, where it was used only for purpose of "supplementing or explaining" other evidence concerning conduct of bail agents sought to be disciplined and parties with whom they were dealing. West's Ann.Gov.Code, § 11513(c).

5. Bail ⚷60

In disciplinary proceeding, against licensed bail agents charged with recommending attorneys and assisting attorneys in preparing petitions for habeas corpus for release of arrestees, solicitation and negotiation for bail with persons not authorized by arrestees, arrangements with certain police officer for obtaining information concerning arrests and jail commitments, and failure to set forth correct information as to source of knowledge leading to bail bond negotiations, there was evidence other than hearsay testimony to sustain findings adverse to licensees. West's Ann.Insurance Code, § 1731.

6. Bail ⚷60
Mandamus ⚷168(3)

Evidence concerning general reputation and character of licensed bail agents might have been properly admitted, in disciplinary proceeding, for consideration of Commissioner in determining nature of penalty to be imposed, but it was not material on trial of mandamus proceeding brought to compel Commissioner to set aside his order of revocation and suspension. West's Ann.Code Civ.Proc. § 1094.-5(e); West's Ann.Insurance Code, § 1821.

7. Insurance ⚷12

Where evidence, in disciplinary proceeding, established that licensed bail agents had acted fraudulently and had done business in a dishonest manner and that they had otherwise violated Insurance Code section subdivisions and Administrative Code sections, Commissioner was authorized to revoke not only their licenses to act as bail agents but also their licenses to act as insurance agents, insurance brokers, and life agents. West's Ann. Insurance Code, §§ 1812, 1813; West's Ann.Code Civ.Proc. § 1094.5(e).

◆

Bernard C. Brennan, William E. Cornell, Blase A. Bonpane and Hill, Farrer & Burrill, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Petitioners appeal from a judgment denying their petition for a writ of mandate. They had sought such writ to compel the Insurance Commissioner to set aside an order revoking and suspending their licenses.

Petitioner August Maurice Nardoni was a duly licensed bail agent, insurance agent, insurance broker, and life agent. Petitioner Brazell Nardoni was a licensed bail agent and insurance agent. They operated as partners in the bail bond business in Los Angeles, and each conducted a separate business in the other insurance specialties in which he was licensed. Petitioners Frank Earl Alexander and Charles August Archambault were licensed only as bail agents and were employees of the Nardonis. Separate accusations were filed against the four, charging them with numerous unlawful acts in the bail bond business. A hearing was had before a hearing officer, who thereafter issued his proposed decision. It was adopted by the Insurance Commissioner and pursuant thereto, all licenses held by the Nardonis were revoked and those held by Alexander and Archambault were suspended for three months. Ins.Code, § 1731. A petition for reconsideration was denied.

The licensees then filed their petition for a writ of mandate in the superior court, seeking to compel the commissioner to set aside his order of revocation and suspension. An alternative writ was issued; a trial was had, and findings and judgment were entered denying the petition. The court specifically found that all the findings of the hearing officer as adopted by the commissioner (being thirty in number) were justified and supported by the weight of the evidence. The violations in part concerned petitioner's recommendations of attorneys and assistance to the attorneys in preparing petitions for habeas corpus for the release of arrestees (Calif.Admin. Code, §§ 2077–2078); solicitation and negotiation for bail with persons not authorized by the arrestees (Ibid. § 2079); arrangements with a certain police officer for obtaining information concerning arrests and jail commitments (Ibid. § 2091); and failure to set forth correct information as to the source of knowledge leading to bail bond negotiations (Ibid. § 2101). The court concluded that the facts found justified the order of the commissioner as to each of the licensees, that there was no abuse of discretion, and that the licensees had been accorded a full and fair hearing. Accordingly, judgment was entered denying the writ and petitioners have appealed.

As grounds for reversal, petitioners contend: (1) the findings of the commissioner are not supported by the evidence and the court should have so found; (2) the court improperly excluded their proffered evidence as to good character and reputation; and (3) the penalty imposed was excessive. Our review of the record, however, convinces us that these contentions cannot be sustained.

[1] The trial court was required to exercise its independent judgment in deciding the factual issues. Code Civ.Proc. § 1094.5, subd. (c); Moran v. Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; Hohreiter v. Garrison, 81 Cal. App.2d 384, 402, 184 P.2d 323; 2 Cal.Jur. 2d § 231, p. 385. It did so and not only found expressly that the commissioner's findings were supported by the weight of the evidence but made its own findings which conformed with those of the commissioner.

The court had before it the entire record of the proceedings before the commissioner, which included the testimony of several witnesses in addition to a stipulation executed by the parties in order to expedite the hearing. The stipulation consisted of sixty pages, covering the testimony of some twenty-seven witnesses, and fifty-five exhibits were attached. It provided in part: "Where it is stipulated that if called a person would testify to certain facts, such stipulation is in lieu of actual testimony and is to be considered admitted without objection unless an objection on specified grounds is expressly reserved for the particular testimony in writing. * * * All facts recited herein as stipulations are agreed to be true and correct, and may be used in lieu of evidence, and are to be considered proven by competent evidence." It was also stipulated that the fifty-five exhibits were offered in evidence and were to be considered admitted without objection in the absence of a written objection upon some ground other than lack of foundation.

[2] Petitioners challenge generally the sufficiency of the evidence to support the material findings, but with one exception hereinafter noted, they do not indicate wherein the evidence is deficient or what precise findings are attacked so that the merits of their objection may be determined. See Goldring v. Goldring, 94 Cal. App.2d 643, 645, 211 P.2d 342. However, in view of petitioners' further claim that hearsay evidence was improperly admitted over their objection at the disciplinary hearing, the record of that hearing has been examined.

[3–5] Petitioners properly maintain that hearsay evidence alone is insufficient to support the revocation of a license. Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; Kinney v. Sacramento etc. Retirement System, 77 Cal.App.2d 779, 782, 176 P.2d 775. However, Government Code, section 11513, subdivision (c), provides in part: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. * * * Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The parties' stipulation covering the testimony of numerous witnesses sets forth essential facts which were competent, material and relevant in support of the commissioner's decision and the subsequent court findings. A brief reference to a few of the principal charges will suffice to show that petitioners' objections to the alleged hearsay evidence cannot prevail.

One of the principal violations charged against the Nardonis was based on a so-called "arrangement" or conspiracy between the Nardonis and a certain police officer. According to the stipulated evidence, four arrestees would testify to facts tending to show that the Nardonis were receiving information from the police officer and were acting upon that information in contacting relatives of the arrestees and arranging for the prisoners' release on bail. These facts leave no doubt that the Nardonis and the police officer were working together under a pre-arranged plan and that the Nardonis were collecting bail fees as the result of such unlawful practices. The stipulated testimony of the same arrestees also indicates that the Nardonis recommended and arranged for the services of certain attorneys on behalf of the arrestees without authorization. In carrying out these unlawful transactions, it appears that Alexander and Archambault, as employees of the Nardonis, actively aided in the preparation of petitions for habeas corpus and other legal documents. The stipulated testimony of other arrestees shows that without their permission the Nardonis contacted their employers, solicited bail and negotiated for certain attorneys to handle their defense upon prescribed fee payments. On still another occasion, it appears that upon the representation of August Nardoni, an indemnitor's agreement was signed by one acting in the belief that he was only witnessing a statement of an arrestee's release; that later the person so signing, when the bail was forfeited, was sued, and his automobile was attached and taken from his possession. It also appears that all four petitioners, in filing bail bond applications, falsified the source of their bail business and failed to recite their pre-arranged plan with the police officer for information leading to solicitation or negotiation of bail.

Thus it appears that there was ample competent evidence in the record from which it could reasonably be inferred that the alleged "arrangement" constituted the basis of a number of the bail transactions effected by the Nardonis and that they falsified the required records by stating that the source of their information leading to the bail solicitation was the arrestee or his relatives rather than the police officer. Petitioners did not testify either before the hearing officer or the court. In this regard, it is significant that petitioners' counsel at the time of suggesting the written stipulation stated: "We are prepared to stipulate to virtually all of the facts in the Accusation. * * * We are not prepared as yet to stipulate as to the conspiracy accusation * * * it is our idea that as long as we are throwing ourselves on the mercy of the Commissioner that we will not offer any defensive matter. * * *"

It is true that some of the alleged objectionable testimony contained in the stipulation was of hearsay character but it was properly received in evidence. It was used only for the purpose of "supplementing or explaining" the other evidence concerning the conduct of petitioner and the parties with whom they were dealing. Gov.Code, § 11513, subd. (c). Our review of the evidence convinces us that it cannot be said that any finding was based solely on the alleged objectionable hearsay evidence.

[6] Nor did the court err in rejecting petitioners' offer to introduce into evidence at the trial oral testimony concerning their general reputation and character. Petitioners Nardoni state that they have been in the bail bond business in Los Angeles for more than thirty years, during which time they have been respected businessmen and have rendered valuable services to the courts, attorneys and the public. Evidence of good reputation is admissible in some cases to rebut testimony of an incriminatory character. But here such evidence had no relevancy, for petitioners had practically admitted by virtue of the stipulation the acts constituting the numerous violations charged. See People v. Green, 217 Cal. 176, 183, 17 P.2d 730. While such evidence might have been properly admitted at the disciplinary hearing for consideration of the commissioner in determining the nature of the penalty to be imposed, it was not material upon the trial of the mandamus proceeding in the superior court. The matter of fixing the penalty was not for the court but for the commissioner in the exercise of his discretion. Code Civ.Proc. § 1094.5, subd. (e).

[7] Petitioners finally contend that the penalty imposed was excessive. The Nardonis are particularly concerned with this contention. They argue that the stipulated facts established their guilt only of violations of bail bond regulations, that the bail bond business is peculiar to itself, and that any transgressions as bail agents would have no application to other branches of the insurance business so as to justify revocation of their general insurance, as well as bail bond licenses. But the insurance code subjects licensees to disciplinary action for violations without regard for any particular licenses that may have been issued thereunder. The standards of conduct and the prescribed measure of disciplinary action have a common statutory basis. Ins. Code, § 1821.

Numerous grounds for suspension or revocation of licenses are found in the several subdivisions of section 1731 of the Insurance Code. Among such grounds are facts establishing that the licensee has "engaged in a fraudulent practice or act or conducted his business in a dishonest manner" (subd. (d)); has shown "untrustworthiness in the conduct of his business or has by commission of a wrongful act or practice in the course of his business exposed the public or those dealing with him to the danger of loss" (subd. (e)); has "failed to perform a duty expressly enjoined upon him by a provision of this code, or has committed an act expressly forbidden by such a provision" (subd. (g)); has "aided or abetted any person in an act or omission which would constitute grounds for suspension, revocation, or refusal of license to the person aided or abetted" (subd. (i)); or has "permitted any person in his employ to violate any provision of this code" (subd. (j)).

Upon substantial evidence, the court found that petitioners Nardoni had violated the cited subdivisions of section 1731. Petitioners Nardoni specifically contend that the evidence fails to sustain the finding of a fraudulent act or of business done in a dishonest manner, but the abovementioned evidence concerning the fraudulent representations made to the person signing the indemnitor's agreement is sufficient for that purpose. The court further found upon substantial evidence that petitioners Nardoni had violated numerous lawful regulations of the commissioner, including sections 2077, 2078, 2091 and 2101 of the California Administrative Code, and that the other petitioners had violated some of these sections. These regulations are authorized by section 1812 of the Insurance Code, and the violation thereof constitutes a proper basis for disciplinary action under section 1813 of the Insurance Code. Smith v. Downey, 109 Cal.App.2d 745, 748, 241 P.2d 618.

It thus appears that all these findings are on matters which are clearly grounds for disciplinary action, and the extent of the penalty was then for the commissioner to determine within his discretion. Code Civ. Proc. § 1094(5), Subd. (e). The court concluded that the commissioner, in ordering the revocation of both the bail and insurance licenses of the Nardonis and the suspension of the bail licenses of their employees, Alexander and Archambault, had acted within his jurisdiction and had not abused his discretion. Accordingly, the court found no reason for granting a writ of mandate affecting the commissioner's decision. The record sustains the propriety of that adjudication. Olson v. Watson, 143 Cal.App.2d 343, 351, 300 P.2d 35; Black v. State Personnel Board, 136 Cal.App.2d 904, 912, 289 P.2d 863.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

McCOMB, J., did not participate herein.

SCHAUER, Justice (dissenting).

I am in general accord with the reasoning and conclusions expressed for the District Court of Appeal by Presiding Justice Shinn and concurred in by Justices Wood (Parker) and Vallée, as reported in 302 P.2d 902. As stated in the opinion of that court, "There was no finding that either of the Nardonis had engaged in a fraudulent practice or had conducted his business in a dishonest manner. There was no inherent dishonesty in their transgressions as bail agents. They were not shown to have been incompetent or untrustworthy with respect to their clients. As to section 1731 (g) they were guilty of violations of their duties as bail agents but these violations were of duties that could have no connection with the duties of insurance agents. Section 1731 must be given reasonable application. As to paragraph (g) of that section which was applied by the commissioner and the court it is to be noted that the acts and omissions which were relied upon were those particularly set forth as violations of the Administrative Code and not the Insurance Code. With respect to paragraphs (i) and (j) of the section we think they should not be held applicable to acts or omissions of employees of a bail agent with respect to violations of the stringent and technical requirements of the Administrative Code applicable to such employees. The violations charged against Alexander and Archambault consisted of the failure to keep proper records as to the identity of persons with whom they negotiated for bail bonds and as to Archambault that he negotiated for bonds with persons who had not been authorized in writing by the arrestees to negotiate. These acts were not in violation of the Insurance Code.

"Our conclusion is that there was no proof and no finding of facts which would justify the revocation of the licenses of the Nardonis other than their licenses as bail agents."

For the reasons developed by the District Court of Appeal I would reverse the judgment in the parts specified by that court and remand the cause for further proceedings.

Rehearing denied; SCHAUER, J., dissenting. McCOMB, J., not participating.

150 Cal.App.2d 696

Rena BOEHLE, Plaintiff, Cross-Defendant and Appellant,

v.

Emma BENSON, Jean L. Gallineau, as Administratrix of the Estate of George H. Gallineau, and Mrs. F. M. Gallineau, Defendants,

Emma Benson, Defendant, Cross-Complainant and Respondent.

Civ. 9032.

District Court of Appeal, Third District, California.

May 7, 1957.

Unlawful detainer and quiet title action by vendor's sister against purchaser and vendor's administratrix and mother. Purchaser cross-complained for specific performance of agreement to sell the realty and for judgment that, upon payment of $15.00 balance due on purchase price, title should vest in purchaser. The Superior Court, Lake County, Banjamin C. Jones, J., entered judgment adverse to sister, and sister appealed. The District Court of Appeal, Schottky, J., held that the agreement was enforceable.

Judgment affirmed.

1. Quieting Title ⚷44(4)

In quiet title and unlawful detainer action by vendor's sister against purchaser and vendor's administratrix and mother, wherein purchaser cross-complained for specific performance of agreement to convey the realty, evidence, which revealed that vendor had had title to the realty put in his mother's name for convenience only and that mother had conveyed the land to daughter, was sufficient to sustain trial court's finding that daughter was not owner of the realty. West's Ann.Civ.Code, § 3388.

2. Frauds, Statute of ⚷103(1)

Writing, which acknowledged receipt from purchaser of $100 on purchase price of described realty valued not to exceed $2,400, and which was signed by vendor, was sufficient to satisfy the statute of frauds though in form of simple receipt.

3. Vendor and Purchaser ⚷16(1)

Where vendor signed writing acknowledging receipt from purchaser of $100 on purchase price of described realty valued not to exceed $2,400, purchaser's payment of the $100 constituted a sufficient acceptance of terms of the contract.

4. Specific Performance ⚷44

Where vendor signed instrument acknowledging receipt from purchaser of $100 on purchase price on described realty valued not to exceed $2,400, and purchaser, who was in and remained continuously in possession, paid the $100 down when the contract was made out, there was part performance, and such contract would be specifically enforceable by purchaser though signed by vendor only, in view of facts that purchaser thereafter paid all of the purchase price except $15 and placed improvements thereon totaling $3,500 and that nothing remained to be done but to deliver the deed.

McGilvray, McGilvray & Cameron, Sacramento, and Bruce B. Bruchler, Lakeport, for appellant.

Phil N. Crawford, Lakeport, for respondent.

SCHOTTKY, Justice.

Plaintiff above-named commenced an action against defendant Emma Benson in unlawful detainer and to quiet title, alleging that said defendant had no right to the possession of certain real property in Lake County and no title thereto. Thereafter, on motion of defendant, the court made an order bringing in Jean L. Gallineau, as administratrix of the estate of George H. Gallineau, deceased, and Mrs. F. M. Gallineau as parties defendant. Thereafter plaintiff filed an amended complaint, the first cause of action being in unlawful detainer against Emma Benson and the second cause of action being to quiet plaintiff's title against all defendants.

The defaults of defendants Jean L. Gallineau, as administratrix, and of Mrs. F. M. Gallineau were entered. The answer of the defendant Emma Benson denied title in plaintiff and pleaded title in herself, basing her claim upon the allegation that she purchased the property from George H. Gallineau, deceased, and that she paid him all of the purchase price for the property during his lifetime with the exception of $15. Her cross-complaint followed substantially the affirmative allegations of her answer and prayed for specific performance of the agreement and judgment that upon payment of said balance of $15 to the estate of George H. Gallineau title should vest in her.

Following a trial the court found:

> "That during the lifetime of said George H. Gallineau, now deceased, and on or about December 7, 1944, said Defendant and Cross-Plaintiff, Emma Benson, entered into a written agreement with said George H. Gallineau for the purchase of Lot 7, Block 5 of Soda Bay Springs Subdivision on Clear Lake, located in Lake County, California, for the sum of Twenty Four Hundred Dollars ($2400.00), payable in installments; that said Defendant and Cross-Plaintiff thereafter paid said installment payments to said George H. Gallineau during his lifetime and thereafter to the said Jean L. Gallineau, as Administratrix of the Estate of George H. Gallineau, deceased; that the total of said purchase price of Twenty Four Hundred Dollars ($2400.00) was fully paid prior to the trial hereof, except the sum of Fifteen Dollars ($15.00).
>
> "That said George H. Gallineau paid the purchase price for said real property and had the title thereto conveyed to his mother, Mrs. F. M. Gallineau by Deed dated October 25, 1937, for convenience only; that said Mrs. F. M. Gallineau held the legal title to said real property hereinabove described in trust for said decedent, George H. Gallineau, with full knowledge of said written agreement with said Defendant and Cross-Plaintiff, Emma Benson, that said George H. Gallineau paid nearly all the taxes on said real property up to the date of his death on April 14, 1953, and also paid other sums on said real property;
>
> "That said written agreement between said George H. Gallineau and Defendant and Cross-Plaintiff, Emma Benson, contains an erroneous description of said real property in that in said written agreement the property was described as Lot 7 in Block 5, while the true description of the real property is Lot 5, Block 7, of said Soda Bay Springs Subdivision on Clear Lake, as hereinabove set forth; that said George H. Gallineau never owned or had any interest in any other real property in said Soda Bay Springs Subdivision on Clear Lake than Lot 5, of Block 7 of said Subdivision; that said written agreement should be reformed to speak the truth and the intention of the parties thereto.
>
> "That after the death of said George H. Gallineau, and on April 23, 1953, said Defendant, Mrs. F. M. Gallineau, deeded said real property, without consideration, to her daughter, the Plaintiff and Cross-Defendant herein, who had at that time and prior thereto full knowledge of said written agreement with said Defendant and Cross-Plaintiff, Emma Benson."

The court found further that defendant Emma Benson had lived on and had been in the exclusive possession of said real property since the date of said agreement and had erected a dwelling house and made other improvements on said property at a cost of more than $3,500.

The court found further that decedent, G. H. Gallineau, purchased said real property in 1937 for the sum of $1,050 from one Jack Munson and that the deed was made to Mrs. F. M. Gallineau, the mother of

G. H. Gallineau, but that the taxes on said property and the cost of the upkeep and maintenance of said real property were paid by G. H. Gallineau. The court found further that:

> "Said Defendant, Mrs. F. M. Gallineau, contributed nothing toward the purchase price of the property first hereinabove described from said Jack Munson; that said G. H. Gallineau did not make a gift of said property to his mother, Mrs. F. M. Gallineau; that no debt ever existed between Defendant, Mrs. F. M. Gallineau, and said G. H. Gallineau; that the transfer of the said real property first hereinabove described to said Defendant, Mrs. F. M. Gallineau, was not made in satisfaction of any debt owing said Defendant, Mrs. F. M. Gallineau by said G. H. Gallineau; that there was no consideration for the deed to Defendant, Mrs. F. M. Gallineau, from said Jack Munson; that Defendant, Mrs. F. M. Gallineau, held the title to said real property first hereinabove described, in trust for her son, G. H. Gallineau, and for his benefit; that the transfer of said property to the Plaintiff and Cross-Defendant herein by said Defendant, Mrs. F. M. Gallineau, was in violation of said trust, and said Plaintiff and Cross-Defendant took title to said real property impressed with said trust; that Defendant and Cross-Plaintiff, Emma Benson, has succeeded to all the rights of said G. H. Gallineau and is now entitled to what said G. H. Gallineau owned and also to have said trust enforced in her favor upon the payment of said balance of said purchase price of Fifteen Dollars ($15.00); that said Defendant and Cross-Plaintiff is the owner of said real property first hereinabove described upon the payment of said sum of Fifteen Dollars ($15.00)."

In accordance with said findings judgment was entered reforming said agreement as prayed for, and decreeing that said defendant and cross-complainant Emma Benson was the owner of said real property subject to the payment of $15 to the Estate of George H. Gallineau, deceased, and that defendant Mrs. F. M. Gallineau and plaintiff, Rena Boehle, have no interest in said property.

Appellant's first contention is that the party under whom the respondent claims, namely, George H. Gallineau, now deceased, had no interest in the property, and any agreement with George H. Gallineau would not be enforceable against the actual owner or her successor in interest. Appellant argues that upon the undisputed evidence in the record it must be held that she is the owner of the real property in question, in fee. There is evidence in the record that appellant and her mother, Mrs. F. M. Gallineau, both testified that the son purchased the property and had title put in his mother's name to settle a debt between them, and denied that there was any gift of the property, but the court found that no debt existed.

Furthermore, during his lifetime G. H. Gallineau dealt with the property as though it was his own. The yearly bill for taxes was sent to his business address, and the evidence shows that he paid the tax bills as they were marked paid and there were many of the cancelled checks signed by G. H. Gallineau.

George H. Gallineau had also paid the interest on the $600 lien against the property as indicated by the letter receipts. Theft insurance on the property was also paid by George, as was the Tax Redemption Certificate. There were title company receipts to George.

The agreement to sell the property to Mrs. Benson is a further act of ownership on the part of G. H. Gallineau, as well as the payment of rent directly to George, and then, after the sale agreement, the deposit of the purchase payments in the bank to the account of George.

Even with the knowledge of Mrs. Benson's acts of ownership of constructing permanent improvements on the property worth several thousand dollars, Mrs. F. M.

Gallineau, the record title holder, was willing to let her son handle the property as though it was his own.

Mrs. Jean L. Gallineau, the wife of George, testified that she knew that her husband owned the property during his lifetime and that his mother was merely holding title thereto for convenience.

Moreover, the decedent told respondent that he owned the property and that all of his property was in his mother's name.

[1] In view of this and other evidence in the record we are satisfied that there is ample evidence in the record to support the finding of the trial court that appellant "has not been and is not now, the owner of" the real property in controversy.

Appellant next contends that the finding that respondent Emma Benson was purchasing the real property under a written agreement is not supported by the evidence. Appellant asserts that the writing is not a contract or agreement for purchase and sale but a simple receipt. Said writing is as follows:

> "December 7, 1944.
>
> "Received of Mrs. Chris Benson one hundred dollars $100.00 on purchase price of property valued not to exceed $2400.00. Located on Lot 5 Block 7 at Soda Bay Springs.
>
> "G. H. Gallineau
>
> "Witness
> "H. S. Twede"

Appellant argues that at most the evidence indicates an intention to secure or enter into a contract which intention was not in fact carried out.

[2] We do not agree with appellant's contention that the agreement does not satisfy the Statute of Frauds. In the case of Cavanaugh v. Casselman, 88 Cal. 543, 26 P. 515, 516, the court said:

> "It was not necessary that the plaintiff should himself sign the agreement * * * in order to enable him to enforce it against the defendant. The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, but it need be subscribed only by the party to be charged. [Citation.] * * * The 'writing' in question is sufficient to satisfy the statute. It sufficiently names the parties and the price, and gives a complete description of the property. It is also subscribed by the defendant, who is the party to be charged."

The memorandum here names the parties, the price, a description, and is subscribed by the owner.

[3] The payment of the $100 by respondent is a sufficient acceptance of the terms of the contract. Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681.

Section 3388 of the Civil Code provides:

> "A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance."

[4] The contract in this case was for the purchase of land. There was part performance, as respondent paid $100 down when the contract was made out and was in possession at that time and remained continuously in possession. Respondent had paid all of the purchase price except $15, and in addition had placed improvements thereon totalling $3,500.00. Nothing remained to be done but deliver the deed. That a contract is enforceable under such circumstances, see 23 Cal.Jur., section 11, page 430; Peixouto v. Peixouto, 40 Cal. App. 782, 181 P. 830; Hart v. Erickson, 63 Cal.App.2d 719, 147 P.2d 414.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 793

Josephine W. BELTZ, Petitioner,

v.

The SUPERIOR COURT of the State of California TO AND FOR The COUNTY OF LOS ANGELES, Respondent.

Civ. 22401.

District Court of Appeal, Second District, Division 2, California.

May 13, 1957.

Proceeding to obtain writ of prohibition to restrain court from dismissing contest of will after probate. The District Court of Appeal held that where contestant had filed civil action to set aside property settlement agreement incorporated in interlocutory judgment of divorce from deceased, property settlement agreement was basis of affirmative defense by proponents of will, and it appeared that civil action was set for early date and that personal representative of estate did not object to deferring hearing of will contest, contestant was entitled to peremptory writ of prohibition restraining court from dismissing will contest solely on ground of pendency of civil action.

Writ of prohibition ordered.

Prohibition ⚷5(3)

Where contestant of will had filed civil action to set aside property settlement agreement incorporated in interlocutory judgment of divorce from deceased, property settlement agreement was basis of affirmative defense by proponents of will, and it appeared that civil action was set for early date and that personal representative of estate did not object to deferring hearing on will contest, contestant was entitled to peremptory writ of prohibition restraining court from dismissing will contest solely on ground of pendency of civil action.

◆

Arthur N. Hews, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Thomas LeSage, Pasadena, for real party in interest.

PER CURIAM.

Petitioner seeks a writ of prohibition to restrain the respondent court from dismissing her contest of a will after probate In the Matter of the Estate of Stanley A. Beltz, Deceased, being number Bur. P 1282. No return to our alternative writ has been made but it appears from the petition that the proponents of the will in the above-entitled matter answered petitioner's contest and set up as an affirmative defense thereto an interlocutory judgment of divorce wherein the petitioner had waived all of her rights of inheritance to the estate of the decedent. It further appears that the petitioner herein has filed in the respondent court a civil action entitled Josephine W. Beltz v. Daniel Beltz, Individually and as Executor of the Estate of Stanley A. Beltz et al., being number 665595, to set aside the property settlement agreement incorporated in the interlocutory judgment of divorce above referred to and that this property settlement agreement is the basis of the affirmative defense in the will contest. It further appears that the respondent court has threatened, unless restrained, to dismiss the will contest by reason of the pendency of the civil action. It was made to appear at the hearing of this matter that the civil action is set for trial at an early date and that an adjudication therein will be determinative of the petitioner's right in the will contest proceedings, and that the personal representative of the estate does not object to deferring a hearing in the will contest until a determination of the civil action. We can find no authority justifying the threatened dismissal of the will contest by reason of the pendency of the civil action, and it is ordered that a peremptory writ of prohibition issue restraining the respondent court from dismissing the aforesaid will contest after probate solely on the ground of the pendency of the aforesaid civil action.

150 Cal.App.2d 725

John J. LUTHER, Administrator of the Estate of William Henry Luther, also known as William Luther, William H. Luther, and W. H. Luther, Deceased, Plaintiff, Cross-Defendant and Appellant,

v.

Mary B. FOSTER, Defendant, Cross-Complainant and Respondent.

Civ. 9022.

District Court of Appeal, Third District, California.

May 8, 1957.

Administrator's quiet title action. Defendant cross-complained to recover for services alleged to have been performed for decedent, alleging that her claim therefor had been rejected by administrator. The Superior Court, Del Norte County, Samuel F. Finley, J., rendered judgment in favor of defendant and cross-complainant, and plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that even though cross-complainant, alleging an agreement (under which decedent was to will her the property which was the subject matter of complainant's quiet title action) had been forced to rely on quantum meruit (because alleged oral contract to compensate her by leaving her decedent's entire estate upon his death was unenforceable), the matter was sufficiently related to transaction upon which action was brought to justify filing of cross-complaint; and held that time to sue in quantum meruit for reasonable value of services was stayed by filing of original complaint.

Affirmed.

1. Appeal and Error ⚷907(2)

Where order recited that evidence had been introduced, but what evidence had been received was not shown in record on appeal, it would have to be presumed that evidence supported order made.

2. Appeal and Error ⚷957(1)

A default inadvertently permitted by party having substantial defense presents case in which great latitude should be extended to discretion of court by which default was set aside.

3. Limitation of Actions ⚷118(2)

Filing of complaint suspended running of statute of limitations as to matters arising out of transaction pleaded.

4. Limitation of Actions ⚷118(2)
Quieting Title ⚷39

Though cross-complainant, alleging an agreement with decedent (under which, for services performed, he was to will her the property which was subject matter of complainant's quiet title action) was forced to rely on quantum meruit (because the alleged oral contract to compensate her by leaving her decedent's entire estate upon his death was unenforceable), matter, nevertheless, was sufficiently related to transaction upon which quiet title action was brought to justify filing of cross-complaint; and time to sue in quantum meruit for reasonable value of services was stayed by filing of original complaint. West's Ann.Civ.Code, § 1624; West's Ann.Code Civ.Proc., §§ 442, 1973.

5. Executors and Administrators ⚷221(5)

In action to recover for services alleged to have been performed by complainant for decedent, evidence would sustain finding that it had been intention and expectation of parties that complainant should be compensated for services she rendered.

6. Interest ⚷39(3)

General rule in quantum meruit action is that interest is not allowable until date of judgment.

7. Executors and Administrators ⚷267

Claim against estate, when established, will bear interest from date of its presentation.

8. Executors and Administrators ⚷267

Where action to recover, on quantum meruit, for services alleged to have been performed for decedent was brought against decedent's administrator after his rejection of claim therefor, it was not error to allow interest prior to judgment.

9. Executors and Administrators ⚷221(3)

In administrator's quiet title action, wherein defendant cross-complained to recover for services alleged to have been performed for decedent, it was not error to sustain objection to question as to jobs held by cross-complainant after decedent's death.

◆

Robert F. Appel, Crescent City, for appellant.

J. Ralph Arnold, Crescent City, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment in favor of defendant and cross-complainant on her cross-complaint to recover for services alleged to have been performed for the deceased, a claim therefor having been rejected by the administrator of his estate.

On March 4, 1952, appellant as administrator instituted an action against respondent, Mary B. Foster, to quiet title to certain real property and for the reasonable rental value of this property from the date of decedent's death and damages for depriving the estate of the use of certain personal property. Respondent was served with process the following day. On March 12, 1952, a demurrer was filed, and on April 10, 1952, appellant filed an amended complaint, and a copy thereof was served upon respondent's counsel. On May 1, 1952, a default was entered against the respondent. On October 17, 1952, the court granted respondent's motion to set aside the default and to permit her to file an answer and cross-complaint. Respondent's notice of motion was served on appellant's counsel on August 29, 1952, and was filed on September 5, 1952. Filed in support of said motion were respondent's proposed verified answer and cross-complaint and an affidavit by her counsel based upon surprise.

[1] Appellant contends first that the court abused its discretion in granting respondent's motion to set aside her default. Appellant urges that no ground exists for relief, for the reason that respondent failed to show surprise to excuse the default and failed to show due diligence after discovery of the fact. The order vacating respondent's default recites that evidence was introduced. What evidence was received is not shown in the record on appeal, and so it must be presumed that the evidence supported the order made. Derrer v. Keeler Gold Mines, Inc., 63 Cal.App.2d 606, 147 P.2d 102; Douglass v. Guardian Holding Corp., 132 Cal.App. 585, 23 P.2d 80.

[2] The proposed answer denied all the material allegations of the amended complaint. Respondent's attorney filed an affidavit in support of the motion. However, appellant filed no counter-affidavit. The record does not disclose that he made any showing that he would suffer any prejudice or that an injustice would result, although respondent's motion for relief was filed about four months after entry of the default. A default inadvertently permitted by a party having a substantial defense presents a case in which great latitude should be extended to the discretion of the court by which the default was set aside. Harbaugh v. Honey Lake Valley Land & Water Co., 109 Cal. 70, 41 P. 792. "And where a party in default makes seasonable application to be relieved therefrom and files an affidavit of merits alleging a good defense, and plaintiff files no counteraffidavit and makes no showing that he has suffered any prejudice or that any injustice will result from a trial on the merits, slight evidence is required to justify setting aside the default." 29 Cal.Jur.2d p. 99, sec. 152; Berri v. Rogero, 168 Cal. 736, 145 P. 95.

"The power vested in the trial courts by Section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that they may order their proceedings so as to dispose of cases on their substantial merits, * * *. In view of the policy of the law to have every litigated case tried on its merits, courts look with disfavor on a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." (29 Cal.Jur. 2d 97, Sec. 152, and cases cited therein.) Appellant has not shown that the trial court, by vacating and setting aside respondent's default and granting her leave to file her answer and cross-complaint, abused its discretion.

[3, 4] The cross-complaint alleged that on April 26, 1946, respondent and decedent entered into an oral agreement whereby respondent agreed to act as a housekeeper for the decedent, assist him in the operation of his ranch and look after his comfort and general welfare as long as he lived, and he agreed upon his death to leave a will giving her all of his real and personal property. The second cause of action alleged that at the time of his death, decedent was indebted to respondent for services performed for decedent at his request reasonably worth $12,500, less the reasonable value of board and room in the sum of $6,000, and that a claim therefor had been presented by her on March 14, 1952, and rejected by the appellant administrator on March 27, 1952. Appellant demurred to the second count on the ground that it failed to state facts sufficient to constitute a defense or counterclaim since said cross-complaint showed on its face that respondent failed to bring action on her rejected claim against the decedent's estate within theree months after notice of its rejection, as provided by Section 714 of the Probate Code, the answer and cross-complaint having been filed more than six months after the rejection of said claim. Appellant contends that his demurrer was improperly overruled. He relies upon Western Pipe & Steel Co. of California v. Tuolumne Gold Dredging Corp., 63 Cal.App.2d 21, 146 P.2d 61, in support of his claim that the time to sue in quantum meruit for the reasonable value of services was not stayed by the filing of the original complaint, since respondent's claim was unrelated to his cause of action.

The contention cannot be sustained for the reason that the filing of the complaint in this action suspended the running of the statute of limitations as to matters arising out of the transaction pleaded. McDougald v. Hulet, 132 Cal. 154, 160–161, 64 P. 278; Jones v. Mortimer, 28 Cal.2d 627, 633, 170 P.2d 893. In her cross-complaint, respondent alleged an agreement with deceased, under which, for the services she performed, he was to will her the property which is the subject matter of appellant's quiet title action. Although respondent was forced to rely on quantum meruit (because the alleged oral contract to compensate respondent by leaving her the entire estate upon his death is unenforceable—Sec. 1624, Civil Code; Sec. 1973, Code of Civ.Proc.), the matter, nevertheless, was sufficiently related to the transaction or matter upon which the action was brought, to justify the filing of the cross-complaint. Sec. 442, Code of Civ. Proc.; Mikesell v. Gomez, 67 Cal.App.2d 507, 154 P.2d 927.

[5] Appellant next contends that the judgment is not supported by the evidence, in that respondent failed to prove the elements necessary to make out her claim of quantum meruit. There is no merit in this contention.

In April of 1946, decedent went to Medford, Oregon, where respondent had been employed, and took her to his home in Crescent City, California. She kept house for decedent until his death on August 21, 1951. She performed household tasks, including cooking, cleaning, laundry, mending, working in the garden and assisted deceased in the construction of a new house. Respondent testified that she expected to be paid for her services and had received no compensation therefor. She said she and decedent were to be married, and that she expected to receive decedent's property upon his death. One Evelyn Patterson, a witness for respondent, testified that decedent told her that he and respondent were going to be married, and in her presence said that he was going to fix it so that respondent would have everything that he had. Appellant points to no evidence in the record that respondent performed the services for decedent in consideration of marriage, or that they were actually intended to be gratuitous. This is ample evidence to warrant the inference that it was the intention and expectation of the parties that respondent should be compensated for the services she rendered, notwithstanding the fact that there was other evidence which in some respects was contradictory. Mikesell v. Gomez, supra.

[6–8] Appellant next contends that the court erred in allowing interest prior to judgment in this quantum meruit action. While the general rule in a quantum meruit action is that interest is not allowable until the date of judgment, it is not the rule when the action is one to establish a claim against an estate. The claim, when established, will bear interest from the date of its presentation since the judgment relates back and takes effect as of that date. "[I]f the claim did not bear interest until the date of the judgment, it would place the claimant who was compelled to sue at a disadvantage with one whose claim is allowed by the executor, for in the latter case there is no doubt that interest is allowable from the time the claim is approved." White v. Deering, 38 Cal.App. 516, 519, 179 P. 401, 402.

[9] Lastly, appellant contends that the court erred in sustaining an objection to a question as to jobs held by respondent after decedent's death. There is no merit whatsoever in this contention.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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150 Cal.App.2d 752

Jack LEWIS and T. R. Burnette, Plaintiffs and Respondents,

v.

Louis FOPPIANO, Green Valley Lumber Co., a limited partnership, R. E. Mussallem, M. Hipsley and Garner Smith; R. E. Mussallem, M. Hipsley and Garner Smith, as copartners doing business as Green Valley Lumber Co., a limited partnership, Defendants and Appellants.

Civ. 8996.

District Court of Appeal, Third District, California.

May 9, 1957.

Action by broker who had been retained under exclusive listing agreement by owner of standing timber to find purchaser, and by broker's agent, to recover commissions from owner and purchaser, on sale to buyer found after expiration date in agreement. The Superior Court, Mendocino County, Lilburn Gibson, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain finding that owner had waived the expiration date in agreement but that judgment could not be properly rendered for his agent or against purchaser.

Judgment reversed in part and affirmed in part.

1. Brokers ⟹86(1)

In broker's action for commission, under exclusive listing agreement, on sale of standing timber to buyer found after expiration date of agreement, on theory that such date had been waived evidence showing that vendor had, after such date, urged broker to continue his efforts was sufficient to support finding of waiver.

2. Brokers ⟹73

One who had agreement with broker having exclusive listing on standing timber offered for sale, for division of commission if sale was consummated to any prospect obtained by such individual but who had no arrangement with timber owner could not recover his commission against the owner, even if all parties knew that he was acting for broker and even though broker allowed him to be joined as party plaintiff in action for commission.

3. Brokers ⟹74

Provision in contract for sale of timber between owner and purchaser found by broker retained by owner under exclusive listing agreement providing commission payable by owner, that purchaser would pay any commission found due any agent by a court of competent jurisdiction did not, under the third-party beneficiary rule, allow judgment for commission due under exclusive listing agreement to be rendered against purchaser as co-defendant in action against owner for the commission, in the absence of any prior determination of liability by a court. West's Ann.Civ.Code, § 1559.

4. Pleading ⚷59

Allegation that a party has performed condition precedent is an essential part of cause of action. West's Ann.Civ.Code, §§ 1436, 1439.

5. Brokers ⚷74

Even if provision, in contract between owner of timber and purchaser found by broker, that purchaser would pay any agent's fees found due by court of competent jurisdiction was third-party beneficiary agreement permitting broker to sue to recover its commission from purchaser, determination by court of competent jurisdiction was condition precedent to recovery. West's Ann.Civ.Code, §§ 1436, 1439.

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Francis Passalacqua, Healdsburg, for appellant Louis Foppiano.

Spurr & Brunner, Ukiah, by Clyde Small, Ukiah, for other appellants.

Kasch & Cook, Ukiah, for respondents.

PEEK, Justice.

Defendants appeal from a judgment in favor of plaintiffs based upon an exclusive listing agreement under which the defendant Foppiano listed with the plaintiff Lewis, a real estate broker, certain timber land owned by him. Defendants' demurrer was sustained as to certain causes of action set forth in plaintiffs' complaint, and the case proceeded to trial on the remaining four counts: (1) That the expiration date of the contract had been waived by Foppiano; (2) that the same was modified by the inclusion of the plaintiff Burnette as a party thereto; (3) that Foppiano was indebted to plaintiffs for services, work and labor in the sum of $5,000; and (4) that the Green Valley Lumber Company, a co-partnership, was liable for any commission found to be due upon the ground that by reason of a particular clause in the contract of purchase between Green Valley and Foppiano, the former had agreed to pay any commission found to be due on the sale. Although numerous contentions are made by defendants, their primary argument is essentially an attack upon the sufficiency of the evidence to support the finding that there was a waiver of the termination date of the listing agreement. Secondly, it is argued that the judgment in favor of the plaintiff Burnette was erroneous in that he was not a proper party plaintiff, and lastly that no cause of action was established against Green Valley.

The facts show that on September 6, 1952, Foppiano and Lewis entered into a written brokerage contract whereby Lewis was given the exclusive right to sell, for a price of $5 per thousand feet, timber belonging to Foppiano on or before January 1, 1953. According to the last cruise made, there was an estimated 21 million feet which at the stated price would amount to $105,000. Shortly thereafter, Lewis and Burnette orally agreed that if a sale was consummated with any prospect obtained by Burnette the commission would be equally divided between them. This arrangement was communicated to Foppiano who evidenced his agreement therewith. Early in January the original brokerage contract was extended by a written amendment for a period of 90 days, or until April 1, 1953. On several occasions subsequent to that date Lewis talked with Foppiano regarding the sale of the timber, and Foppiano instructed him to continue his efforts to sell it. Similar instructions were given to Burnette. Foppiano himself testified that he knew Burnette was continuing his efforts to sell the timber. On May 6, 1953, Burnette showed the property to Garner Smith, the general manager of Green Valley Lumber Company, and to one Hoyt, an employee thereof. Apparently Hoyt contemplated purchasing the timber and reselling it to the partnership. Two or three days later Burnette again showed the property to them. Following the second showing, Smith informed Burnette that if Hoyt did not buy the timber the partnership would. Thereafter Burnette telephoned Foppiano requesting him to arrange a meeting, and later that month Hoyt, Smith and another partner, one Hipsley, met with Foppiano to discuss Hoyt's possible purchase of the timber. It then developed that Hoyt was unable to make the down payment on the purchase price, and Smith informed Burnette that the partnership would purchase the property as soon as it was able to obtain the money to do so. On July 16, 1953, Foppiano and the partnership executed a written contract by which the latter agreed to purchase the timber for the sum of $100,000. Assuming Green Valley was thereby obligated to pay a commission of 5%, the sales price would be identical with that set out in the listing agreement between Foppiano and Lewis. The agreement provided in part as follows: "The buyers covenant that they have dealt directly with the sellers in regard to the subject of this contract, and not through any agents. Should any agent establish by a Court of Competent Jurisdiction of his or its right to a Commission for the sale of said timber, such commission shall be paid for by the buyers."

[1] It is apparent from the evidence as summarized that it was amply sufficient to support the finding that Foppiano had waived the termination date of the contract. Here as in Baker v. Curtis, 105 Cal.App.2d 663, 669–670, 234 P.2d 153, 157, "* * * the owner, after the time limit provided in the contract had expired, urged and encouraged the broker to continue his efforts to find a purchaser for the property, and the broker did so continue with the knowledge, approval and encouragement of the owner, and, as a result of the broker's efforts, a purchaser to whom the owner sold the property was produced, under such circumstances the time limit in the written contract must be considered as having been waived and the broker is entitled to his commission. To hold otherwise would in our opinion permit the use of the Statute of Frauds to perpetrate a fraud. Such a holding would not only be inequitable, but is not required or justified by either reason or authority."

Although we have concluded that the judgment in favor of Lewis and against the defendant Foppiano must be sustained, such is not the case as to the plaintiff Burnette.

[2] The evidence as regards Burnette's connection with the transaction discloses testimony by him that he did not claim a commission by reason of an agreement with Foppiano, but only because of his arrangement with Lewis. Plaintiffs' argument that all parties knew that Burnette was acting for Lewis and that by joining Burnette as a party Lewis showed he was willing to share his commission, "so what concern is it of either defendant", is not too persuasive. It follows that the judgment in favor of Burnette and against Foppiano, being wholly devoid of any evidence to sustain it, must be reversed.

[3] We also agree with defendants in their final contention that plaintiffs' complaint was insufficient to sustain a cause of action against Green Valley, and hence their demurrer should have been sustained. The only basis for the judgment against said defendant is the particular provision previously quoted from the contract between it and Foppiano. We find nothing therein to warrant such a conclusion which from plaintiffs' argument appears to be predicated upon the third party beneficiary rule. Civil Code, sec. 1559. From the plain language of the contract any obligation on the part of Green Valley to pay a broker's commission could only arise after the same had been established "by a Court of Competent Jurisdiction."

[4, 5] But even if we assume that Lewis is a beneficiary for whose benefit the contract was entered into, the complaint failed to allege performance of the contract provision that required him to establish by a court of competent jurisdiction his right to a commission. An allegation that a party has performed a condition precedent imposed upon him is an essen-

tial part of his cause of action. Caspar Lumber Co. v. Stowell, 37 Cal.App.2d 58, 61, 98 P.2d 744; Civil Code, secs. 1436 and 1439. Here, to the contrary, the complaint shows that such condition had not been performed, nor could Lewis truthfully so allege.

That portion of the judgment against Green Valley, and that portion of the judgment in favor of Burnette are reversed. The remaining portion of the judgment in favor of the plaintiff Lewis against the defendant Foppiano is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

150 Cal.App.2d 786

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Charles H. CAHAN and Phillip Marsh, Defendants,

Charles H. Cahan, Defendant and Appellant.
Cr. 5758.

District Court of Appeal, Second District, Division 1, California.
May 13, 1957.

Prosecution wherein issue was presented with regard to legality of search and seizure by officers who had been called to defendant's mother's home by defendant's mother and had arrested defendant, without warrant, after secreting themselves in bedroom and observing his bookmaking operations. The Superior Court of Los Angeles County, Charles W. Fricke, J., rendered the judgment challenged on appeal. The District Court of Appeal, Doran, J., held that conviction must be affirmed.

Affirmed.

Searches and Seizures 🔑7(27)

In prosecution wherein issue was presented with regard to legality of search and seizure by officers, who had been called to defendant's mother's home by defendant's mother and had arrested defendant, without warrant, after secreting themselves in bedroom and observing his bookmaking operations, conviction was affirmed.

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Ray M. Davidow, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Morris Schachter, Deputy Atty. Gen., for respondent.

DORAN, Justice.

As recited in appellant's brief, "Mrs. Springer, of 3861 Brunswick Avenue, telephoned the police on November 3, 1955, to come to her home. The defendant Marsh was her natural son; she had raised the defendant Cahan. Neither lived with her at that address. She resided there with her husband. On arriving, the police were admitted into her home. Neither of the defendants was present at that time. There were quite a few officers. After some conversation two of the officers stayed in the bedroom at the said address, and Mrs. Springer left. Defendant Marsh arrived and was observed to be engaged in bookmaking by the two police officers from their vantage point in the bedroom. He was arrested and taken from the house. Subsequently, Mr. Cahan arrived and was observed by the two officers from their vantage point in the bedroom to be engaged in bookmaking, and he was arrested.

"Both arrests were made without a warrant for either defendant.

"Issue

"The sole issue is whether or not consent to the officers was voluntarily given to enter, to remain, to search, and to hide; or whether or not there was a submission on the part of Mrs. Springer to an express or implied assertion of authority by the police officers.

"Defendant's Contention

"It is defendant's contention that Mrs. Springer submitted to the implied assertion of authority of the police officers and did not voluntarily consent to the police officers hiding in her house or searching the premises." It is further argued by appellant, "It is defendant's contention that consent to enter is not consent to search or remain or hide on the premises; that consent to remain is not consent to hide. Defendant further contends that Mrs. Springer consented freely only to the officers entering to see if the defendants were on the premises, that thereafter her consent to the officers remaining and hiding was not voluntarily given, if given at all."

Respondent, on the contrary, points out that, when the officers arrived "Her reason for phoning the police department and inviting the officers into her home was because she was afraid. She had the 'fear of having that phone taken out and having that phone disrupted.' Something was going on at her house which she didn't like and that something involved people using her telephone. * * *" "Appellant's only contention is that Mrs. Springer did not voluntarily consent to the officers remaining and hiding in her home. He doesn't argue that there wasn't probable cause for an arrest without a warrant. It is undisputed that the officers observed appellant Cahan carrying on bookmaking activities, a felony, in their presence, and since the officers were properly in the house at the time the arrest was proper. (Penal Code Section 836, subd. 1.)

"What was a lawful entry does not become trespassory merely because the officers heard damaging declarations and observed incriminating activity.

"A careful examination of the evidence introduced against appellant Cahan shows clearly that it was not obtained by unlawful search and seizure."

Although the judgment may be regarded by some, as rather severe, in the circumstances, nevertheless that issue is not open to discussion on appeal. Inasmuch as no prejudicial errors appear in the record the judgment is affirmed.

WHITE, P. J., concurs.

FOURT, Justice.

I concur in the judgment. I cannot, however, agree with the statement in the majority opinion that "the judgment may be regarded by some as rather severe, in the circumstances". The appellant was charged in three separate counts of violating the provisions of Section 337a, Penal Code. A preliminary hearing was conducted and the appellant was remanded to the superior court for trial. In the superior court an information was filed charging the appellant with the three violations above mentioned and further, the information set forth that the appellant had, before the commission of the offenses in question, been convicted of the crime of robbery, a felony. The appellant pled not guilty as to each count and denied the prior conviction. A motion was made to quash the evidence, which was denied. On February 20, 1956, a trial by jury was waived and it was stipulated that Count I be severed from the other counts and that the matter be submitted on the transcript of the preliminary hearing. The appellant was found guilty as charged in Count I. An application for probation was made and the hearing on such application set for March 15, 1956. On August 23, 1956, the application for probation was heard and denied and judgment was pronounced that appellant be imprisoned in the state prison for the term prescribed by law.

The defendant was charged with and convicted of bookmaking on a previous occasion, which ultimately resulted in People v. Cahan, 1955, 44 Cal.2d 434, 282 P.2d 905, where the judgment was reversed. At the time of sentencing in the instant case the appellant's attorney referred to another "prior conviction for bookmaking" for which appellant was sentenced to six months in the county jail, and counsel twice stated to the court as though it were a recommendation in his client's behalf, "he has never been anything but a bookmaker". Thereafter, the defendant was charged with and convicted of two counts of robbery. People v. Cahan, 141 Cal.App.2d 891, 297 P.2d 715. The delay which occurred in the sentencing of the defendant in the instant case, from March 15, 1956, to August 23, 1956, was brought about because the appellant had apparently been shot in still another episode.

In my opinion, the trial court was entirely correct when he said, "It is true that he has only this one prior conviction, and I will take judicial notice of it, along bookmaking lines, particularly as evidenced by the decisions of our appellate courts." "This defendant, after all the warning that that law enforcement agencies could possibly give him, decided to continue experiments with it. If there was ever a case where a sentence to the penitentiary was merited, this is one."

The defendant has but little to complain of. The trial court, without any motion on the part of the People or the defendant, dismissed Counts II and III, and my reading of the transcripts and the records discloses no mention whatever of the prior conviction of robbery after the defendant denied such prior conviction, although it would have been a simple matter to secure and submit a certified copy of the judgment of conviction of the two counts of robbery, and thereby have proved the allegation.

A reading of the transcript discloses that, without doubt, the appellant was guilty as to Counts II and III of the information. The judge saw fit to dismiss the same, on his own motion, presumably "in furtherance of justice", although the minutes are devoid of any explanation as is required by Section 1385, Penal Code, and furthermore, by the stipulation between the district attorney and counsel for appellant, only Count I was before the trial court.

No reasons whatsoever appear why the second and third counts were dismissed, and nothing appears to have been done by the district attorney as to the prior convictions for robbery.

The appellant may have been surprised at having been sent to the state prison, but he must have realized that to continue interminably with his violations of the law, in one form or another, could ultimately end in no other way. Under the circumstances the judgment was not at all severe.

150 Cal.App.2d 702

ESTATE of Louis Jacques Marie COLLIN, also known as Louis Verneuil, Deceased.

Elvire POPESCO and Lee D. Mathews, Proponents, Contestants, Objectors and Appellants,

v.

Florence RYAN, Louie E. Swarts and Eva Devynck, Proponents and Contestants, and Respondents.

Civ. 21955.

District Court of Appeal, Second District, Division 1, California.

May 8, 1957.

Hearing Denied July 3, 1957.

Proceeding for probate of wills executed on December 19, 1951, October 24 and October 27, 1952, by decedent, who committed suicide November 2, 1952. From judgment of the Superior Court, Los Angeles County, Caryl M. Sheldon, J., admitting the 1951 will to probate, proponents of the other wills appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain finding that decedent was of unsound mind and lacked testamentary capacity at time that he executed wills in October 1952, in which he changed beneficiaries each time, but that he was of sound mind when he executed a will in December 1951.

Judgment affirmed.

1. Wills ⚷55(1)

In proceeding for probate of wills executed on December 19, 1951, October 24, 1952, and October 27, 1952, by decedent, who committed suicide on November 2, 1952, evidence sustained finding that decedent was of unsound mind and lacked testamentary capacity at time he executed wills in October 1952, in which he changed beneficiaries each time.

2. Wills ⚷400

Trier of fact is sole judge of credibility and weight of evidence in a will contest the same as in any other case.

3. Wills ⚷400

Finding by trial judge that testator lacked testamentary capacity will not be disturbed on appeal when supported by sufficient evidence.

4. Wills ⚷53(2)

Commission of suicide by testator shortly after execution of four purported wills was a factor to be considered in determining his testamentary capacity.

5. Wills ⚷53(2)

Proof of testamentary incapacity and of facts upon which a testator's state of mind depends is not necessarily confined to exact time or moment of execution of will.

6. Evidence ⚷555

In proceeding for probate of wills executed by decedent within year prior to death by suicide, wherein decedent's secretaries and others testified as to decedent's mental condition prior to death, testimony of psychiatrist based on hypothetical question as to his opinion of decedent's mental capacity based solely upon testimony given by secretaries as to conversations with decedent and correspondence with him was properly admitted.

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Charles A. Thomasset, Los Angeles, for appellants.

Pacht, Ross, Warne & Bernhard, Isaac Pacht, Ellis J. Horvitz, Los Angeles, Tannenbaum, Steinberg & Shearer, Robert Weil, Beverly Hills, for respondents.

FOURT, Justice.

[1] This is an appeal from a judgment by the court, sitting without a jury, admitting to probate the will of decedent dated December 19, 1951, and denying admission to probate of a purported will executed by decedent on October 24, 1952. Respondents Louis E. Swarts and Florence Ryan, as petitioners, filed their petition for the probate of the will of decedent dated December 19, 1951 (hereinafter referred to as the "Ryan will"). In the Ryan will Florence Ryan and Eva Devynck were named devisees and legatees of the decedent's entire estate. Elvire Popesco filed objections to the above petition, contending that the Ryan will was not the last will of decedent and that Louis Verneuil had made a later will dated October 24, 1952 (hereinafter sometimes referred to as the "propounded Popesco will"). Thereafter, proponent Lee D. Mathews filed his petition for letters of administration with-the-will-annexed, wherein he propounded for probate the Popesco will dated October 24, 1952, which would have revoked all prior wills and left the entire estate to Elvire Popesco. Florence Ryan filed objections to the petition for probate of the Popesco will propounded by Lee D. Mathews, and a contest thereto, and objections to the petition of Lee D. Mathews to be appointed administrator with-the-will-annexed, and to the admission of the Popesco will.

Elvire Popesco and Lee D. Mathews filed a contest to the Ryan will, the grounds, among others, being that the December 19, 1951, will had been revoked by a will dated October 13, 1952 (hereinafter referred to as the Tambour will), and by the terms of the propounded Popesco will. Elvire Popesco and Lee D. Mathews and Jean Collin Du Bocage filed their answer to the objections filed by respondent Ryan, and their contest to the Ryan will; Florence Ryan and Louis E. Swarts answered the contest filed by Elvire Popesco and Lee D. Mathews.

The Societe Des Auteurs and Compositeurs Dramatiques then filed a petition for the probate of a purported will of decedent dated October 27, 1952 (hereinafter referred to as the "Societe will"), to which objections and contest were filed by Florence Ryan. The Societe answered the objections and contest of Florence Ryan, and alleged that the Ryan will had been revoked by the propounded Popesco will, executed October 24, 1952.

After a trial the court determined and found that the decedent was of sound mind when he executed the Ryan will and that such will is the last will of decedent; that the decedent was of unsound mind and lacked testamentary capacity and was suffering from insane delusions and hallucinations from February 2, 1952, until his death on November 3, 1952; further, that the will offered for probate by the appellants dated October 24, 1952, and other documents purporting to be wills of the decedent bearing dates respectively, October 4, 1952, October 13, 1952, and October 27, 1952, were all invalid for any purpose for the reasons set forth above. The judgment was in conformity with the findings.

Louis Verneuil committed suicide on November 3, 1952. He was a successful French playwright who came to the United States just before the Nazi invasion. In 1945, he came to Hollywood where he met Florence Ryan, who was then a secretary to Sol Lesser, a motion picture producer, for whom Louis Verneuil had contracted to write a screen play. Thereafter a friendship developed between Miss Ryan and Louis Verneuil.

Florence Ryan testified that she was fifty-five years of age and worked as a confidential secretary to Sol Lesser for twenty years, from 1925 to 1945, at which latter time she met Louis Verneuil. She frequently went to dinner with him and when he had a heart attack in September of 1945, she visited him nightly when he was in the hopsital. She drove his automobile for him, loaned him a total of $34,750; she loaned him money to settle an attachment which was made for back taxes owing to the government. He proposed marriage to her. She organized his contracts and copyright records and coached him in English. In 1947, she was expected nightly for dinner at his home on Faring Road. Eva Devynck, Louis Verneuil's secretary from France, visited with Verneuil at his home during July, 1947, and brought all of his household goods, library files, and manuscripts with her from Paris. Louis Verneuil told her that Eva Devynck had been his secretary since 1930; that she was an intelligent and capable person and most devoted and honest. In 1949, Verneuil told her that he had drawn a will in which he had left everything to her (Miss Ryan). She told him that she thought it unfair to omit Eva Devynck from his will. At Verneuil's invitation, she moved into the Faring Road home in January, 1950, and she lived there until his death. In 1950, he wrote a successful play, "Affairs of State", and asked her opinion concerning it during rehearsals at his home. When Verneuil went on the road with the play before it opened in New York, he and she wrote to each other daily. In 1951, she stopped working for Sol Lesser and went to work for Verneuil. She went to Florida with him after he became ill in the fall of 1951. After they returned to Los Angeles, he became ill again in December, and she gave him medication under the supervision of doctors. On February 2, 1952, Verneuil talked to her as if she were a stranger, stating that he was the worst criminal in the world and asking to be turned over to the police. He was completely incoherent. From then on he had delusions and hallucinations about the house having been wired for television to the end that every word spoken would be recorded and every move photographed. He stated, among other things, that there was a television camera placed in his fireplace directly in front of his desk where he worked, and that there were television cameras in his bedroom; that there were shows concerning him going on twenty-four hours a day all over the United States. While staying in Laguna with her, the decedent said that everybody was laughing at him; that the water sprinklers in the hotel room were microphones to pick up the conversations and that it all had been ordained ahead of time. After February 2nd, 1952, he spoke each day about his being on television, about being ridiculed when people on the street recognized him, saying that all of the taxi drivers, colored chauffeurs, soldiers, sailors and marines in particular, laughed every time he appeared on the screen. He told her that she, too, was a part of the conspiracy to ridicule him and to make fun of him. He told her all of his files had been searched by the F.B.I., and all of the books in his library had been taken out and reprinted over night and then put back in the same bindings, so as to confuse him. He stated that the newspapers delivered to his house were special editions for his sole benefit—that all of his friends were in a conspiracy against him. He stated that his deceased wife was not in fact dead, but she merely pretended to die in 1940, and she was alive and hiding somewhere in France to make him appear ridiculous for believing she was dead. Frequently he shut himself up in a dark room. He threatened suicide many times. On one occasion he indicated the place where he had contemplated suicide by jumping from a tall building; on another occasion he asked if the sharp knives had been hidden so that he could not use them to commit suicide, though in fact the knives had not been hidden. In the spring of 1952, he said he was going to take a trip to France to ascertain whether the conspiracy which existed against him in the United States also existed against him in France, and whether his family and friends were in conspiracy against him. She attempted time and time again to convince him that there was no conspiracy against him. At a theatre in New York, on May 19, 1952, two days before he was to leave for France, he stood up in his seat during the intermission, and then stated, "Everybody in the theatre laughed at me, everybody recognized me; everybody knows me from the television shows that are going on." He was addicted to the use of sleeping pills and took one hundred of them with him when he left for France; two weeks after his arrival in France, he cabled for three hundred more. On May 2, 1952, when he left California for France, he did so with $10,000 worth of travelers checks sewed into his pants, and $10,000 worth sewed into his vest, and $5,000 more sewed into his coat. Between May 2, 1952, when he left for France, and November 2, 1952, when he committed suicide, she received many letters from him and nine transatlantic telephone calls, including a twenty-minute call on Sunday night, November 1st, the eve of his suicide.

One of the letters Miss Ryan received from him was written on October 27, 1952, wherein he set forth, among other things:

"* * * marriage always brought me bad luck. I do have a kind of superstition against it and I wanted to be happy with you for ever. So, as I am a free man, I had to find a strong reason not to marry you. It was a lie, granted. But certainly a well-meant one, and which did not harm anyone.

"* * *

"All right, it does not matter. For some unknown reason, I have been the victim of the most fantastic plan and joke ever staged,—and by the biggest country in the world: the United States. What can I do? * * * My house was searched between August and December 1951, all my files and books visited, and some marked with pencil, there is no doubt about that. And so were unquestionably searched all my drawers and the two safes. I did not know a Democracy could do that. Anyway, it was done. Then, by some device, my face and name were made known to the whole American people.

"* * *

"This does not remove the fact that you were, for years, the most charming, devoted, generous, tender person I ever met. And I wish to thank you, once more, for the years of happiness you gave me. You were good, sincere, marvelous * * * until sometime in 1951. Then you did switch to take part in the National Joke. But when? * * * That I don't know, of course. It was so gradually, so marvelously done! * * * What a wonderful actress you are! * * * But why bother about 'when'? * * * I lost you. That is the tragedy to me. The rest is unimportant.

"Under those circumstances, I will not come back to America. Never. It is crushing, because it is the country in which I was the happiest (thanks to you). But what can I do? * * * I have been thinking it over for five months * * * They have, in fact, forced me to leave * * * No one can bear to live in a country of 162 millions people, where everyone recognizes you in the street, and laughs at you! * * * In a way, it is worse than the electric chair.

"Besides, I wanted to come back mainly —I should say: only—to live with you. And your sudden moving out of Faring, then our last telephone conversation, then your last cable, made it clear that you don't want me any more. If anyone had told me that, even last February, even last May * * * I would never have believed it! * * *

"* * *

"But I won't bother about anything since, on May 21st, 1952, I left New York by plane, and found myself travelling only with extras, with a sewart who made the service of a fool, and a stewardess, a brunette, who looked much more like a brothel-hoare than a plane attendant, and addressed me several times in the most sarcastic way. I am saying that all passengers were extras, because none (out of 30 or 40) had a decent shirt or collar, none had any luggage, and all had the hands of killers, or, anyway, of very poor people, who never went to a manicurist in their life. People who can afford to cross the Atlantic by plane, do not have that kind of shirts, or that kind of hands.

"Besides, when we left New York, the plane went South, so as to make me believe that we were going to Mexico, or Peru, or God knows where! * * * Then, without my being able to notice it, of course, they turned around, and went to England and France.

"So, they had a special plane, for me alone! * * * And don't tell me again that I should see a psychiatrist, and that I am mentally ill. I am not at all. I know the foregoing is true.

"But, again, I say: it does not matter * * *. I no longer dress * * * I no longer wash * * * I no longer eat * * * I stay in bed * * * And, even if Popesco's hospitality was charming, I left Mezy. I am now, momentarily, in some hotel * * * And I'll soon move * * * I don't know where! * * * That is why I gave you my brother's address. He will probably always know where to reach me.

"As far as the Faring Road house is concerned, goodbye also to that beautiful dream! * * *

"* * *

"As for all my files, scripts, and everything else: the result of 40 years of work * * * I don't care. Do with them whatever you wish * * * It seems the incinerator will be plenty busy! * * *

"However, I would very much like to receive all my clothes, (shoes, linen, etc. * * *) including those I brought from Paris to America in 1940. They were practically new then, and I never wore them since. And I am so thin now that I could use them. Thank you.

"And this will be the end of my 12 years in America * * * of Faring Road * * * (for which you and I fought so hard) * * * and of our love.

"I'll say it a thousand times: I just cannot understand how and when you could have switched that way * * * and why! * * * I remember San Francisco, Santa Barbara, La Jolla * * * and so many other beautiful recollections * * * I can still see your sad face one evening, in 1946, when I had thought of having a wall built by Mac, in the 2nd floor hall, between your bedroom and mine * * * *You did love me* then, I'm sure of it and even much later than that. What could have made you change? * * *

"But I won't insist, I realize it is so futile! * * * Be happy, my darling, that is the only thing that counts * * *. But, with such wealthy bosses, who can afford to have a special plane for me alone, I am not worried for you! * * * Your future is safe! * * * After what you did for 'them', and the prominent part you played for months, they just can't let you down!

"Even if you made so much fun of me since last December (and probably sooner than that) thank you again for all you did before. You'll always remain my great and only love, and, as long as I live, an ununderstandable, but perfectly adorable recollection.

"* * *

"Still, I will always be happy to hear from you in the future. And I still love you with all my heart, even if it makes you laugh or shrug.

"Goodnight, my sweet darling
Louis"

Eva Devynck testified that she was sixty years of age, and had been married thirty-four years; that she was Verneuil's secretary for twenty-two years, and lived near Paris. She stated that before Verneuil came to the United States in 1940, she attended to his correspondence and did his secretarial work. From 1940 to the date of his death he wrote her 1,091 letters, and she wrote him 1,007 letters. In 1941, she had a power of attorney from him to collect all of his royalties, and in 1945, she had a general power to take charge of everything of his. During the Nazi occupation of France she occupied his house to keep it from being requisitioned by the Germans. After the Germans left Paris, she went from house to house looking for the furniture which had been taken from the establishment, and brought it back piece by piece to restore the facility, even though she was warned that much of the furniture had been "boobytrapped" and she risked being blown up. In 1947, she went to Berlin to try to collect some of his royalties from German publishers at a time when that city was divided into sectors, and thereby risked falling into the hands of the Russians. She met Verneuil at the airport when he landed in Paris in May, 1952, and saw then that he was gravely ill. He did not seem to recognize her. He said he thought he was on an island in the Pacific, and did not believe he was in France. He stated that the airplane from which he had just landed was not a real airplane and that his fellow passengers on the flight were not real persons, but were actors playing the part of travellers, and that he could not understand why such large sums of money were being expended for such purposes. He inquired about who was plotting against him, and who was spending such large sums of money for that purpose; he said that he could not escape them, even if he went to Japan. He looked under the bed for microphones. He said he did not think his first wife was dead. When he and she went to pick up his return-flight ticket to the United States on July 12th, he did not believe the ticket was a real one and turned it back, stating that the conspiracy continued. Further, she testified that Verneuil lived at Madam Popesco's home for a time, then in a hotel, then again at Madam Popesco's, and then in the home of an actress friend, and then back at the hotel, where he died. He had stated that he had no money left, no furniture—that there was nothing left.

Dr. Eliot Corday, a member of the U.C.L.A. medical facility and co-chief of cardiology at the Cedars of Lebanon Hospital, testified that he treated Verneuil in 1947, and from time to time until sometime in May, 1952. He further testified that Verneuil was afraid of everything; that he had developed delusions; that Verneuil had told him about people taking television pictures of him, and that everybody was against him. He further stated that in January and February of 1952, Verneuil was confused; that he showed distrust of his household, and showed signs of mental deterioration, and that he had symptoms of persecution paranoia.

Sol Lesser testified that in the summer of 1952, he went to Paris and met Verneuil there, and found that Verneuil's "mind was not what he (Lesser) had known it to be"; that Verneuil was completely irresponsible and unbalanced; that he was suffering from many hallucinations and delusions, and that he was "deranged or something."

Dr. Norman Levy testified that he was a professor of psychiatry in the U.S.C. Medical School and had read and considered the reporter's transcript of the testimony of Florence Ryan, Eva Devynck, Dr. Corday and Sol Lesser; also, certain letters from Verneuil to Florence Ryan and certain letters from Verneuil to Eva Devynck. Further, he testified that based upon his examination of the items just set forth, he formed an opinion as to the mental condition of Verneuil between February 2, 1952, and November 2, 1952, which opinion was in substance that Verneuil showed evidences of mental and emotional disturbances, the most conspicuous of which were his ideas and apparent delusions of persecution. Also, on the basis of the testimony and exhibits examined by him, the doctor testified that Verneuil had delusions and that it was his opinion that a man who had $68,000 in cash on his person and who felt he could not pay for ordinary meals or a room in a hotel was suffering from delusions; that he had no insight into his ideas about the conspiracies against him and that these ideas continued and seemed never to disappear. It was further the doctor's opinion that Verneuil, on October 27, 1952, had the delusion that Miss Ryan had joined a conspiracy against him, in which the United States government was involved, and that he was the victim of a fantastic plan and joke against him.

Other witnesses, without setting forth a summary of their testimony, testified in the proceedings. It is enough, however, to say that there is ample evidence in the record to show that Verneuil, from February 2, 1952, to his death, suffered continually from paranoiac persecutions, delusions and hallucinations; that his delusions progressed and he included his closest friends and associates in the so-called conspiracy; that during the last of such an existence he made out four separate wills, changing beneficiaries each time. Within a few days or so after executing the last of the purported four wills, he killed himself. It is uncontradicted that before he was victimized with the delusions and hallucinations referred to, Florence Ryan was his close and trusted companion and the object of his love and affection, and that Eva Devynck for twenty-two years had been his devoted and loyal secretary, and that both were the natural objects of his bounty.

[2] Appellants' main contention is that there is insufficient evidence to sustain the findings. It is admitted by them that the conclusions are in harmony with the findings, and apparently it is admitted that the findings support the judgment. Our courts have repeatedly held that the trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case, and in Re Estate of Teel, 25 Cal.2d 520, at page 527, 154 P.2d 384, at page 388, it is said, "All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed."

[3] In our opinion, the evidence clearly establishes that the four October, 1952, wills were the product of delusions or hallucinations, and that such mental condition bore directly on the creation and terms of the wills. The trial judge could well have inferred that but for such delusions and paranoid beliefs, Verneuil would not have attempted to alter his will of December 19, 1951. A finding by the trial judge that the testator lacked testamentary capacity, buttressed by such evidence as was produced in this case, will not be disturbed on appeal. In re Estate

of Teel, supra, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Russell, 189 Cal. 759, 210 P. 249; In re Estate of Wasserman, 170 Cal. 101, 148 P. 931; In re Estate of Fosselman, 48 Cal.2d 179, 308 P.2d 336; In re Estate of Becker, 98 Cal.App.2d 574, 220 P.2d 766; In re Estate of Halbert, 80 Cal. App.2d 666, 182 P.2d 266; In re Estate of Krause, 71 Cal.App.2d 719, 163 P.2d 505; In re Estate of Sandman, 121 Cal.App. 9, 8 P.2d 499; In re Estate of Lingenfelter, 38 Cal.2d 571, 581, 241 P.2d 990.

[4] The fact of the suicide itself, standing alone, might well be insufficient to establish testamentary incapacity, but it is a factor which the trial judge should, and apparently did, take into account with all of the other evidence. In re Estate of Teel, supra; In re Estate of Lingenfelter, supra; In re Estate of Dolbeer, 149 Cal. 227, 86 P. 695; In re Estate of Chevallier, 159 Cal. 161, 113 P. 130; In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Rich, 79 Cal.App.2d 22, 179 P.2d 373.

[5] Appellants assert that there was no testimony that at the very time or moment Verneuil executed each of the four instruments in question he was laboring under illusions or delusions, or was incompetent; in other words, that no one testified that in October, 1952, on the dates the purported wills were executed, the decedent was not competent to make a will. Proof of testamentary incapacity and of the facts upon which a testator's state of mind depends is not necessarily confined to the exact time or moment of the execution of the will. In re Estate of Frank, 102 Cal.App.2d 126, 226 P.2d 767; In re Estate of Hartley, 137 Cal.App. 630, 31 P.2d 240; In re Estate of Alexander, 111 Cal.App. 1, 295 P. 53; In re Estate of Ivey, 94 Cal.App. 576, 271 P. 559; In re Estate of Johnson, 72 Cal.App. 663, 237 P. 816; In re Estate of Barr, 69 Cal.App. 16, 230 P. 181; In re Estate of O'Connor, 51 Cal.App. 339, 196 P. 792; In re Estate of Perkins, 195 Cal. 699, 235 P. 45.

[6] Appellants contend further that it was error to receive the testimony of Dr. Levy and that the objections thereto should have been sustained, as the opinions expressed were lacking in foundation and were incompetent. Dr. Levy read and considered the transcript of the testimony of Florence Ryan, Eva Devynck, Dr. Eliot Corday and Sol Lesser, together with the letters written by decedent and introduced in evidence. The doctor was then asked the question: "Not basing your opinion or founding your opinion upon the opinion of any witness in this case as to the mental capacity of Mr. Verneuil, but solely based upon the testimony which was given by Miss Ryan and Miss de Vynck as to the conversations had with Mr. Verneuil and the correspondence that you have examined, I will ask you if you have an opinion as to his mental capacity, and to give, state it."

An objection was made to the question and counsel for the respondent argued to the court that the question was nothing more than a hypothetical question, framed in a different way; that here a transcript of the testimony had been prepared to the end that the witness could have the advantage of studying the exact phraseology and the exhibits as well. The objection was overruled and the doctor then testified that in his opinion Verneuil suffered from delusions of persecution from February, 1952, continuously until the time of his death; that from June 16, 1952, Miss Ryan was included in the deceased's paranoid ideas and subsequently, Miss Devynck as well. The witness was cross-examined extensively and the doctor went into detail and related the precise evidence upon which his opinion was based. Appellants have called to our attention the case of People v. Le Doux, 155 Cal. 535, 102 P. 517, as being authority for their contentions. The facts of that case are not similar to the facts of this case, and we do not believe that the rule set forth in the Le Doux case necessarily applies in the instant case.

Had the question been put in the usual form of a hypothetical question, nothing of importance would have been included therein which was not before the doctor in the transcript of the testimony of the witnesses in question and the exhibits examined. Further, had the question been put in the usual hypothetical manner, a great deal of extra time would have been consumed in asking the question, and surely, no one would argue that by so proceeding, the doctor would have been in a better position to have given an intelligent opinion. There is no assertion here that the testimony of the witnesses in question was contradictory or conflicting in any wise. Neither is there any assertion here that exhibits considered were in any wise in conflict with the testimony of either of the witnesses referred to.

Much has been written on the subject of hypothetical questions, and many of the writers have urged that, in practice, the use of the hypothetical question in presenting expert opinion has been so grossly abused as to be almost a scandal. Judge Learned Hand referred to it as "the most horrific and grotesque wen on the fair face of justice."

In 2 Wigmore on Evidence, 3rd Ed., 1940, section 686, it is stated: "Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus; and logic must here be sacrificed. After all, Law (in Mr. Justice Holmes' phrase) is much more than Logic. It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence.

"The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

"No partial limitation of its use seems feasible, by specific rules. Logically, there is no place to stop short; practically, any specific limitations would be more or less arbitrary, and would thus tend to become mere quibbles.

"How can the extirpating operation be performed? By exempting the offering party from the *requirement* of using the hypothetical form; by according him the *option* of using it,—both of these to be left to the trial Court's discretion; and by permitting the opposing party, *on cross-examination*, to call for a hypothetical specification of the data which the witness has used as the basis of the opinion. The last rule will give sufficient protection against a misunderstanding of the opinion, when any actual doubt exists.

"The foregoing proposals, be it understood, represent a mere practical rule of thumb. They do violence to theoretical logic. But in practice they would produce less actual misleading of the jury than the present complex preciosities. After all, the only theoretical object of the hypothetical question (*ante*, § 672) is to avoid misunderstanding; and 'if the salt have lost its savor, wherewith shall it be salted? It is thenceforth good for nothing but to be cast out and trodden under foot of men.' The present proposal does not tread under foot the hypothetical question, but merely transfers its function to the hands of the cross-examiner."

Uniform Rules of Evidence, Rule 58, reads as follows: "Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data."

Rule 409 of the Model Code of Evidence reads: "An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the trier of fact, and he may state his reasons for such inferences and need not, unless the judge so orders, first specify, as an hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data."

The substance of the last above mentioned rule is found in section 9 of the Uniform Expert Testimony Act.

It is our view that under the circumstances of this case, it was within the discretion of the court to admit the testimony in question. The trial judge was able to determine whether there was any conflict in what was said by the witnesses Florence Ryan, Eva Devynck, Dr. Corday and Sol Lesser, and whether the exhibits conflicted with any of the testimony of the witnesses and whether the transcript was too voluminous.

In any event, we cannot see whereby there could possibly have been the slightest prejudice worked against the appellants by reason of the form in which the question was put in this case. And we hold that the asking of the queestion in the form as indicated, and the answer given, did not result in any prejudicial error to the appellants. Even if the doctor's testimony is not considered, the record contains a great sufficiency of testimony and other evidence to sustain the court's judgment.

The final contention of appellants is that the evidence does not sustain the finding of the court to the effect that the four purported wills executed by the decedent in 1952, had not been admitted to probate in France, nor proved nor established in accordance with the laws of France. In this connection, suffice it to say that William B. Stern, the foreign-law librarian of the Los Angeles county law library since 1939, whose testimony was not even alluded to by the appellants in their brief, testified with reference to this subject, and his testimony was sufficient to support the findings of the court in this connection. No useful purpose would be served by setting forth the résumé of his testimony.

The order admitting the will propounded by the respondents to probate and denying probate to the will propounded by the appellants is affirmed.

WHITE, P. J., and DORAN, J., concur.

150 Cal.App.2d 785

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Emil F. HOFF, Jr., Arthur Fred Williams,
Bobbie Eldon Williams and Jerry
Kelavos, Defendants,
Emil F. Hoff, Jr., Defendant and Appellant.
Cr. 5755.

District Court of Appeal, Second District,
Division 1, California.
May 13, 1957.

Defendant was convicted of robbery. From judgment rendered by the Superior Court of Los Angeles County, Gerald C. Kepple, J., defendant appealed. The District Court of Appeal, Doran, J., held that where jury found defendant guilty of robbery in first degree on conflicting evidence but also found that he had been armed at time of arrest, though such was not alleged or supported by evidence, it was proper for trial court in entering judgment and sentencing defendant to strike charge that defendant was armed.

Judgment affirmed.

Criminal Law ⇨890

Where jury found defendant guilty of robbery in first degree on conflicting evidence but also found that he had been armed at time of arrest, though such was not alleged or supported by evidence, it was proper for trial court in entering judgment and sentencing defendant to strike charge that defendant was armed.

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Emil F. Hoff, Jr., in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged with robbery. Following a trial by jury defendant was adjudged guilty of robbery of the first degree. As recited in respondent's brief, "The jury also found to be true 'the charge' that defendant Hoff was armed at the time of his arrest.

"The court found that the verdict as to the defendant having been armed at the time of his arrest was erroneous in that it made a finding on a matter not alleged or supported by the evidence and ordered that verdict stricken. The allegation of being armed was stricken.

"A probation report was ordered and defendant was arraigned for judgment; probation was denied and he was sentenced to imprisonment in the state prison for the term prescribed by law. Judgment was entered June 29, 1956.

> "On July 9, 1956, a document entitled 'Notice of Appeal' was filed with the Clerk of the Court. This appeal is from the judgment."

The evidence was conflicting. It would serve no useful purpose to detail the differences. It is sufficient to note that the trial judge's finding that, "the verdict as to the defendant having been armed at the time of his arrest, was erroneous in that it made a finding on a matter not alleged or supported by the evidence", is, as a matter of law, supported by the record.

In the light of the law therefore, the judgment should be, and is affirmed.

WHITE, P. J., and FOURT, J., concur.

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150 Cal.App.2d 671

Glenn D. COREY, Plaintiff and Appellant,
v.
Goodwin J. KNIGHT, Governor of the State of California, et al., Defendants,
Clarke Gray, Respondent.
Civ. No. 22068.

District Court of Appeal, Second District, Division 1, California.
May 6, 1957.
Hearing Denied July 3, 1957.

Declaratory judgment action to determine eligibility of judge of the justice court to position of judge of municipal court and to determine judge's retirement rights. The Superior Court, Ventura County, Charles F. Blackstock, J., entered judgment adverse to judge of the justice court, and he appealed. The District Court of Appeal, Fourt, J., held that judge would be ineligible to be municipal court judge, and that, in event that municipal court were to come into existence, judge, who was over 70, would be compulsorily retired and be entitled to retirement benefits under the County Employees Retirement Law of 1937 when the municipal court came into existence.

Judgment affirmed.

1. Judges ⇨4

Class B justice's court and Class A justice's court, which superseded the Class B court, constituted two different courts, and therefore, in event of establishment of municipal court, plaintiff, who was not an attorney, and who had been justice of both of the justice courts, could not combine his tenure in both courts for purpose of establishing sufficient service to enable him to be municipal judge. West's Ann.Gov.Code, §§ 71040, 71080, 71081, 71601; St.1952, 1st Ex.Sess., p. 347; West's Ann.Const. art. 6, §§ 11, 23.

2. Statutes ⚷219

Where Attorney General has interpreted a law in a written opinion, and his position has been adopted by an administrative agency, the administrative application of the act is entitled to respect by the courts and, unless clearly erroneous, is a significant factor to be considered in ascertaining meaning of the statute.

3. Judges ⚷4

Where Attorney General had given opinion that, under existing constitutional provision, present justice court justices who were not attorneys could not be eligible to become municipal judges, failure of passage of proposed constitutional amendment which was submitted by Legislature to make justices who qualified as to consecutive years of service eligible to continue as municipal court judges even though not attorneys created presumption that the constitutional provision means what the Attorney General said it means. West's Ann.Const. art. 6, § 23.

4. Statutes ⚷212.6

Word or clause in a statute is presumed to have the same meaning throughout.

5. Constitutional Law ⚷12

Exceptions contained in constitutional provisions are to be narrowly, not broadly, construed.

6. Justices of the Peace ⚷8, 15

In event that municipal court were to come into existence because of increase in population in judicial district containing justice court, plaintiff, who was justice of the justice court, who was not eligible to be municipal judge, and who was over 70, would be compulsorily retired and be entitled to retirement benefits under the County Employees Retirement Law of 1937 when the municipal court came into existence upon finding of existence of a necessary population requirement. West's Ann. Gov.Code, §§ 31450 et seq., 31671, 71043 (c), 71080, 71081, 71084, 71180, 74880–74887; West's Ann.Const. art. 6, § 11.

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Waite & Drapeau, by David R. Drapeau, Ventura, for appellant.

Charles Kaplan, Beverly Hills, Arden T. Jensen, Solvang, amici curiae.

Roy A. Gustafson, Dist. Atty., Ventura County, Ventura, for respondent.

FOURT, Justice.

This is an appeal from a judgment in a declaratory relief action wherein it was adjudged "that if plaintiff is Judge of the Justice Court of the Ventura Judicial District at the time when the district is found to have over 40,000 inhabitants, (1) a Municipal Court will thereupon supersede the Justice Court, (2) plaintiff will be ineligible to be Judge of the Municipal Court, (3) a vacancy will exist to be filled by appointment of the Governor, (4) plaintiff will be compulsorily retired and (5) plaintiff will receive retirement benefits under the County Employees Retirement Law of 1937 [Gov.Code, § 31450 et seq.]."

A résumé of the facts in the case is as follows: In about 1947, the legislature requested the Judicial Council to make a survey of all courts in California exercising jurisdiction inferior to the superior court. After an extensive study the Judicial Council, in 1949, recommended to the legislature a plan for the reorganization of such courts (Twelfth Biennial Report [1948], Judicial Council of California). The legislature, through committees, conducted public hearings, and as a result thereof some changes and additions were made in the proposed constitutional amendments and the proposed statutes drafted by the Council. The interpretation to be given to some of the words added in one of the constitutional amendments which was proposed and adopted (Article VI, section 23) is the only real problem to be determined in this case. The language in question is contained in the "exception" section, generally referred to as the "Grandfather Clause", the pertinent parts of which are as follows:

"No person shall be eligible to the office of a Justice of the Supreme Court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the State for a period of at least five years immediately preceding his election or appointment to such office; provided, however, that any elected judge or justice of an existing court who has served in that capacity by election or appointment for five consecutive years immediately preceding the effective date of this amendment shall be eligible to become the judge of a municipal court by which the existing court is superseded upon the establishment of said municipal court or at the first election of judges thereto and for any consecutive terms thereafter for which he may be reelected * * *."

The legislature voted to submit the proposed constitutional amendment to the People at the General Election, November 7, 1950. The proposition was Number 3 on the ballot at that time, and was adopted by the People by a large majority. At the same election, section 11 of Article VI of the Constitution was amended to provide for only two types of courts inferior to the superior court, namely, justice courts and municipal courts, and further to validate the laws relating to judicial districts enacted in the legislative session of 1949, in anticipation of the adoption of the constitutional amendments. The amendments provided, among other things, in substance, that each county should be divided into judicial districts and that if the population of any district were over 40,000, the district should have a municipal court, or if under 40,000, a justice court. The legislature, by section 1 of Chapter 1511, Statutes 1949, Government Code, § 71040, directed the Board of Supervisors to district their counties. The new plan was to become effective January 1, 1952, except where two or more incumbent judges would be eligible to be judges of the new court, in which case section 2 of Chapter 1510, Statutes 1949, Government Code, §§ 71080, 71081, provided that they "shall not automatically succeed to judicial positions in the municipal or justice court, and the existing courts shall continue to function within the district until the first judge or judges of said municipal or justice court shall be elected by the qualified electors of the district at the first general state election held following the expiration of 90 days and qualify."

Article VI, section 11, as amended in 1950, also contained a provision that "existing courts shall continue to function as presently organized until the first selection and qualification of the judge or judges of the municipal or justice court, at which time, unless otherwise provided by law, pending actions, trials and all pending business of existing courts shall be transferred to and become pending in the municipal or justice court established for the judicial district or city and county in which they are situated, and all records of such superseded courts shall be transferred to, and thereafter be and become records of said municipal or justice court."

On July 6, 1944, Ventura township was one of nine townships into which Ventura county was divided. The court of Ventura township was a class B justice court. The justice of the peace who presided over the court died and appellant herein was appointed by the Board of Supervisors to fill the vacancy.

The City of San Buenaventura (hereinafter referred to as Ventura) is located in the territorial limits of Ventura township. The charter of Ventura provides for a police court and such court was presided over by Judge B. L. Gregg, a former member of the State Bar. Appellant's original term as justice of the peace expired January 6, 1947. He was elected to that position for the term from January 6, 1947, to January 2, 1951, and was re-elected to that position for the term from January 2, 1951, to January 3, 1955. On October 26, 1951, the population of the township having been found to be over 30,000 by the 1950 census, the court became a class A justice court. The boundaries of the Ventura judicial district were established as of September 4, 1951, by Ordinance No. 472 of the board of supervisors of Ventura county, in conformity with the Statutes of 1949. The area of the district included, but was larger than, Ventura township. The population of the district was less than 40,000.

On January 1, 1952, there were two judicial officers of courts within the area of Ventura judicial district, namely, appellant as justice of the peace of Ventura township, and B. L. Gregg as judge of the police court in the city of Ventura. Both were candidates for the office of judge of the justice court of Ventura judicial district at the election in 1952. Appellant was not and never has been an attorney, and had not passed any examination prescribed by the judicial council. Appellant, who was over 70 years of age at the time of the election, was elected and took office as judge of the justice court on January 5, 1953, for the term ending January 5, 1959.

The justice court of Ojai judicial district began functioning in January, 1952, because only one incumbent was eligible to the judgeship. The remaining four districts in Ventura county were inoperative as such, pending the election of judges. Judges were elected in 1952, and the four districts began functioning as such on January 5, 1953, or, in other words, on January 5, 1953, Ventura county had five judicial districts, each with a functioning justice court.

An action was filed in the superior court of Ventura county on July 5, 1956, for the purpose of having it declared that Ventura judicial district had a population of over forty thousand. On September 6, 1956, the trial judge of that court found that there were forty thousand or more persons in the district, and a municipal court is now in existence. Appellant contends that he is eligible to be, and that he is the judge of such municipal court now in existence. Appellant further asserts that he will continue to be a judge of the justice court if found to be ineligible to be the municipal court judge, until a municipal court judge is elected for the term beginning January 5, 1959. Respondent asserts that appellant is ineligible and he cannot pay appellant now that such municipal court is established; that appellant's term is now terminated as of September 6, 1956, the date upon which the municipal court was declared to be in existence, and appellant is compulsorily retired, and that a vacancy existed which was to be filled by appointment by the Governor.

Appellant, in his briefs and in the oral argument, has made issue of the first contention heretofore mentioned, namely, that he is eligible to become judge of the municipal court of Ventura judicial district, and no argument or authorities were presented on the other matters, and we therefore assume that the disposition of the first question will dispose of this appeal.

Honorable Charles F. Blackstock, the learned trial judge, prepared findings of fact and conclusions of law and in his conclusions set forth the appicable law. We believe that the commentary of the trial judge concisely and correctly sets forth the law and we adopt his statements in reference thereto, as follows:

"Both parties concede that if Ventura Judicial District is found to have a population of 40,000 persons and if plaintiff is eligible to be a Municipal Court judge, the court will begin to function immediately with plaintiff as judge. Government Code, Section 71080. Not being an attorney, plaintiff is eligible, if at all, only under this proviso of Section 23 of Article VI of the Constitution:

"'[A]ny elected judge or justice of an *existing court* who has served in that capacity by election or appointment for five consecutive years immediately preceding the effective date of this amendment shall be eligible to become a judge of a municipal court by which the *existing court* is ***superseded*** upon the establishment of said municipal court. * * *' (Emphasis added.)

"The basic question is the meaning of the words 'existing court'. The amendment was adopted November 7, 1950. Do the words refer to a court then existing or to a court existing at the time the amendment is invoked?

"The court over which plaintiff presided on November 7, 1950 was the Justice's Court of Ventura Township. The court over which he now presides is the Justice Court of Ventura Judicial District. If those two courts are the same court (identified by different names), plaintiff is clearly eligible regardless of the time to which the words 'existing court' refer.

[1] "A Class B Justice's Court had jurisdiction over cases involving claims up to $300. A Justice Court has jurisdiction of claims up to $500. The jurisdiction of a Justice's Court was not exclusive and, in fact, was shared in Ventura Township with the Police Court. The jurisdiction of the Justice Court is exclusive within its territorial area. The territorial area of a township was not necessarily the same as the territorial area of a judicial district and, in fact, the boundaries of the Ventura Judicial District are larger than the boundaries of Ventura Township. (There were nine townships in Ventura County, whereas there are only five judicial districts.) The presiding officer of a Justice's Court was a Justice of the Peace. The presiding officer of a Justice Court is a Judge. There were no qualifications for a Justice of the Peace. A Judge of a Justice Court must either be a lawyer or have passed an examination prescribed by the Judicial Council. The term of a Justice of the Peace was four years. The term of a Judge of the Justice Court is six years. It appears, therefore, that the two courts are different and are not the same.

"This conclusion is fortified by language used in the pertinent laws. Article 6, Section 11 of the Constitution refers to the fact that 'existing courts [in a judicial district] shall continue to function' until the new justice court is established at which time all records of such superseded courts shall be transferred to [the] * * * justice court.' Government Code, Section 71080 provided that where two persons were eligible to be judge of the new justice court (as were Justice of the Peace Glenn Corey and Judge B. L. Gregg in the Ventura Judicial District), 'such incumbents shall not automatically succeed to judicial positions [on January 1, 1952] in the * * * justice court, and the existing courts shall continue to function within the district until the first judge * * * of such * * * justice court [is] elected [for the term beginning January 5, 1953].' Similarly, Chapter 14, Statutes of 1952, First Extraordinary Session, referred to the fact that:

"'Certain Class B justices' courts will *remain in existence* until January 5, 1953, under the inferior court reorganization program, after which time there will be no courts in the State inferior to the superior courts except municipal and justice courts.' (Emphasis added.)

"Thus it is plain that the Justice's Court of Ventura Township is not the same as the Justice Court of Ventura Judicial District.

"Which, then, is the 'existing court' referred to in the eligibility clause of the Constitution? If it is the Justice Court of Ventura Judicial District, plaintiff is ineligible because plaintiff has not 'served in that capacity [that is, judge] by election or appointment for five consecutive years immediately preceding [November 7, 1950].' This is so because that court did not exist *before* January 5, 1953. If it is the Justice's Court of Ventura Township, plaintiff is ineligible because that court will not be 'superseded upon the establishment of said municipal court.' This is so because that court did not exist *after* January 5, 1953 and cannot be superseded in 1956. That court was superseded on January 5, 1953 and plaintiff holds his present position pursuant to Section 71601 of the Government Code which made him eligible to be Judge of the Justice Court solely because he was 'the incumbent of a superseded inferior court.' In either event, plaintiff is ineligible. (Had a Municipal Court been established between November 7, 1950 and January 5, 1953, plaintiff would have been eligible to be judge.)

[2] "The conclusion that plaintiff is ineligible has been reached by the Attorney General (21 Ops.Cal.Atty.Gen. 152) and by defendant county auditor. Where the Attorney General has interpreted a law in a written opinion and that position has been adopted by an administrative agency, the 'administrative application of an act is entitled to respect by the courts, and unless clearly erroneous is a significant factor to be considered in ascertaining the meaning of a statute.' Mudd v. McColgan (1947), 30 Cal.2d 463 [183 P.2d 10].

[3] "Proposition 19 on the ballot in 1954 was this:

" 'Proposed Amendment to Article VI

" 'Sec. 23. No person shall be eligible to the office of a justice of the Supreme Court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the State for a period of at least five years immediately preceding his election or appointment to such office; provided, however, that any elected judge or justice ~~of an existing court~~ who has served ~~in that capacity~~ by election or appointment *as such judge or justice of a court superseded by a justice or municipal court* for five consecutive years immediately preceding ~~the effective date of this amendment~~ *November 7, 1950, and has served continuously as a judge of such superseding court after said date until the establishment of a municipal court,* shall be eligible to become the judge of a municipal court ~~by~~ which *supersedes* the ~~existing~~ court *of which he is judge* ~~is superseded~~ upon the establishment of said municipal court or at the first election of judges thereto and for any consecutive terms thereafter for which he may be reelected. The requirement of consecutive years of judicial service shall be deemed to have been met even though interrupted by service in the armed forces of the United States during the period of war.'

"In the pamphlet sent to all voters, the following argument was made in favor of the proposition:

" 'The voters of California at the 1950 general election adopted a constitutional amendment providing for the reorganization of the inferior courts of this State and reducing the number of such courts to two classes known as municipal courts and justice courts. The Constitution then required admission to practice law before the Supreme Court for at least five years before a person is eligible to be a municipal court judge. The 1950 amendment made any elective judge or justice of an existing court superseded by a municipal court eligible to become judge if he had served in his present capacity for five consecutive years immediately preceding the effective date of the amendment. It was the intent and spirit of the amendment that experienced incumbent Justices of the Peace would be permitted to continue in office, even though their courts were changed to municipal courts without requiring that they be lawyers.

" 'The Attorney General of California last year gave an opinion that the present Justices who are not attorneys would not be eligible to become the judges of municipal courts when such a court succeeds their justice courts.

" 'Following the opinion of the Attorney General, both houses of the Legislature unanimously voted to submit the present amendment to the Constitution, for the reason that it was the concensus of the Legislature that incumbent Justices who qualify as to consecutive years of service should not be ineligible to continue as municipal court judges because they are not attorneys.

" 'By adopting the present amendment, the people will remove any doubt as to the status of incumbent Justices who are not attorneys and they will be eligible to become municipal judges upon the conversion of their courts if they were eligible to do so in 1950.

"'There should be nothing in the administration of justice in municipal courts which requires men who have had long experience as judges to be attorneys. The Justices of the Peace have always been close to the people and responsive to their needs in matters over which they have jurisdiction, and it is felt that when a Justice has been in office for many years, he has met with approval at the hands of the people, even though he is not an attorney.

"'This amendment merits the approval of the people for the reasons herein set forth, in order to protect incumbent Justices as to their eligibility for office, even though they are not attorneys.

"'J. B. Cooke
"'State Assemblyman 37th Dist.'

Had it been passed, it would have been presumed to have been passed with full knowledge of the Attorney General's opinion (Coca-Cola Co. v. State Board of Equalization [1945], 25 Cal.2d 918 [156 P.2d 1]) and it would have been presumed to have changed the law, rather than to have 'clarified' it. Loew's, Inc., v. Byram (1938), 11 Cal.2d 746 [82 P.2d 1]. Having failed of passage, there is a presumption that the provision means what the Attorney General said it means. The interpretation by the Attorney General is the same as this Court has reached independently.

[4, 5] "Plaintiff's only possible hope is that the Court will, as he urges it to do, 'attach separate meanings to the two uses of the term "existing."' In other words, plaintiff says that 'existing court' means the Justice's Court of Ventura Township in the first part of the sentence and means the Justice Court of Ventura Judicial District in the second part of the sentence. This construction is not reasonable because a word or clause in a statute is presumed to have the same meaning throughout. Pitte v. Shipley (1873), 46 Cal. 154; Hoag v. Howard (1880), 55 Cal. 564. Even if reasonable, that construction would be extremely broad and exceptions are to be narrowly, not broadly, construed. City of National City v. Fritz (1949), 33 Cal.2d 635 [204 P.2d 7].

[6] "Plaintiff, as an elective officer, must be retired 'at the end of the first term to which he is elected and which commences on a date following his seventieth birthday.' Gov. Code, Sec. 31671. His term of office will end, by operation of law, when a Municipal Court is established. 'In each district containing a population of more than 40,000 inhabitants * * * there shall be a municipal court.' Constitution, Article VI, Section 11. 'Whenever a municipal court is established in a district in which a justice court was previously established * * *, the justice court shall cease to exist. * * *' Government Code, Section 71084. A 'vacancy in the office of judge of a municipal court shall be filled by appointment by the Governor. * * *' Government Code, Section 71180. (If plaintiff were eligible, he would automatically become Judge of the Municipal Court. If two or more incumbent judges were eligible to one position of Judge of the Municipal Court, the court would not begin to function until January, 1959 following the election of a judge in 1958. Gov. Code, Secs. 71080, 71081. Neither of these situations exists in this case.) Since the necessary legislation exists for a Municipal Court in the Ventura Judicial District (Gov. Code, Secs. 74880–74887), the court will come into existence when it is found, pursuant to Section 71043(c) of the Government Code, that there are 40,000 inhabitants of the district. At that moment plaintiff will be compulsorily retired and will be entitled to retirement benefits under the County Employees Retirement Law of 1937."

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

150 Cal.App.2d 654

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Larry Allen KEMP, Defendant and Appellant.

Cr. 1309.

District Court of Appeal, Fourth District, California.

May 2, 1957.

Prosecution for manslaughter arising out of unlawful operation of an automobile. The Superior Court, San Diego County, Gerald C. Thomas, J., entered judgment of conviction and denied defendant's motion for new trial and he appealed. The District Court, Barnard, P. J., held that evidence sustained conviction.

Affirmed.

1. Automobiles ⇨344

In manslaughter prosecution, where defendant was guilty of reckless speeding, and was racing his automobile on a public street with automobile of a codefendant, mere fact that his vehicle did not strike another automobile, and death was caused by collision of codefendant's automobile with such other vehicle, did not mean that defendant was not criminally liable under manslaughter statute on any theory that his actions were not the proximate cause of the death, in view of showing that defendant and codefendant were jointly engaged in a series of acts which led directly to the fatal collision. West's Ann. Vehicle Code, §§ 505, 510, 511(a)(3), 601.-5; West's Ann.Pen.Code, § 192.

2. Criminal Law ⇨822(6)

In prosecution for manslaughter arising out of unlawful operation of an automobile, instructions defining negligence, gross negligence and proximate cause were not erroneous as setting wrong standard for imposition of criminal negligence when each of the instructions complained of was read together, since it was not necessary that all parts of each instruction be repeated as a part of every other instruction.

3. Automobiles ⇨344

Statute providing that in every crime there must exist a joint operation of act and intent or criminal negligence, does not mean that a conviction for manslaughter through operation of a motor vehicle could not be had on mere negligence, since manslaughter statute covers negligent operation of a vehicle whether gross or not and makes either one criminal negligence under circumstances named therein. West's Ann. Pen.Code, §§ 20, 192.

4. Criminal Law ⇨1172(1)

In prosecution for manslaughter arising out of unlawful operation of an automobile, instructions on violation of speed limit in a residence district without qualifying limitations, was not prejudicial, in view of evidence that defendant was violating basic speed law and blind intersection statute. West's Ann.Vehicle Code, §§ 90, 90.1.

5. Criminal Law ⇨1173(2)

In manslaughter prosecution arising out of operation of a motor vehicle, failure of court to instruct on necessity of proof of corpus delicti in connection with admissions was not reversible error.

6. Criminal Law ⇨781(2)

In prosecution for manslaughter arising out of operation of a motor vehicle, statements made by defendant as to the operation of his vehicle shortly before a fatal accident occurred, warranted giving of instructions as to confessions and admissions. West's Ann.Pen.Code, § 192, subd. 3(a).

7. Criminal Law ⇨792(2)

In prosecution for manslaughter arising out of operation of a motor vehicle, wherein a vehicle with which defendant was racing struck another vehicle causing a death, instruction upon aiding and abetting was proper, notwithstanding fact that defendant's vehicle was not involved in fatal collision. West's Ann.Pen.Code, § 192, subd. 3(a).

8. Automobiles ⇨355(13)

Evidence sustained conviction for manslaughter arising out of operation of a motor vehicle. West's Ann.Pen.Code, § 192, subd. 3(a).

◆

Edgar B. Hervey, James Edgar Hervey, San Diego, Henry F. Walker, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant and one Jack Coffin were jointly charged with the crime of manslaughter (violation of paragraph (a) of subd. 3 of section 192 of the Penal Code). It was charged that on March 10, 1956, they unlawfully and without malice, while driving and operating an automobile, and while in the commission of an unlawful act not amounting to a felony, with gross negligence, killed one Ralph Rook. At the trial the defendants called no witnesses and submitted no instructions. A jury found them both guilty as charged, and further found that the act causing death was done with gross negligence. Probation was granted to each defendant on certain conditions, including the serving of nine months in jail and the suspension of driving licenses for one year. The defendant Kemp has appealed from the order denying his motion for a new trial.

The accident happened about 5:40 p. m. at the intersection of Oregon and Monroe Streets in a residence section of San Diego. Oregon Street runs north and south, and Monroe east and west. A block to the south of Monroe, Meade Street, also crossed Oregon and there were stop signals at that intersection. The block on Oregon between Meade and Monroe is some 600 feet long. On this occasion Kemp was driving north on Oregon in a Chevrolet in which a Cadillac engine had been installed. While he was stopped at the stop sign at Meade, an Oldsmobile driven by Coffin pulled up on his right and also stopped. Both cars then proceeded north on Oregon at a high rate of speed, the Chevrolet being near the middle of the street and the Oldsmobile about five feet to its right except for a time in the middle of the block when the Oldsmobile came over to within about two feet of the Chevrolet. When these cars were about 50 feet south of the south curb line of Monroe they were abreast, and the drivers then ceased to accelerate their speed. At that point Kemp pulled sharply to the left, and Coffin pulled to his right, both trying to avoid another car that had entered the intersection and was proceeding east on Monroe. Kemp succeeded in missing that other car, by cutting to the extreme southwest corner of the intersection, and he then drove west on Monroe, without stopping. As Coffin's car passed through the intersection it struck the east-bound car and Rook, who was a passenger in that car, died as a result of injuries received in that collision.

An eyewitness, who was standing on the east side of Oregon some 200 feet north of Meade, and facing Meade, testified that both cars started off with "a little bit of a spin of the wheels"; that they proceeded north on Oregon accelerating constantly until a little way back from Monroe; that when they passed him they were going about 35 miles an hour and running "neck and neck"; that passengers in the two cars made movements which are highly suggestive of a race; that the cars were making a noise of acceleration and ceased accelerating at a point about 50 feet from the Monroe intersection; that at that time the cars were approximately abreast; that while traveling this block they reached a maximum speed of approximately 55 miles per hour; that he got a glimpse of the other car traveling east on Monroe, and that it was going about 15–20 miles per hour; that the Chevrolet veered left, coming close to the southwest corner of the intersection and going on west on Monroe; that the Oldsmobile pulled to its right, proceeded into the intersection and collided with the east-bound car; and that he heard a short screech of brakes and saw the collision.

Shortly after the accident the appellant Kemp answered questions asked by an investigator in the district attorney's office, the matter being taken down in shorthand. Portions of the statements thus made were admitted in evidence as against Kemp alone, and were read to the jury. In reply to these questions he stated, among other things, that he had never seen Jack Coffin before; that while he was crossing Meade, Coffin pulled up beside him; that "I started across at a pretty good speed"; that "We finally passed each other and kept on going"; that "I always accelerate pretty good, reach a certain speed and knock off;" that he thought he was going between 30 and 35 miles per hour; that he could have been going more than 35 miles per hour; and that he doubted that he was going 45 miles an hour. When asked if he was not racing to keep ahead of Coffin he said, "No, he passed me." When asked whether, while in the middle of the block, he was racing to see that Coffin did not pass him he answered, "No, not especially. If I didn't want him to pass me, he never would." He also stated that Coffin was ahead of him "most of the way down the block"; and that when Coffin passed the Monroe intersection he (Kemp) must have been six or seven car-lengths behind. He further stated that after the accident he went on to La Mesa and did not stop at his home; that he changed his mind about going home for a good reason; that the reason was "I didn't want to get involved"; that he was afraid the witnesses might be out looking for him; and that he did not go home for several hours. When asked why he left the scene if he knew there was an accident he said he did not want to get involved in it. When asked why he felt he might become involved he said, "Because I was speeding down the street. I mean—not speeding, but I was with him most of the way down there". "* * * I did reach over the speed limit, yes. That still doesn't mean I was racing."

There was ample evidence that the intersection of Oregon and Monroe Streets was a "blind" intersection within the meaning and intent of section 511 (a) (3) of the Vehicle Code. There was ample evidence that these cars traversed the block between Meade and Monroe and entered the Monroe intersection at a high rate of speed, and it could reasonably be inferred from the evidence that Kemp and Coffin were racing while traversing that block.

[1] Appellant's main contention is that even though he may have been guilty of reckless speeding, and even though he and Coffin were racing their vehicles on a public street, he could not be held criminally liable since he struck nothing and since this death was caused solely by the speed and reckless driving of Coffin. In this connection it is contended that there was no showing of anything attributable to him which was a proximate cause of the death, as required by section 192 of the Penal Code. It is argued that the mere violation of section 601.5 of the Vehicle Code prohibiting speed contests on a highway is immaterial, like the failure to have a required license to drive, and could not constitute a proximate cause of the death; that the thing that caused this death is either excessive speed (violation of section 510) or reckless driving (violation of section 505) on the part of Coffin; that Coffin's violation of either of those sections was neither attributable nor imputable to Kemp; that Kemp neither interfered with nor had control of the actions of Coffin; and that it follows that he could not have been guilty of any unlawful act, or of any gross negligence, which was a proximate cause of this death.

The appellant relies on the case of People v. Lemieux, 176 Misc. 305, 27 N.Y.S.2d 235, in which it was held that where a passenger in one of two racing automobiles was thrown out and killed the driver of the other racing automobile, which was a block away, was not criminally liable under a statute denouncing criminal negligence in the operation of a vehicle resulting in death; and on the English case of Rex v. Mastin, 6 C. & P. 396, 172 Eng.Rep. (N.P.) 1292, involving the riders of two horses. The Lemieux case involved a charge under section 1053–a of the New York Penal Law, McKinney's Consol. Laws, c. 40, which provides that a person who operates a vehicle in a reckless manner whereby a human being is killed is guilty of criminal negligence in the operation of a vehicle resulting in death. Prior to the enactment of that statute the killing of a human being in the operation of a motor vehicle was treated as manslaughter in that state. Since the enactment of that statute such a killing is no longer treated as manslaughter. People v. Curnuch, 177 Misc. 606, 31 N.Y.S.2d 105. The New York statute by its terms clearly applies only to the person operating the vehicle at the time in question. Section 192 of our Penal Code does not expressly use such restrictive language and such language should not be read into it, at least until such time as suitable provision is made by a replacing statute. In a later English case, (Reg. v. Swindall, 2 Car. & K. 230, 2 Cox. C.C. 141) involving the fast driving of two horses, it was contended that since only one of the defendants had driven over the deceased the other must be acquitted. The court said: "Not so. If two persons are together, inciting and encouraging one another to do an unlawful act, and one of them does it, the other is equally guilty."

The evidence here strongly indicates that Kemp and Coffin were inciting and encouraging one another to drive at a fast and reckless rate of speed on a residence street and as they closely approached a blind intersection. It was by the merest chance that Kemp was able to avoid hitting the other car, and that Coffin was not. Only the matter of a split second and a few inches made the difference. They were both violating several laws, the acts of both led directly to and were a proximate cause of the result, and the fact that the appellant happened to narrowly escape the actual collision is not the controlling element. The evidence is sufficient to show that they were not acting independently of each other, and that they were jointly engaged in a series of acts which led directly to the collision. The language of section 192 of the Penal Code is broad enough to impose criminal liability in this situation and the evidence, with the reasonable inferences therefrom, is sufficient to show that the homicide was a proximate result of the commission of an unlawful act or acts on the part of the appellant, within the meaning of that section. A petition for a writ of prohibition, based on the same contention that since Kemp could not be held criminally liable for manslaughter no probable cause appeared, was denied by this court (Kemp v. Superior Court, 4 Civil, 5421); and a hearing in the Supreme Court was denied (on the merits and not for a jurisdictional reason). We still adhere to the views suggested by the denial of that petition.

[2] It is further contended that the court erred in giving a number of instructions to the jury. Error is first assigned in the giving of ten instructions defining negligence, gross negligence and proximate cause, and giving various rules in connection therewith. It is argued that section 20 of the Penal Code provides that in every crime there must exist a joint operation of act and intent or *criminal negligence;* that these instructions in effect told the jury that a conviction could be had on mere negligence, simple or gross, as distinguished from criminal negligence or from an unlawful act not amounting to a felony; that this is contrary to the requirement of section 20 that there must be criminal negligence; that these instructions were not only incorrect but conflicted with other given instructions, so that it cannot be ascertained upon what basis the jury returned its verdict; that while the evidence was sufficient to find that Coffin was guilty of an unlawful act in driving his vehicle with gross negligence, this is not necessarily true as to Kemp; that Kemp took some care by turning before he reached the curb line of Monroe, and he could not be said to have been grossly negligent; that under the instructions mere negligence on Kemp's part, contributing substantially in conjunction with an intervening act, could be taken as imposing liability upon

him; and that the jury might thus have found him guilty if he had been guilty of ordinary negligence and if Coffin was guilty of an unlawful act with gross negligence; and that the jury might thus have been misled.

[3] While section 20 of the Penal Code requires criminal negligence as one alternative, section 192 covers negligence whether gross or not and makes either one criminal negligence under the circumstances named. That section is to be harmonized with section 20. People v. Wilson, 78 Cal.App.2d 108, 177 P.2d 567. Each of the instructions complained of must be considered in the light of the entire charge given the jury, and when all are read together it is apparent there was no conflict between these instructions and others which were given. The jury was instructed as to all elements of the crime charged, including the matter of proximate cause, and it was not necessary that all parts of each instruction be repeated as a part of every other instruction. From a reading of the instructions we are convinced that the jury was fully and properly instructed on the degree of negligence required to convict. It is apparent that the jury was not misled in the respect here complained of, since it specifically found that the death in question was caused through gross negligence. No reversible error appears in this connection.

[4] It is next contended that the court erred in instructing the jury that the prima facie speed limit in a residence or business district was 25 miles per hour; that driving in excess thereof is presumed to be unlawful and the presumption is controlling unless it be shown that the basic speed law was not violated, and in giving the statutory definition of "residence district" (Veh. Code, Sec. 90), without giving the qualifying limitations (Veh. Code, Sec. 90.1). It is argued that these instructions were prejudicially erroneous since there was no evidence that Oregon Street was sign-posted with any speed restriction signs, and no evidence as to whether or not it was a state highway. It is also argued that while there was testimony as to the number of houses in three blocks on Oregon there was no evidence as to how close these houses were to the street, or as to how many of these houses had any access to the street.

There was testimony that the block on Oregon between Monroe and Meade had eleven dwellings on the west side, and a school on the east side; that the block on Oregon north of Monroe contained twenty-seven dwellings and a store; and that the block on Oregon south of Meade, between Meade and El Cajon Boulevard, had eighteen houses, nine on each side. The officer who testified to this testified that there were a certain number of dwellings "on" Oregon Street, in these three blocks, and on the respective sides thereof. The situation in the residence sections of cities is well known, and it need not be assumed that this jury lacked ordinary intelligence. When dwellings are said to be "on" a certain street it may reasonably be inferred that they have access to that street. The court instructed the jury concerning the basic speed law, and also the prima facie speed limits, as set forth in sections 510 and 511 of the Vehicle Code. It cannot reasonably be thought that the jury could have been misled or that prejudice could have resulted under the circumstances here appearing. It would be unreasonable to believe that the jury was in any way influenced by the presence or absence of any evidence as to whether Oregon Street had been sign-posted for any particular speed. It sufficiently appeared beyond any reasonable doubt that Kemp and Coffin were also violating the basic speed law and the blind intersection statute, neither of which laws depends upon the posting of signs, and it cannot be held that any errors in this connection could have affected the result. The court qualified its statement that to drive in excess of the prima facie limit is presumed to be unlawful, and such presumption is controlling unless it is shown that the basic speed law was not violated, by stating "that presumption is controlling unless the evidence shows that the defendant did not violate the basic speed law, or you entertain doubt whether or not he did so."

[5, 6] It is further contended that the court erred in giving instructions which defined confessions and admissions, and as to silence in the face of accusations, and in failing to instruct on the necessity for proof of the corpus delicti in that connection. It is argued that the statements of Kemp which were read to the jury did not constitute a confession and that they contained no accusatory statements made to him. Also that, while it may have been proper to instruct on admissions, the jury was not told that an admission may not be considered in the absence of proof of the corpus delicti. There was ample evidence establishing the corpus delicti outside of any admissions of the appellant and, in any event, the failure to instruct as to that was not reversible error. People v. Chan Chaun, 41 Cal.App.2d 586, 107 P.2d 455; People v. Clark, 117 Cal.App.2d 134, 255 P.2d 79. The statements made by the appellant sufficiently warranted the giving of these instructions and neither prejudice nor error appears.

[7] Finally, it is contended that the court erred in giving an instruction upon aiding and abetting, in the absence of supporting evidence. It is argued that in giving this instruction the court failed to also tell the jury that one who aids and encourages the commission of an offense is not deemed by law to be guilty unless what he did was done knowingly and with criminal intent. Not only was this element covered in other instructions, but the instruction in question was limited in its application to persons "who knowingly and with criminal intent aid and abet in its commission." Most of the argument in this connection is based upon appellant's basic contention that he struck nothing, and that nothing that he did personally could be said to have proximately resulted in this death. We are unable to see how anything in this instruction could have been sufficiently prejudicial to justify a reversal.

[8] It cannot be held that the evidence here is insufficient as a matter of law to support this conviction, as appellant argues. It cannot be held that any errors which may appear were such as to deny to the appellant a fair trial, and it does not appear reasonably probable that any such errors could have affected the result or that a different verdict could reasonably be expected in the event of a new trial. The evidence of guilt was clear and convincing, and it would appear that the punishment imposed was very light and much more favorable to the appellant than it might well have been.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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150 Cal.App.2d 606

Charles L. SABIN, Plaintiff and Appellant,
v.
UNION OIL COMPANY OF CALIFORNIA, a corporation, Defendant and Respondent.
Civ. 17069.

District Court of Appeal, First District, Division 2, California.
May 1, 1957.

Rehearing Denied May 31, 1957.
Hearing Denied June 26, 1957.

Action by independent contractor's employee for injuries sustained while repairing chimney damper at defendant's refinery. From judgment of nonsuit entered in Superior Court, Contra Costa County, Homer W. Patterson, J., employee appealed. The District Court of Appeal, Dooling, J., held that where maintenance contract between independent contractor and defendant provided that independent contractor would comply with regulations governing safety and safe performance of work but defendant had never interfered with manner in which independent contractor carried out work of maintaining and servicing chimneys and flues in defendant's refinery, defendant did not reserve control over independent contractor's work so far as safe performance was concerned and defendant was not liable for independent contractor's negligence which resulted in injury to independent contractor's employee.

Judgment affirmed.

1. Master and Servant ⚿315

When property is turned over by the owner to an independent contractor to do work thereon, the owner is not liable to third persons for the negligence of the independent contractor.

2. Master and Servant ⚿318(1, 2)

Where an independent contractor's employee is injured by some condition of the owner's premises over which the owner retains control or where the owner interferes or assumes to direct the employee in the manner or method of performing the independent contractor's work and such interference or direction results in injury to the employee, the owner will be liable.

3. Master and Servant ⚿318(1)

Where independent contractor which held contract for maintenance and service of chimneys and flues at refinery only worked on units which had been taken out of operation and refinery only indicated to independent contractor that unit was available for repair and the character of work to be done, act of refinery's employee in pointing out chimney damper to be repaired and directing independent contractor's foreman to repair it did not change the relationship from that of owner and independent contractor or the duties arising from that relationship.

4. Master and Servant ⚿318(1)

Where maintenance contract provided that independent contractor would comply with regulations governing safety and safe performance of work but defendant had never interfered with manner in which independent contractor carried on work of maintaining and servicing chimneys and flues in defendant's refinery, defendant did not reserve control over independent contractor's work so far as safe performance was concerned and defendant was not liable for independent contractor's negligence which resulted in injury to independent contractor's employee who fell from plank which was improperly constructed.

◆

P. H. McCarthy, Jr., F. Nason O'Hara, Herbert S. Johnson, San Francisco, for appellant.

Ricksen, Freeman, Hogan & Vendt, Oakland, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit. Plaintiff was an employee of Fluor Corporation, Ltd. (hereafter called Fluor). Fluor had a contract with defendant Union Oil Company of California (hereafter called Union) under which Fluor was bound to service and maintain the chimneys and flues in Union's refinery at Oleum.

The heating unit in which the injury to plaintiff occurred had been shut down for eleven days when on April 29, 1952, plaintiff, under the direction of George Clark, the foreman in charge for Fluor, entered though a manhole to repair a damper. To reach the damper it was necessary to cross an open space 6 feet wide and 7 to 7½ feet above the floor of the chamber. A board or plank 8 feet long and less than 2 feet in width had been laid across this opening over which it was necessary to pass. Clark and one O'Brien, shutdown supervisor of Union, had passed twice over this board earlier in the day when O'Brien had pointed out the damper to Clark and instructed him to repair it. In passing over the plank Clark noticed that it was loose and tipped somewhat.

Before plaintiff entered the manhole, Clark testified: "I told him there was one plank in there that was not very steady." Plaintiff denied hearing this. When plaintiff crawled on to the plank it tilted and precipitated him to the floor below.

Plaintiff testified that when he crawled through the manhole on to the plank it was so dark that he could not see the plank or walls. There were two lights burning in the flue but they were about 22 feet from the manhole.

Clark testified that it was the practice for Fluor employees to place the planks and the lights in flues to be repaired by Fluor and there is no evidence that Union took any part in placing the plank or lights in this particular flue.

[1, 2] Appellant admits that it is the general rule that when property is turned over by the owner to an independent contractor to do work thereon the owner is not liable to third persons for the negligence of the independent contractor. McDonald v. Shell Oil Co., 44 Cal.2d 785, 285 P.2d 902; Green v. Soule, 145 Cal. 96, 78 P. 337. However appellant seeks to bring this case within certain exceptions to this general rule, i. e., 1. where the employee is injured by some condition of the owner's premises over which the owner retains control (Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 282 P.2d 69), or 2. where the owner interferes with or assumes to direct the employee in the manner or method of performing the work (Revels v. Southern California Edison Co., 113 Cal.App.2d 673, 248 P.2d 986) the owner will be liable.

[3] The evidence shows that in practice the maintenance and repair work was done by Fluor only on units that had been taken out of operation and Union did no more than indicate to Fluor that the unit was available to Fluor and the character of work to be done. It seems clear under the authorities that the activity of O'Brien in pointing out the damper to be repaired to Clark and directing him to repair it did not bring Union within either of these exceptions. In McDonald v. Shell Oil Co., supra, the court said at page 790 of 44 Cal.2d, at page 904 of 285 P.2d:

"However, the owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor or the duties arising from that relationship." What O'Brien did in pointing out the damper and directing its repairs falls well within these limits.

Appellant, however, relies upon the provisions of section 13.0 of the contract between Union and Fluor to bring the case within the exceptions. That section of the contract reads:

"All materials, workmanship and construction methods shall comply with the codes, ordinances, and rules of the governing bodies having jurisdiction. Contractor shall comply with all federal, state, local *and owner's orders, rules and regulations governing safety and safe performance of work*. Contractor shall comply with all owner's rules governing conduct of contractor's personnel within owner's property." (Emphasis ours.)

It is appellant's theory that, particularly by the emphasized portion of this section, Union retained control over the manner of doing the work insofar as "safety and safe performance of work" was concerned. It is respondent's theory that this was not a reservation of control but only created a contract obligation on Fluor to obey such "orders, rules and regulations" as Union might give or promulgate governing these matters, and that a violation of its terms by Fluor would be a breach of its contract to be enforced by Union as any other breach of contract by appropriate legal proceedings. Neither party has cited us any case construing the effect of a contract provision of this character.

There is no evidence that in practice Union ever assumed to interfere in any way with the manner in which Fluor had carried out its contract but there is likewise no evidence of any prior breach by Fluor of any of the terms of section 13.0 of the contract, so that in practice it does not appear that a test of the practical construction of these provisions by the parties ever occurred. Union had adopted certain safety rules which were communicated to Fluor. They dealt chiefly with the avoidance of fire hazards and did not otherwise concern the matter of safe working conditions for Fluor's employees. The question thus presents one of the construction of paragraph 13.0 on its face.

The General Industry Safety Orders of the Division of Industrial Safety require elevated working levels more than 4 feet above the floor to be not less than 2 feet wide and runways in such position to be guarded by a railing (Order No. 3237); and adequate illumination to secure the safety of employees (Order No. 3242).

[4] Paragraph 13.0 bound Fluor by its contract to obey these orders, but the existence of this contract obligation does not answer the question posed: did Union by this paragraph reserve to itself the right to control Fluor's operations in these particulars? We have concluded that it did not. While the second sentence of the paragraph binds Fluor to follow safety "orders, rules and regulations" of the owner, the same sentence also binds Fluor to comply with federal, state and local "orders, rules and regulations" as well. Thus "owner's orders, rules and regulations" must be construed not to refer to a particular order as to a particular operation, but to general orders, rules and regulations similar to those that might be promulgated by a public authority for the control of all operations falling within their scope. We cannot find in the general language of paragraph 13.0 a reservation of the right of the immediate control and direction of the operations of Fluor which would be necessary to make Union liable for Fluor's negligence. If Union had intended to reserve this power it would seem that it would have done so by more apt and direct language indicating such reservation.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

Hearing denied; CARTER, J., dissenting.

150 Cal.App.2d 638

Dale D. PEARSON and Elaine Pearson, Plaintiffs and Respondents,

v.

Jean Curry ALLEN, Defendant and Appellant.

Civ. 21786.

District Court of Appeal, Second District, Division 3, California.

May 2, 1957.

Hearing Denied June 26, 1957.

Action by lessees against lessor for damages for fraudulent representations inducing execution of lease contract. From adverse judgment of the Superior Court of Los Angeles County, J. Howard Ziemann, J., lessor appealed. The District Court of Appeal, Shinn, P. J., held that evidence supported findings that lessor misrepresented that she had necessary permits for apartment house hotel business, and misrepresented amount of monthly rentals.

Affirmed.

1. Courts 🔑**106**

Since decision of District Court of Appeal is subject to review, material facts, including sufficient statement of evidence, must be contained in its opinion. West's Ann.Rules on Appeal, rule 29.

2. Fraud 🔑**58(1)**

In action by lessees against lessor for damages for fraudulent representations inducing execution of lease contract, evidence supported findings that lessor misrepresented that she had necessary permits for apartment house hotel business and misrepresented amount of monthly rentals. West's Ann.Health & Safety Code, § 15000 et seq.

3. Fraud ⚷23

Mere examination of premises by lessees did not charge them with knowledge that lessor's operation thereof as apartment house hotel was violation of law, nor preclude reliance upon lessor's representations as to amount of rentals and licensing of premises. West's Ann.Health & Safety Code, § 15000 et seq.

4. Fraud ⚷58(2, 3)

In action by lessees against lessor for damages for fraudulent representations inducing execution of lease contract, in view of evidence that lessor was aware of illegal operation of premises as apartment house hotels and had been ordered to convert buildings to lawful use, and had admitted to lessees that her cooperator had been in trouble with authorities, evidence sustained finding that lessor knew that her representations were false or that they were made with intent to mislead. West's Ann.Health & Safety Code, § 15000 et seq.

5. Landlord and Tenant ⚷27

Concealment by lessor of fact that she did not have proper license and lessor's false representation as to current legal rentals constituted actionable fraud. West's Ann.Civ.Code, §§ 1572, 1710, subd. 3.

6. Fraud ⚷11(1)

Lessor's assertions in negotiations for lease, that she had necessary permits for apartment house hotel business, were statements of fact and not mere representations as to matters of law, and could therefore be made basis for liability for fraud. West's Ann.Health & Safety Code, § 15000 et seq.; West's Ann.Civ.Code, §§ 1572, 1710, subd. 3.

◆

P. E. Durkee, Los Angeles, for appellant.

Glenn R. Watson and Robert G. Beverly, Los Angeles, for respondents.

SHINN, Presiding Justice.

Defendant is the owner of two adjoining buildings located at 1349 and 1353 South Westlake Avenue in the City of Los Angeles. On February 19, 1951, she leased the premises to plaintiffs for a five-year term at a rental of $250 per month "for the purpose of renting rooms and for no other purpose whatsoever." Plaintiffs also agreed to purchase the furniture and furnishings located therein for $5,000. The present action is by the Pearsons to recover damages for fraudulent misrepresentations by defendant who induced them to enter into the transaction. Trial was to the court. The court made findings and entered judgment for plaintiffs in the sum of $4,500. Defendant appeals.

[1] This is a typical case of an appeal in which we are asked to reweigh conflicting evidence and to decide questions of fact to the contrary of the findings of the trial court. Most of the authorities cited by defendant respecting the sufficiency of the evidence would have been pertinent had the trial court found the facts in favor of defendant. If we were a court of last resort we could properly affirm the judgment with the statement that we had read the record and found the evidence to be sufficient to justify the findings that established defendant's liability. But since our decision is subject to review, it is necessary that the material facts, including a sufficient statement of the evidence be contained in our opinion (Rule 29, Rules on Appeal).

The complaint alleged, and the court found, that defendant represented to plaintiffs (1) the average monthly rentals from the premises were $640 per month; (2) the premises were being used and operated lawfully for the rental of housing accommodations; (3) defendant had all licenses and permits required by law for the operation and rental of the premises in the manner in which they were being operated by her. The representations were false; defendant knew they were false; she made them fraudulently; and that plaintiffs relied on them. The court also found: (1) At the time of the execution of the lease, the buildings were being operated as apartment-house hotel combinations without permits from the Board of Health of the City of Los Angeles; (2) they were being so operated without certificates of occupancy from the City Building and Safety Department; (3) they were being so operated under permits for use as hotels only; (4) prior to the execution of the lease, defendant had converted the buildings from use as hotels to use as apartment-house hotel combinations without obtaining necessary permits; (5) the preceding acts and omissions were in violation of the State Housing Act, Health and Safety Code, § 15000 et seq., and the Los Angeles Municipal Code.

Plaintiffs took possession and operated the premises in the manner in which they were operated on February 19, 1951; in November 1951 the City Board of Health directed plaintiffs to discontinue operation of the premises as apartment-house hotels until they secured health permits and certificates of occupancy; plaintiffs attempted to secure such permits and certificates but they were denied because of the unlawful use as apartment-house hotels; plaintiffs were prosecuted in 1952 for violations of the Los Angeles Municipal Code in that they were operating the premises without the required permits and certificates; by judgment of the court in November 1952 plaintiffs were compelled to convert the buildings into lawful dwelling houses containing two apartments and 5 guest rooms and remove all tenants from those portions of the premises that could not be legally occupied for rental purposes. Plaintiffs removed the tenants. The trial court found that the loss of rentals occasioned by compliance with the 1952 judgment was the sum of $112.50 per month from November 1952 to February 1956, or $4,500.

There was evidence of the following facts. Defendant acquired the premises in 1947 from her brother, W. J. Stout, and for some time thereafter they operated them as a partnership. In February 1951, she employed the Seaton Realty Company to find a lessee for the property and a purchaser or the furniture. At that time, 1349 South Westlake contained 5 apartments and 2 guest rooms; 1353 South Westlake contained 5 apartments and 3 guest rooms.

An inspector for the City Health Department and two inspectors for the City Building and Safety Department testified to the particulars in which the buildings were operated in violation of permits and certificates held by the defendant; the violations resulted from the conversion of the buildings from a hotel classification to an apartment house classification without obtaining the necessary building permit and certificate of occupancy. One of the inspectors testified to having notified Mr. Stout (in whose name the hotel permits were issued) to correct the violations, that Mrs. Allen knew of the same and was notified by the City Attorney as early as August 1948 to correct the conditions.

Plaintiff Dale D. Pearson testified that he and his wife saw Mr. Robert Donnelly at the offices of the Seaton Realty Company on February 12, 1951. Donnelly accompanied them to the premises, where they met defendant and examined some of the rooms. Plaintiffs returned the same evening and looked at the rest of the rooms. Defendant was present part of the time; Mr. Pearson asked defendant whether she had licenses to operate the premises and she said: "Yes, that everything was in order, that she had run the property for a few years * * * I have all the licenses that are necessary. I have been operating this business for many years." He testified that he did not then know what kind of licenses were required to run a hotel and an apartment house. He never saw Mrs. Allen's licenses and although he had rented out rooms before, he had never had a license. He had a conversation with Donnelly who told him that the rent would be $250 per month on a five-year lease, the price of the furniture was $5,000, the total income from the premises was $640 per month, of which about $300 per month should be net income. Donnelly handed Mr. Pearson a prorate rental sheet (prepared from information given by defendant) which Pearson and defendants signed; it disclosed a rental income of $611 per month, one unit on the third floor of 1353 being vacant. Mr. Pearson testified that he believed the representations made by defendant and her agent, relied upon them, and that in the absence of the representations he would not have entered into the transaction.

The premises were inspected in November 1951 by health department inspectors and on November 30th notices were mailed to plaintiffs, instructing them to discontinue the operation of the premises until they obtained health permits and certificates of occupancy. The premises were in the same condition as they were when plaintiffs entered into possession. Pearson was unable to obtain a license from the health department because he did not have a certificate of occupancy, which was refused by the building and safety department because the department demanded that he reconvert the premises into hotels.

Health department officials inspected the property again in June 1952 and found 1349 and 1353 to be still in violation of the Municipal Code. In September 1952 plaintiffs were convicted of operating the premises illegally. As a condition of probation they were required to conform to code requirements in their future operations. They vacated the third floors in November 1952 and operated the property as dwellings. Mr. Pearson testified that he lost rentals of $150 per month due to compliance with the court's order.

[2, 3] Defendant contends that the evidence was insufficient to support the findings that she falsely represented that she had the necessary permits and that the rentals were $640 per month as an inducement to plaintiffs to enter into the lease. She denied having made the representations. Mr. Pearson's testimony clearly supports the findings that defendant made the representations, that they were made with the intention that the Pearsons be induced thereby to execute the lease, and that plaintiffs relied on them. It is argued that since the Pearsons inspected the premises before signing the lease they cannot be said to have relied on Mrs. Allen's statements about the licenses and rentals. The argument cannot be maintained. A cursory inspection of the rooms would not have disclosed that the premises were being operated without the requisite licenses; Mr. Pearson testified that he did not know what kind of licenses were necessary and that he never saw defendant's license. The mere examination of the premises by the Pearsons did not charge them with knowledge that Mrs. Allen was violating the law or preclude them from relying on her representations. Curran v. Heslop, 115 Cal.App.2d 476, 481–482, 252 P.2d 378.

[4] Defendant contends there was no evidence that she knew her representations to be false or that they were made with an intent to mislead. The argument is without merit. There was evidence that the buildings were converted in 1948 to apartment-house hotels without building permits and that Mrs. Allen was aware of the illegal operation of the premises; she had been ordered to convert the buildings into lawful hotels and admitted to Mr. Pearson in 1952 that her brother had had trouble with the authorities.

[5] Defendant's statements that she had all the necessary licenses were unqualified. The statement that the rentals amounted to $640 per month was based upon current rentals of each rental unit. The falsity of these representations was well established. Instead of revealing these facts to the Pearsons, defendant chose to conceal them. Concealment by a seller of conditions of the property known to be in violation of law, and which materially affect the desirability of the property, has been held to constitute actionable fraud. Civ.Code, §§ 1710(3), 1572; Barder v. McClung, 93 Cal.App.2d 692, 209 P.2d 808; Milhoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273; Curran v. Heslop, supra, 115 Cal.App.2d 476, 252 P.2d 378.

[6] Defendant's final contention is that her representations as to the licenses were merely representations as to matters of law and cannot be made the basis of liability.

We do not agree. We are persuaded that defendant's statements were such as to justify reliance by the Pearsons. Her assertions that she had all the permits necessary for the conduct of the business in the manner in which it was being conducted at the time were statements of fact; they also implied that the manner of her operation of the premises had not been questioned by the municipal authorities although she knew that the facts belied her assertions. She deliberately concealed facts which would have proved her representations to be untrue. The court was justified in finding that defendant made material representations she knew to be false and positive statements of fact not warranted by the information she possessed. This was fraud. Civ.Code, § 1572.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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150 Cal.App.2d 735

STERLING ESCROW CO., a California corporation, Plaintiff and Respondent,

v.

Philip VANDERNOOT, Pearl Vandernoot, Alonzo Parks, Pauline Parks, and Sarah Abrahamer, Defendants,

Alonzo Parks and Pauline Parks, Appellants.

Civ. 21919.

District Court of Appeal, Second District, Division 3, California.

May 9, 1957.

Action in interpleader to determine claims to a fund resulting from a sale under a trust deed. From a judgment of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., certain defendants appealed. The District Court of Appeal, Parker Wood, J., held that the appellants were not entitled to appeal from an interlocutory judgment where they were not aggrieved thereby.

Appeal dismissed.

1. Appeal and Error 🔑151(2)

In interpleader action to determine claims to proceeds resulting from sale under a trust deed, where appellants disclaimed any interest in the fund and interlocutory judgment recited that they had filed a disclaimer and it did not appear that the word "defendants" as used therein was intended to include the appellants, appellants were not aggrieved by the interlocutory judgment and were not entitled to appeal therefrom. West's Ann.Code Civ. Proc., §§ 934 et seq., 938.

2. Appeal and Error 🔑150(1)

Every appellant must be interested in the subject matter of the litigation and his interest must be immediate, pecuniary and substantial and not nominal or a remote consequence of the judgment. West's Ann.Code Civ.Proc., §§ 934 et seq., 938.

◆

Roscoe C. Carroll, Los Angeles, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action in interpleader. Alonzo Parks and Pauline Parks appeal from an interlocutory judgment entered November 21, 1955. They executed a promissory note for $7,308.45, payable to Philip Vandernoot and Pearl Vandernoot. As security for the payment of the note, Mr. and Mrs. Parks executed a trust deed wherein Sterling Escrow Company was named trustee. The real property described in the trust deed was sold at a trustee's sale for $8,524.14 to Sarah Abrahamer, who was owner of a second trust deed on the property. Plaintiff, as trustee, commenced this action to require the Parks, Vandernoots, and Mrs. Abrahamer to plead and litigate their claims to the proceeds of the sale.

The complaint alleged, in part, that the "Deed Of Trust" was sold by the trustee, "according to law"; that each of the defendants claimed the proceeds or a portion thereof; that plaintiff intended to deposit the proceeds in court at the time of filing the complaint.

The answer of defendants Parks denied the allegations of the complaint, except that plaintiff was trustee and that plaintiff executed a trustee's deed in favor of defendant Abrahamer. Their answer also alleged that the purported trustee's sale was contrary to law; plaintiff was without authority to execute the deed; the deed was executed for the purpose of defrauding defendants Parks; they had defenses "to the purported sale" which defenses were pleaded in case Number 633655 then pending in the superior court; plaintiff and the other defendants had knowledge of such defenses prior to the sale; defendants Vandernoot and plaintiff induced defendants Parks to execute the trust deed by false representations which were set forth in said case Number 633655; the note was fraudulently obtained by defendants Vandernoot and plaintiff; defendant Abrahamer knew prior to the sale that the note had been fraudulently obtained; there was a failure of consideration for the note and trust deed.

A demurrer of defendants Vandernoot to the complaint was sustained with leave to amend. The amended complaint was substantially the same as the complaint, except that it alleged further as follows: that plaintiff had deposited the proceeds of the sale with the county clerk; the Vandernoots claimed the proceeds as beneficiaries under the trust deed; defendant Abrahamer, as a junior lienholder, claimed any surplus above the amount to which the Vandernoots were entitled; that prior to the commencement of the action the defendants Parks orally claimed the proceeds, stating that the note and trust deed were usurious and there was a failure of consideration for them.

The answer of defendants Vandernoot to the amended complaint alleged that the note and trust deed were valid and were given for a valuable consideration. In the answer of defendant Abrahamer to the amended complaint, she claimed all the proceeds above the amount due the Vandernoots.

Defendants Parks did not answer the amended complaint. On November 3, 1955, the date of the trial, and prior to the time the case was transferred from the department of the presiding judge to a trial department, the attorney for defendants Parks filed a disclaimer of interest in the proceeds of the sale.[1] Thereafter, on that date, the case was assigned to a trial department. Neither of the defendants Parks, nor their attorney, was present at the trial.

The attorney for defendants Parks filed written objections to proposed findings. It may be stated generally that the objections were to findings which were to the effect that the sale was fairly conducted and made according to law; that the Vandernoots paid $7,308.45 to appellants as consideration for the note and trust deed, and there was no fraud. On the margin of the written objections, the judge wrote: "Considered and denied."

On November 17 findings were filed. There was one set of findings, and there were two judgments—the interlocutory judgment (discharging plaintiff from liability) and the judgment (determining the claims). Also on November 17, the judgment[2] was entered, which provided that the Vandernoots were entitled to $8,523.14 of the proceeds, and that defendant Abrahamer was entitled to $1 thereof. On November 21 an interlocutory judgment[3] (dated November 17) was entered, which provided that plaintiff was dismissed from the cause and discharged from all liability to all defendants with respect to the proceeds, and that defendants interplead and litigate their claims among themselves.

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[1] "No. 636785 Notice of Disclaimer of Interest of Proceeds of Sale. Now comes the defendants, Alonzo Parks and Pauline Parks, and in pursuance to their answer on file herein, files this notice that; they and each of them disclaim all interest in and to the sum of $8,524.14 or any other sum now on deposit with the Office of the County Clerk of the County of Los Angeles, as alleged in the Interpleader herein and makes no claim thereto, whatsoever; and in pursuance thereof, said defendants have never, and do not now

The findings were that the allegations of the amended complaint were true, and that the allegations of the answer of defendants Parks "to the complaint herein" were not true, with the exception of certain allegations which it is not necessary to state here. The court also found that the sale was fairly conducted and made in compliance with all statutory requirements; and that defendants Vandernoot paid $7,308.45 to defendants Parks as consideration for the note and trust deed; and that no fraud was practiced on defendants Parks by plaintiff or defendants Vandernoot or defendant Abrahamer.

It thus appears that the interlocutory judgment was entered (November 21) four days after the judgment was entered (November 17).

As above stated, the appeal herein is from the interlocutory judgment.

Appellants (Parks) contend that the court made findings that were in excess of the scope of an action in interpleader. The findings so referred to are: (1) That the sale was fairly conducted and made in compliance with all statutory requirements; and (2) that the Vandernoots paid $7,308.45 to the Parks as consideration for the note and trust deed, and there was no fraud. Apparently the principal concern of appellants on this appeal is that, in their "pending case" against the escrow company, the company might "plead res judicata by virtue of the Findings to the effect that the sale was valid." Appellants also assert in effect that the findings pertained to the allegations of the amended complaint, whereas "the only complaint before the Court as far as these appellants are concerned is the original complaint." Of course, after the amended complaint was filed the issues which had been presented by the *complaint* and appellants' answer to the *complaint* were not issues before the court. Since appellants did not "answer" the *amended complaint* but filed a disclaimer after the amended complaint was filed, there was no issue between the plaintiff escrow company and appellants Parks. (The record does not show whether the amended complaint was served on appellants.) It seems that the action was set for trial before it was at issue insofar as appellants Parks were concerned. The findings which were made with reference to appellants' answer to the *complaint* were not necessary.

demand from the plaintiff the proceeds thereof."

[2] "It Is Ordered, Adjudged and Decreed as follows:

"1. Plaintiff is hereby discharged from all liability to any of the defendants, and defendants, Sarah Abrahamer and Philip Vandernoot and Pearl Vandernoot are hereby discharged from any and all liability to plaintiff for attorney's fees and court costs.

"2. The County Clerk of the County of Los Angeles is hereby ordered and directed to forthwith pay to Philip Vandernoot and Pearl Vandernoot the sum of $8,523.14.

"3. The County Clerk of the County of Los Angeles is hereby ordered and directed to pay to Sarah Abrahamer forthwith the sum of $1.00."

[3] "It Is Hereby Ordered, Adjudged and Decreed:

"1. That the Complaint is properly brought by plaintiff in this action and that plaintiff be, and it is hereby, dismissed from this cause and discharged from all liability to all and any defendants in this action with respect to said fund but that, pursuant to stipulation between the parties, said plaintiff is not entitled to its costs of action;

"2. That the defendants do interplead, litigate and settle their several claims, demands and matters in controversy in this suit between themselves."

The interlocutory judgment from which this appeal is taken provided in paragraph 1, as above shown, that the complaint is properly brought by plaintiff, and that plaintiff is dismissed from this cause and discharged from all liability to all defendants with respect to the fund. Appellants are not aggrieved by that provision of the interlocutory judgment. They disclaimed any interest in the fund. The interlocutory judgment recited that they had filed a disclaimer.

[1, 2] In paragraph 2 of that judgment it was provided that "the defendants do interplead, litigate and settle their several claims, demands and matters in controversy in this suit between themselves." Appellants are not aggrieved by that provision unless the word "defendants" as used therein was intended to include defendants Parks (appellants) and to mean that they should interplead. It does not seem reasonable that that was intended. Appellants had filed a disclaimer, as recited in the interlocutory judgment. They were not present, nor represented, at the trial. The defendants who were present and represented at the trial, as recited in the interlocutory judgment, were the defendants Vandernoot and Mrs. Abrahamer. The use of the word "between," rather than the word "among," in paragraph 2, indicates that two defendants, or groups of defendants, were referred to. It is reasonable to assume that the "defendants" referred to in that paragraph were the Vandernoots and Mrs. Abrahamer. Furthermore, the interlocutory judgment was signed on the same date that the (final) judgment was signed and entered (November 17), thereby indicating that it was not intended that the absent defendants (Parks) should interplead. There was no opportunity for them to interplead, if it was so intended. It is to be noted also that the (final) judgment determining the interests of the Vandernoots and Mrs. Abrahamer was entered on the same date it was signed, which was four days before the interlocutory judgment was entered. Appellants Parks were not mentioned in the (final) judgment. The word "defendants" as used in paragraph 2 of the interlocutory judgment did not include defendants Parks. Appellants were not aggrieved by the interlocutory judgment. Section 938 of the Code of Civil Procedure provides: "Any party aggrieved may appeal in the cases prescribed in this Title." The title referred to is "Title XIII" which pertains to "Appeals in Civil Actions" from the superior court. "[E]very appellant must be interested in the subject matter of the litigation, and his interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." Hamilton v. Hamilton, 83 Cal.App.2d 771, 774, 189 P.2d 722, 724.

The appeal is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

150 Cal.App.2d 731

Kenneth R. WALTZ, Plaintiff, Cross-Defendant and Appellant,

v.

Linnea G. WALTZ, Defendant, Cross-Complainant and Respondent.

Civ. 22166.

District Court of Appeal, Second District, Division 1, California.

May 9, 1957.

Rehearing Denied June 4, 1957.

Hearing Denied July 8, 1957.

Action by husband for a divorce, wherein wife filed cross-complaint for divorce. The Superior Court of San Luis Obispo County, Ray B. Lyon, J., entered an interlocutory decree granting wife a divorce, and husband appealed. The District Court of Appeal, Drapeau, J. pro tem., held that finding as to mental cruelty was supported by substantial evidence and that wife's testimony as to such cruelty was sufficiently corroborated.

Interlocutory decree affirmed.

1. Divorce ⚷130

Interlocutory decree granting wife a divorce on ground of mental cruelty was supported by substantial evidence.

2. Divorce ⚷184(10)

Where trial judge, on basis of conflicting evidence in divorce case, found for wife on issue of mental cruelty and against husband on issue of desertion, reviewing court could not substitute its own deductions from the evidence on such issues for those of trial judge.

3. Divorce ⚷127(4)

All acts of cruelty relied on as ground for divorce need not be corroborated.

4. Divorce ⚷127(4)

Rule as to corroborating evidence in divorce case is primarily designed to prevent collusion in uncontested cases, and is not as strictly applied in a hotly contested case.

5. Divorce ⚷127(4)

Wife's testimony as to mental cruelty of husband as ground for divorce was sufficiently corroborated by evidence that day after husband allegedly told her he wanted a divorce wife was crying and appeared to be upset and frustrated.

◆

Loyal C. Pulley, Long Beach, for appellant.

Charles E. Ogle, Morro Bay, for respondent.

DRAPEAU, Justice pro tem.

In this divorce case, plaintiff husband and defendant wife were married in 1938. There was one child, a girl, the issue of the marriage. The wife had a boy by a previous marriage, who was adopted by plaintiff. At the time of the trial in 1956, the boy was twenty-one years of age and the girl was nine.

Husband and wife lived at Cambria in San Luis Obispo County until 1940. Due to economic conditions it became necessary for the husband to move to Santa Monica, where he obtained employment with Douglas Aircraft Company. He is still employed by that company, and has a good job as an engineer.

A few months after plaintiff moved to Los Angeles County, his wife joined him. They maintained their home there until 1951. In that year the wife went back to San Luis Obispo County and has lived there ever since.

At this point in the family history of these two people is to be found the major conflict in the evidence on the trial of the case.

The husband testified that in 1951 his wife told him she no longer loved him, and from then on she would have nothing to do with him; that she said she couldn't live with him any more, and that she had decided to move to Morro Bay and live there permanently.

The wife testified that no such conversations took place; that she moved back to San Luis Obispo County to take care of her father, who was very ill; and, pursuant to agreement between her and her husband, to establish a home at Morro Bay, where they could spend their declining years together; and that she thought the marriage was congenial until, to her great surprise and shock, her husband told her in 1954, that he wanted a divorce.

The trial judge found mental cruelty inflicted upon the wife by the husband, and awarded certain community property to each of the parties. He also awarded $125 per month to be paid by plaintiff for the support of the minor child, and $50 per month alimony for the wife.

Plaintiff appeals from the interlocutory decree of divorce that followed.

Plaintiff makes no complaint as to the award of community property or the support money for the girl. He does, in effect, complain about the alimony ordered paid to his wife. She has been steadily employed by a newspaper in San Luis Obispo County since 1951.

So far as the main case is concerned, the following colloquy among Court, counsel, plaintiff and defendant at the close of the trial is illuminating:

"The Court: I'm trying to reduce the issues here. Is there any question in the minds of either of these parties but what a divorce should be granted, or do you think there is a possibility of reconciliation? A. (By plaintiff.) I don't think there is, Your Honor. I wish there were.

"The Court: Do you think there is?

"Mrs. Waltz: I don't think so; love demands trust.

"The Court: You think it's out?

"Mrs. Waltz: Love demands trust, and trust has been destroyed.

"The Court: Then it seems to be a matter of social justice that divorce be granted here. That seems to be it.

"Mr. Ogle: Unfortunately, that does seem to be it, Your Honor.

"The Court: Custody of the child seems to be agreed upon, division of the property seems to be agreed upon; it seems the only question I will have to decide is how much shall be paid here and for how long a time."

Now plaintiff contends that the evidence is insufficient to support the finding of mental cruelty, and that the wife's testimony as to cruelty was not sufficiently corroborated.

Therefore, this appeal turns upon the answers to two questions:

First. In a divorce case is it mental cruelty for a man to tell his wife, out of a clear sky, that he wants a divorce; considering, of course, all of the other facts and circumstances in the case?

Secondly. Is corroborating evidence in a divorce case sufficient when a witness says she saw the wife the day after the foregoing statement was made, and that the wife was crying, and appeared to be upset and frustrated?

Plaintiff argues that the evidence in his case brings it within the rule stated in Chase v. Jonkey, 12 Cal.App.2d 365, 55 P.2d 1229: That when the undisputed circumstances in a case establish that the story told by a litigant and his witnesses cannot by any possibility be true, then an appellate court is not bound by the substantial evidence rule.

[1] There is neither force nor cogency in the argument. The evidence as stated was substantial, and, considering all the facts, did prove mental cruelty of the plaintiff toward his wife.

[2] While it is of course true that the trial judge could have found for the husband on the issue of desertion, and on the issue of mental cruelty, his finding followed one of two inferences to be deduced from all of the evidence in the case. Therefore, this Court is without power to substitute its deductions for those of the trial judge. See, Clewett v. Clewett, 136 Cal.App.2d 913, 289 P.2d 512, for an extended discussion of the principles involved, and the cases in support thereof.

Referring now to the sufficiency of the corroborating testimony. This is the closest question in the case.

[3-5] As stated by this Court in Bixby v. Bixby, 120 Cal.App.2d 495, 261 P.2d 286, the extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. All of the acts of cruelty relied upon need not be corroborated, and in a hotly contested divorce case the rule is not as strictly applied, because it is primarily designed to prevent collusion in uncontested divorce cases. While the corroboration in this case is not as clear and convincing as the law would wish it to be, it is, in the opinion of this Court sufficient. And, viewing the matter retrospectively, it is difficult to say what more testimony could have been presented upon this narrow issue.

After a critical examination of the record no good reason can be found for a reversal of the interlocutory decree. Plaintiff has been divorced, as he desired. As already stated, he is making no complaint about division of community property or child support. If he fears some unfair order as to alimony that might be made in the future, that contingency may be safely left to the sound discretion and good judgment of the superior court. If the wife continues working, as she has been for a long time, no logical reason appears for the law to indefinitely continue to take money from a man and give it to a woman who no longer makes a home for him and who is able to support herself.

The interlocutory decree must be, and the same is, affirmed.

WHITE, P. J., and FOURT, J., concur.

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150 Cal.App.2d 644

Carmen J. FASELLI, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, and J. E. Robinson, Defendants and Respondents.

Civ. 9034.

District Court of Appeal, Third District, California.

May 2, 1957.

Action arising out of railroad crossing collision. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that instruction regarding statutory speed limit at obstructed crossings was erroneous as placing burden upon motorist of disproving negligence if jury found he was exceeding statutory limit, but under circumstances the error was not prejudicial.

Affirmed.

1. Railroads 🔑351(17)

In railroad crossing collision case, the instructions did not improperly imply that prima facie speed limit for vehicles traversing obstructed grade crossing also applied to the approach to the crossing. West's Ann.Vehicle Code, §§ 510, 511.

2. Witnesses 🔑281

Questions on cross-examination of motorist suing railroad for injuries sustained in crossing collision did not imply that prima facie speed limit for traversing obstructed grade crossing also applied to approach to crossing. West's Ann.Vehicle Code, §§ 510, 511.

3. Appeal and Error 🔑1064(1)
Railroads 🔑351(3)

In railroad crossing collision case, instructions on prima facie speed limits erroneously shifted burden of proof upon plaintiff motorist to disprove negligence if jury found motorist exceeded statutory limit; however, the error was not prejudicial in view of the considerable proof that motorist was guilty of negligence which was sole proximate cause of collision. West's Ann.Vehicle Code, §§ 510, 511.

4. Automobiles 🔑246(20)

The statute declaring that speeds in excess of the prima facie specified limits are prima facie unlawful unless defendant establishes by competent evidence that any such speed did not constitute a violation of basic speed law, is applicable solely to criminal cases; the statute should not be included in an instruction in a civil case. West's Ann.Vehicle Code, § 511.

5. Automobiles 🔑242(4)

Under statute, in civil action the party charging negligence has burden of proving negligence even though there is proof of speed in excess of statutory prima facie limit. West's Ann.Vehicle Code, § 513.

6. Automobiles 🔑246(20)

Under statutes, in a civil action it is proper to give an instruction on prima facie speed limit even though proof of speed in excess of that limit is not enough, standing alone, to show that vehicle has been operated negligently; it is also proper to instruct that speed of a vehicle operating not in excess of specified limits is lawful unless clearly proved to be in violation of basic speed law. West's Ann.Vehicle Code, §§ 510, 511, 513.

◆

Chargin & Briscoe, Stockton, for appellant.

Jones, Lane, Weaver & Daley by R. B. Daley, Stockton, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon a defense verdict in a personal injury action.

The accident, which occurred at a railroad crossing in the City of Stockton, involved a collision between a car driven by appellant and a train of the Southern Pacific Company. The engineer was made a party defendant. We shall for convenience, however, refer to the Southern Pacific Company as the respondent herein. Respondent's train, composed of a diesel electric engine and from 30 to 40 cars, was approaching Weber Avenue from the south at 15 to 25 miles per hour. Appellant was driving in an easterly direction on Weber Avenue at a speed between 25 and 40 miles per hour. It was early in the morning and dark. The weather was clear. The street was dry. Appellant was familiar with the crossing and knew that there was no flagman on duty at that hour nor any wigwag signal. He also knew that the view of the track to the south was obstructed by a building on the southwest corner of the crossing. As he neared the crossing, he slackened his speed. He said he looked both to the left and to the right but did not see the train until he was 60 or 70 feet distant from the tracks. The train crew testified that the engine's bell was ringing. Appellant said he did not hear it, and that when he saw the train he applied his brakes. His automobile laid down skid marks for a distance variously estimated at from 58 feet to 69 feet. It came to an almost complete stop before striking the side of the train's engine. The fireman testified that he saw appellant's automobile when it was 60 or 70 feet from the crossing; that he assumed that it was going to stop as its speed was decreasing; that when he decided appellant's vehicle was not going to stop, he called to the engineer to apply the emergency brakes. The train came to a halt approximately 150 feet from the point of impact. Appellant was not thrown from his vehicle and did not then appear to be hurt. However, there was evidence that he had suffered a disk injury to his back. There was also evidence that the injury he ascribed to this accident might have been suffered in a later accident.

[1, 2] Appellant's first contention in support of his appeal is based upon a misconception of the record. He asserts the court instructed the jury as to the prima facie speed limit for vehicles "traversing an obstructed grade crossing, which this crossing was, and then further instructed the jury in such a way as to imply that the prima facie speed limit also applied to the approach to the crossing. Apparently appellant failed to note that the trial court specifically told the jury: "You will note that this prima facie speed limit of 15 miles per hour is applicable 'when traversing a grade crossing' as distinguished from approaching it." In view of that specific instruction no implication could be drawn from the other instructions given that the prima facie speed limit of 15 miles per hour applied to the approach to the crossing. Basing his further argument on the same misconception as to the record, appellant asserts that the "misleading instruction" serves to accentuate the impropriety of questions addressed to appellant during his cross-examination, which questions appellant says were so formed as to imply, if not to directly state, that the prima facie speed limit was 15 miles per hour for the last 100 feet traveled before reaching the obstructed crossing. We have read the cross-examination referred to and think it sufficient to say that it does not bear out the charges made against it. We also note that during the argument between counsel as to the form of questions, the court said: "I will instruct the jury as to what the law is with reference to obstructed intersec-

tions, and I will do it as simply and clearly as I can, and they can be governed by the law as I state it to them." In view of the charge thereafter given, these contentions of the appellant cannot be sustained.

Appellant next contends that the court committed error in the instructions given on the subject of prima facie speed limits. The instructions addressed to this subject were as follows:

"The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

"Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.

"The basic speed law of this state is as follows: 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.' [Vehicle Code, § 510.] A violation of this basic rule is negligence.

"The prima facie speed limit for any vehicle is 15 miles per hour; when traversing a grade crossing of a steam, electric or street railway, if during the last 100 feet of the approach to such crossing the driver does not have a clear and unobstructed view of such crossing and of any traffic on such railway for a distance of 400 feet in both directions along such railway.

"You will note that this prima facie speed limit of 15 miles per hour is applicable 'when traversing a grade crossing' as distinguished from approaching it.

"You are instructed further that the law does not prescribe an absolute speed limit in terms of so many miles per hour which was applicable to the vehicle involved in this case. The law does, however, establish a prima facie speed limit of 15 miles per hour which may be applicable here if you find that during the last 100 feet of the approach to this crossing the driver did not have a clear and unobstructed view of the crossing and of any traffic on the railway for a distance of 400 feet in both directions.

"If you find that a prima facie limit of 15 miles per hour is applicable, then a speed not in excess thereof is lawful unless proved to be a violation of the basic speed law. Similarly, a speed in excess thereof, of the prima facie limit of 15 miles per hour, is unlawful *unless the proof establishes that such a speed under all the circumstances is not a violation of the basic speed law.* (Italics ours.)

"You will remember then, that proof of a speed in excess of a prima facie limit does not establish negligence as a matter of law, but negligence in this regard must be found by you as a question of fact under the court's instructions."

[3] Appellant contends that if the jury found appellant exceeding the statutory limit this instruction placed upon him the burden of disproving negligence. We think this contention must be sustained. Although the jury had been instructed that it was respondent's burden to prove its allegations that appellant had been negligent, yet when the court said that speed in excess of the applicable prima facie limit was unlawful unless the proof established that it was not a violation of the basic speed law we think they could not have believed that the court was telling them that such proof had to come from respondent. We think it did not occur to the jury that when respondent had proved a prima facie unlawful speed it would then go forward to prove that such speed under the circumstances was not a violation of the basic speed law. The jury could only have understood that, having proved the unlawful speed, respondent could stop and that unless appellant then proved the speed was not in violation of the basic speed law he would stand convicted of the charge of negligence. We hold the instruction to have been in this respect erroneous and that it did shift the burden of proof unwarrantably.

[4-6] This case presented the ever recurrent problem confronted by trial courts who are required to give instructions concerning speed limits under this state's prima facie speed law, and the trouble seems to arise principally when the trial courts include in their instructions matter contained in the second paragraph of Section 511. That paragraph declares that speeds in excess of the prima facie specified limits are prima facie unlawful unless the *defendant* establishes by competent evidence that any such speed in excess of said limits did not constitute a violation of the basic speed law. The paragraph is applicable solely to criminal cases. Cavalli v. Luckett, 40 Cal.App.2d 250, 104 P.2d 708; Westberg v. Willde, 14 Cal.2d 360, 369, 94 P.2d 590. "In such a case the burden is placed upon the defendant of proving that any speed in excess of these limits did not constitute a violation of the basic rule set forth in section 510." Akers v. Cowan, 26 Cal.App.2d 694, 697, 80 P.2d 143, 144. Section 513 sets up a special statute applicable in civil actions and declares that in such actions "proof of speed in excess of any prima facie limit declared in Section 511 hereof at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence." This leaves the burden of proving negligence in a civil action where it belongs, that is upon the party charging negligence, and notwithstanding such party has established speed in excess of the applicable prima facie limit yet the proof must establish negligence under the circumstances. "It is proper under section 513 of the Vehicle Code to give an instruction on the prima facie speed limit even though proof of speed in excess of that limit is not enough, standing alone, to show that the vehicle was being operated negligently." Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 439, 260 P.2d 63, 67. We think it also proper to instruct in accordance with the first paragraph of section 511 which provides that the speed of a vehicle operating not in excess of specified limits is lawful unless clearly proved to be in violation of the basic rule. This paragraph is merely a statutory admonition directed to the trier of fact as a guide. It is closely akin to the admonition addressed to triers of fact in cases where fraud has been charged, which rule is based upon strong presumptions of innocence and fair dealing and tells the triers of fact that before finding fraud to have been committed they should require one charging fraud to prove it by evidence that is clear and convincing. Such admonitory rules find their sole application in the trial court. But having given the first paragraph of section 511, and having stated the applicable prima facie limit, the substance of section 513 should be given, and there the matter should be dropped. The second paragraph of section 511, the criminal statute, ought never to be given in a civil case, neither verbatim nor in substance. "It has been held repeatedly that the second paragraph of § 511 should not be included in an instruction given in a civil case, and that it is in irreconcilable conflict with the rule of § 513." Clark v. Pamplin, 147 Cal.App.2d 676, 305 P.2d 950, 952, see cases cited.

It remains to consider whether or not for the error contained in the instructions the judgment appealed from should be reversed. In this case there was little proof of negligence on the part of respondent. There was much proof that appellant was negligent and that his negligence was the sole cause of the collision. Appellant, knowing he was approaching the railroad track at an obscured intersection, was, according to the undisputed evidence, traveling at such a rate of speed that after he observed the train his car laid down skid marks estimated at from 58 to 69 feet in length. It appears there were four tracks across the intersection, and this also appellant knew. The engine with which he collided was on the second track from him in the direction in which he was going. The proof of negligence on the part of respondent was simply that, (1) notwithstanding the engine crew testified that the bell on the locomotive was ringing, the appellant said he did not hear it, and, (2) there was testimony of speed on the part of the train of from 18 to 25 miles an hour. This speed was not shown to have been in excess of any law fixing a speed limit at that point. It is to be considered, along with the undisputed fact that the heavy train was brought to a stop within 150 feet of the point of impact. Also the jury was told that whether *any* speed was negligent was a question of fact, the answer to which depended on all the surrounding circumstances and that proof of a speed in excess of a prima facie limit does not establish negligence as a matter of law but that negligence in that regard must be found by the jury as a question of fact. Notwithstanding the seriousness of the error in instructions, it is our view that there has been no miscarriage of justice and that under the constitutional provision the judgment appealed from should be affirmed.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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150 Cal.App.2d 756

George E. HOPKINS and Marie B. Hopkins, his wife, Plaintiffs and Respondents,

v.

Perry H. BLACK, Gladys C. Black, his wife, and Earl Simmons, Defendants and Appellants.

Civ. 9064.

District Court of Appeal, Third District, California.

May 9, 1957.

Action to quiet title and for damages for removal of timber and pollution of spring. The Superior Court of Butte County, Dudley G. McGregor, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Schottky, J., held that evidence supported the judgment.

Affirmed.

1. Boundaries ⇨37(3)

Evidence supported finding that of two roads which might have been intended as boundary of land conveyed, easterly road was the one intended though result would be to exceed acreage called for in deed.

2. Adverse Possession ⇨95

Evidence did not establish title by adverse possession, particularly in view of failure to show that taxes paid by alleged adverse possessor covered the land in dispute, which was assessed to record owner.

3. Waters and Water Courses ⇨107(3)

Evidence supported award of $350 for pollution of spring and silting of pipeline.

◆

Millington & Millington, Gridley, for appellants.

Clewe, Blade & McDonald, Oroville, for respondent.

SCHOTTKY, Justice.

Plaintiffs commenced an action to quiet title to 6.2 acres of land, for damages for removal of some timber on said 6.2 acres, and for damages for the pollution of a spring. Following a trial, the court, sitting without a jury, decided in favor of plaintiffs as to the ownership of the 6.2 acres, and awarded plaintiffs damages. Defendants' motion for a new trial was denied by operation of law, and they have appealed from the judgment.

The parties are the owners of adjoining parcels of land. The correct location of the boundary separating such parcels is the core of the dispute between them. Through separate chains of title they derive from a common owner, one Zada J. Schauer.

Respondents' chain of title is as follows: (a) In 1932, Schauer conveyed to one Whims a parcel of property with respect to which the easterly and southerly boundary is described as: "The center of the County Road from Flea Valley to Concow." This deed contained no reference to the area or acreage so conveyed. (b) In 1937, said Whims conveyed a parcel of land to one Stowell. The description of the land so conveyed is identical to the description in the deed to Whims, above referred to, except that following the description of the land there appear the words, "containing 3 acres, more or less." (c) In 1947, said Stowell conveyed the same land to respondents, using the identical description as contained in the deed to Stowell.

Appellants' chain of title is as follows: (a) In 1938, Schauer conveyed to one DeAlberts certain lands, excepting therefrom, however, a certain parcel of land, the description of which is identical to that found in the deed from Schauer to Whims, above referred to. Such exception, likewise, carries no reference to acreage. (b) In 1943, said DeAlberts conveyed the land (less two further exceptions which are not pertinent to the issues herein) to one Smith. This conveyance contained the same description of the land excepted in the deed from Schauer to Whims, above referred to, except that following the reference to the conveyance to Whims the following words are added: "containing 3 acres, more or less." (c) In 1949, said Smith conveyed the land to the appellants, using the identical description as contained in the deed to Smith.

It was and is the position of appellants that the easterly and southerly boundary of the parcel so acquired by respondents is the center line of a certain road other than the road contended by respondents and found to be the correct road by the trial court. Consistent with the position of appellants, the area of the parcel so acquired by respondents would be approximately 3 acres, whereas, the area of the parcel contended for by respondents, and so found by the trial court, is approximately 9.2 acres. Thus it is the difference of 6.2 acres which is in dispute. At the present time the road contended for by the respondents is the main Flea Valley Road.

Section 2077 of the Code of Civil Procedure provides:

> "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:
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> * * * * * *
>
> "Two—When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount."

Appellants concede that if there was only one Flea Valley Road, the natural boundary, a road, would be conclusive as against the measurement of three acres. However, appellants contend that in 1932, when this property was all owned by one person and sold in two parcels, there were two Flea Valley Roads, and since it cannot be ascertained which of the roads was the one referred to in the deed, the natural boundary is not controlling, but the boundary is controlled by the measurement of the three acres, and therefore the road on the west is the boundary meant by all the parties. Appellants refer to that road contended for by them as the west road, and the road contended for by the respondents as the east road, while the respondents refer to the former as Road No. 2 and the latter as Road No. 1. For convenience we will adopt the respondents' designation.

Appellants contend that the evidence is conclusive that Road No. 2 was the one intended, that there is not only no conflict in the testimony, but that the two witnesses produced by the plaintiffs also corroborated the fact that in 1932 there were two Flea Valley Roads. Appellants then set forth the testimony of certain witnesses as follows: (1) J. A. Bumgarner, a civil engineer, who testified for plaintiffs to the effect that both roads were there before Butte County had any roads, and that he didn't know whether Road No. 2 went to Flea Valley or not. (2) Warren H. Peck, another witness for plaintiffs, testified in effect that Road No. 2 went from the Witherow Place, then to Saw Mill Peak, and then you could come out at Flea Valley, and that this was so at least from 1906. (3) Warren Pittman, a real estate operator living in Butte County for many years, testified in effect that while he had never been to the end of it, Road No. 2 had been known as the old Flea Valley Road. (4) Earl Simmons, a defendant, testified in effect that in 1938, his uncle logged off the land now owned by Hopkins and also the land owned by Black, and that at that time Stowell owned the Hopkins land and Mrs. DeAlberts owned the land now owned by Black, and that Stowell was paid by Simmons' uncle for the logging off of the land up to the Road No. 2, namely, the three acres, but that his uncle logged off and paid DeAlberts for all of the logging off of the land on the balance of the 9.3 acres, being the land lying between Road No. 2 and Road No. 1, and Stowell was present during the logging off of the latter parcel for DeAlberts and offered no objection whatsoever. (5) Louis Kirby, who lived in the area between 1880 and 1900, testified in effect that among the old-timers Road No. 2 was called Concow-Saw Mill Peak Road, and from Saw Mill Peak it was called the Saw Mill Peak-Flea Valley Road, but was all one road.

Notwithstanding the earnest and able argument of appellants, we are unable to agree with them that the evidence shows without conflict that Road No. 2 was the road intended. For, as pointed out by respondents, there is the following testimony in the record: (1) J. A. Bumgarner, Assistant County (Butte) Road Engineer from 1919 to 1927, and County Road Engineer from 1927 to 1943, testified that Road No. 1 has been known to him since 1911. The road was known as Oroville-Fallbrook Road at one time. In 1911 it was known as Oroville-Flea Valley Road. He has never known of any other road in the area called Oroville-Flea Valley Road. (2) Warren H. Peck testified that Road No. 1 has been known as Flea Valley-Concow Road, or Concow-Flea Valley Road ever since 1906, and its course has not changed. Road No. 2, by which one could leave Concow-Flea Valley Road (No. 1), arrive at Saw Mill Peak and from there a brushed out road or trail would enable one to reach Flea Valley, has never had a name. (3) Earl Simmons, an appellant, testified that Road No. 2 is a means to reach Saw Mill Peak, from whence one may reach Flea Valley, but is not now in use, nor has he ever been to Flea Valley via Road No. 2. (4) Louis Kirby testified that Road No. 2 was his father's private road called Concow-Sawmill Peak Road before it was abandoned in 1900. Since 1903, or earlier, Road No. 1 has always been known as Concow-Flea Valley Road and was and is a public road.

In addition to the above testimony, a map made in 1948 by the State of California, Department of Natural Resources, Division of Forestry, shows that while one could depart from Road No. 1, traverse Road No. 2 and eventually arrive at Flea Valley, the distance would be approximately twice as far as traveling to Flea Valley by Road No. 1 only.

Respondents point out that aside from the foregoing evidence there is additional evidence to support the findings and judgment. Reference to the deeds of conveyance in the several chains of title discloses the following wording in all such documents: "* * * thence at a right angle east to a point in the center of the County Road from Flea Valley to Concow; thence southwesterly along the center of said road. * * *" Reference to the exhibits reveals that from the intersection of the northerly boundary of the disputed property, Road No. 1 bears southwest. Plaintiffs' Exhibit 6, in which Bumgarner penciled two parallel lines indicating the location of Road No. 2, and Plaintiffs' Exhibit 5, an aerial map, show Road No. 2 running from the northerly boundary of the parcel in a southeasterly direction. The descriptions in the deeds do not say "southeasterly", but say "southwesterly".

The finding of the trial court was that Road No. 1 (the easterly road) was the natural boundary referred to in the deed as the county road from Flea Valley to Concow. The court stated in its memorandum of opinion:

> "It is the opinion of the Court that of the two roads contended for by the respective parties the easterly road claimed by plaintiff, and, not the westerly road, claimed by defendants, has been established by a preponderance of the evidence as the proper road to be used in construing the deed to Hopkins. Therefore the Court must ignore the statement in the deed referring to 3 acres more or less."

[1] It is clear that the evidence upon the issue as to which was the "County Road from Flea Valley to Concow," referred to in the deed to respondents, was conflicting, but we are also convinced that there was substantial evidence to support the finding of the trial court.

Appellants next seek to invoke the theory of adverse possession and cite the case of Doyle v. Bradshaw, 41 Cal.App. 247, 183 P. 185, where it is stated in the headnote:

> "Where adjoining property owners, following a dispute regarding the true location of the boundary line between them, of which they are uncertain, agree upon its location, and thereafter hold possession of the property up to the agreed line and pay the taxes thereon, the agreed line becomes in law the true line between the properties, regardless of the accuracy of the agreed location as made to appear by subsequent survey or measurement."

Appellants contend that Black has claimed this land openly and notoriously and that Hopkins has been informed of that ever since he purchased his land in 1947, and Black has paid the taxes.

[2] Respondents, in reply, point out that the record shows that appellants had possession only for a brief time when they trespassed upon the property, and for which trespass damages were awarded in this action. There is no testimony that appellants claimed the property adversely or that if there was a claim it was open and notorious. Appellants admit that the Assessor of Butte County testified that the lands are assessed to Hopkins, but try to show mathematically by acreage that Black must be paying the taxes on this disputed parcel. However, the assessor also testified that if Black was being assessed for too much acreage he should object. The testimony showed that erroneous references to the number of acres, taken from the first deed so referring, did not affect the assessed valuation, which was based upon the description of respondents' property, using the Road No. 1 as the Concow-Flea Valley Road.

There was no evidence that there was any agreement as to the boundary line, and the implied finding of the court was that there was no such agreement.

It is clear that appellants have not established title to the land in dispute by adverse possession. For as stated in West v. Evans, 29 Cal.2d 414, at page 417, 175 P.2d 219, at page 220:

> "To establish title by adverse possession, the claimant must establish five elements in connection with his occupancy of the property. [Citations.] (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. [Citations.] (2) Possession must be hostile to the owner's title. [Citations.] (3) The holder must claim the property as his own, either under color of title, or claim of right. [Citations.] (4) Possession must be continuous and uninterrupted for five years. [Citations.] (5) The possessor must pay all of the taxes levied and assessed upon the property during the period. [Citations.] Unless each one of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession."

[3] Appellants' final contention is that there is no evidence to justify the award of

$350 for the pollution of a spring and silting of pipeline. There is no merit in this contention. There was evidence that the logging operations of appellants caused a muddy condition of the stream which led into the spring and that it made the water too muddy for domestic use, necessitating the hauling of water from another source two miles away; that it was a week before the water cleared up so it could be used; that thereafter when it rained the water got muddy again, although previously, before the operations of appellants, the rainfall did not affect the clarity of the water. In view of this evidence we cannot hold that the award of $350 is without substantial support in the record.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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150 Cal.App.2d 684

Wellington H. SNEED, as Trustee in Bankruptcy of the Estate of Andrew Kanelos and James Kanelos, doing business as Kanelos Bros., a co-partnership, bankrupt, Plaintiff and Appellant,

v.

Garefalia KANELOS, individually, Garefalia Kanelos, as Administratrix of the Estate of Jem Kanelos, also known as Jim Kanelos, also known as James Kanelos, Deceased, Defendant and Respondent.

Civ. 9029.

District Court of Appeal, Third District, California.

May 6, 1957.

Action by trustee in bankruptcy of partnership against wife of deceased partner, individually and as administratrix of the estate of deceased partner, to establish claim, as partnership asset, to real property and claim to life policy. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment for deceased partner's wife and trustee appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence failed to establish that surviving partner had paid any portion of purchase price of land, that land had been dedicated to partnership use or that before purchase of land, deceased partner had made any promise to hold a half interest, or any interest in the property in trust.

Judgment affirmed.

1. Appeal and Error ⚷110

Order denying motion for new trial is not an appealable order. West's Ann. Code Civ.Proc., § 963.

2. Partnership ⚷68(1)

True method of determining, as between partners themselves, whether land standing in name of individuals is or is not to be treated as partnership property, is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control.

3. Trusts ⚷89(2), 110

In action by trustee for bankrupt partnership against wife of deceased partner, individually and as administratrix of the estate of deceased partner, to establish claim, as partnership asset, to certain real property, evidence did not establish that surviving partner paid any portion of purchase price of land, that land had been dedicated to partnership use, or that before purchase of land, deceased partner had made any promise to hold a half interest, or any interest, in property in trust.

4. Appeal and Error ⚷996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

5. Trusts ⚷95

In action by trustee for bankrupt partnership against widow of deceased partner to establish claim to life policy, where evidence failed to establish that deceased partner committed any wrongful or illegal act when he paid premium on policy out of partnership funds and did not embezzle any funds from partnership and where partnership funds were used upon direct request and with knowledge of surviving partner, resulting trust in life policy, as partnership asset, did not result.

◆

Bradford, Cross, Prior & Dahl, Sacramento, and Thomas W. Loris, Ochsner Building, Sacramento, for appellant.

Wilke & Sapunor, Sacramento, for respondents.

WARNE, Justice pro tem.

[1] Appellant Wellington H. Sneed, the trustee in bankruptcy of the estate of Andrew Kanelos and James Kanelos, doing business as Kanelos Bros., a co-partnership, bankrupt, brought suit against Garefalia Kanelos, individually and as the administratrix of the estate of James Kanelos, to establish his claim as a partnership asset to certain real property and to establish his claim as a partnership asset to the proceeds of an insurance policy on the life of James Kanelos. Judgment was entered in favor of the defendant. The plaintiff appeals both from the judgment and from the order denying his motion for a new trial. Since an order denying a motion for a new trial is not an appealable order, the appeal from said order is dismissed. Section 963, Code of Civil Procedure.

James Kanelos, a partner in the firm of Kanelos Bros., died in July, 1948. His brother Andrew continued the business. In January, 1949, a petition for bankruptcy proceedings was instituted, and Andrew and James Kanelos, doing business as Kanelos Bros., were adjudicated bankrupt. No claim against the estate of James Kanelos was filed until 1951, when the trustee brought suit to establish a claim to certain property in which the partnership was alleged to have an interest.

In 1924, James acquired the real property which the trustee alleges was a partnership asset. Title was taken in James' name alone, and he paid the purchase price. James also acquired a slaughterhouse which was on the property. James built a home on the property in which he and his brother lived until 1939. Appellant offered evidence to show that at about the time James purchased the property, Andrew sent a dowry to Greece for their sister, and that by providing the funds for the dowry, he (Andrew) was to have a half interest in the property. Also at the time of the purchase, Andrew was to be married, and James took title in his name to avoid any possible trouble with Andrew's wife in case the marriage did not work out. After James had purchased the property he built a home upon the land, using his own funds and labor in so doing. Andrew had nothing to do with the construction, and he did not furnish any of the money used in the purchase of materials. When the house was completed James lived in it, and after Andrew married, he permitted Andrew and his wife to live in the house also. When James married the defendant Garefalia Kanelos, he asked Andrew to move out of the house, which Andrew did; and he, Andrew, then built a home of his own.

There is no evidence whatever that Andrew paid any portion of the purchase price of the land or of the old slaughterhouse building owned by one Kareazis. There is no evidence that before the purchase of the land, James made any promise to hold a half interest, or any interest, in the property in trust for his brother, Andrew, except the evidence that Andrew was to have a half interest because he provided the funds for their sister's dowry. On the contrary, all of the dealings of the brothers after 1924 indicate that James was the owner of the property.

Mr. Kareazis testified that after he sold the old slaughterhouse to James Kanelos, he paid rent for the use of the slaughterhouse at a rate of $25 per month, and that he always paid the rent to James Kanelos and never to Andrew. Five other tenants also testified that they paid rent to James for the use of the slaughterhouse or the small dwelling house on the same property, or for both, at amounts varying from $15 to $30 per month. None of these tenants ever paid rent to Andrew or had any idea that Andrew claimed an interest in the property. He, Andrew, never demanded rent from any of these persons. According to the testimony of Cladianos, when he and Andrew were first partners in 1931 to 1933, they used the old slaughterhouse to kill animals, and they used partnership funds to pay rental to James for the use thereof at the rate of $15 per month.

The record also shows that either James or his wife, Garefalia, paid all the taxes assessed against the land and never sought or received reimbursement for any share thereof from Andrew. James maintained the dwelling house and the small house upon the land and paid all expenses involved in such maintenance. Andrew never paid any portion of the cost of such maintenance.

The record also shows that when the partnership of Kanelos Bros. and D. Cladianos was formed in 1937, Mr. Himmelman, who was the accountant for the partnership, discussed the ownership of the property with James and Andrew when he first set up the partnership books, and at that time the land and improvements were not carried on the books as a partnership asset, nor at any later date; that the only things relating to real property that were carried as fixed assets of the partnership were those improvements which were put on the land after the formation of the partnership.

There is also evidence that in 1943 a written lease was prepared, under the terms of which the partnership leased the land from James for a period of five years at a monthly rental of $75. This lease was signed for the partnership by D. Cladianos.

The record further discloses that James and his wife borrowed money upon the property and executed deeds of trust to various banks as security for these loans, and that Andrew was aware of these loans but never participated therein, either in the execution of the loans or in the proceeds thereof.

To establish the land as partnership property, appellant places some reliance on the fact that Andrew and James were brothers and very close to each other, and that the improvements made after the formation of the partnership were paid for from partnership funds. There is no merit in this contention. The improvements which were placed upon the land after the partnership was formed, were always, as distinguished from the land, considered partnership property. Respondent's counsel points out, in his brief, that the trustee took charge of those improvements and sold them at a trustee's sale for the benefit of the bankrupt.

[2, 3] Appellant also contends that the partnership may claim ownership of the real property, notwithstanding the fact that title was acquired by James with his own private funds or that it was owned by him prior to the formation of the partnership, the real property having been dedicated to partnership use and used solely for its benefit. He cites Swarthout v. Gentry, 62 Cal.App.2d 68, 144 P.2d 38, in support of this contention. In the instant case we have an entirely different factual situation from that in the Swarthout case. The land standing in James' name was never dedicated to the sole partnership use. As heretofore noted, it was at all times carefully distinguished from partnership property, and was not at any time carried on the partnership records as partnership property. It was considered at all times as the individual and separate property of James Kanelos. It was so considered by the partnership accountant and bookkeeper and also by Andrew Kanelos and the partner, D. Cladianos. Both the partnership and various other individuals who used the land paid rental to James for the use thereof. The indisputable fact is that the land was purchased by James in 1924 at a time when James and Andrew were not partners. James did not become a member of the partnership with Andrew and D. Cladianos

until 1937. It is said in Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573, 576, "'"The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control."'"

[4] Appellant also claims that James held the property in trust for Andrew. He argues that when the property was purchased, the brothers agreed that Andrew was to have a one-half share. The answer to this is that the trial court, upon conflicting evidence, found that the evidence was insufficient to establish the trust. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[5] The second cause of action involves a life insurance policy on James' life in the amount of $40,000. Appellant claims that when James took out the insurance in 1947, there was an oral agreement that the insurance would be made payable to the partnership, the premiums thereon to be paid out of partnership funds and charged to partnership expense. The trial court, in discussing this matter in its memorandum opinion, says, "No constructive trust has been established by the record, and while there are suspicions and innuendoes of dominance by the one brother over the other, it cannot be said there is proof sufficient to warrant a recovery by plaintiff." The evidence shows that it had long been the custom of each of the partners to use partnership funds for the payment of personal expenses, leaving it to the bookkeeper as best he could to make proper adjustments in the partnership accounts to reflect the drawing of the two partners. Each partner drew checks directly upon the partnership account to pay his personal obligations. Neither partner, during the lifetime of the other, ever claimed as partnership property any property or assets thus acquired by the other. When Andrew built his own home after James married, he used partnership funds to pay for building the house. The record does not show that James claimed any interest in this house, for the money used to build the house was merely charged against the partnership accounts of Andrew. It appears that this was common practice, and each partner did it with the full knowledge and acquiescence of the other. In 1947 Himmelman, the firm accountant, suggested to the partners that they consider some sort of partnership insurance, and that they enter into some formal written agreement pertaining to such insurance. Apparently, the partners did discuss insurance on several different occasions but never came to any agreement about the same. The partners even went so far as to have medical examinations to determine their eligibility for insurance, and such examinations disclosed that only James could pass the physical examination. In order to obtain the kind of insurance suggested by Himmelman, both partners would have had to be insurable. James Kanelos purchased a policy of insurance upon his own life, making his wife the beneficiary of said policy. The first year's premium was charged as a partnership expense on the books of the partnership. It is not clear who, if anyone, paid the second year's premium. Andrew did not bring any action against James' estate to recover the proceeds of the insurance policy. It is only his heirs and assignees in bankruptcy who make the claim that the $40,000 collected on the policy at the time of James' death is an asset of the partnership. The fact that the first premium was paid by a check drawn upon the partnership account has no real significance since it was in accord with the custom and practice of the partners to pay their obligations with partnership checks.

There was no resulting trust for the reason that the evidence fails to show that James Kanelos committed any wrongful or illegal act when he paid the premium upon his policy of life insurance out of the partnership funds. He did not embezzle any funds from the partnership, and according to the appellant, he used partnership funds to purchase the policy upon the direct request and with the knowledge of Andrew. Therefore, Brodie v. Barnes, 56 Cal.App.2d 315, 132 P.2d 595, and cases cited therein, holding that where one has embezzled funds and used them for the payment of premiums for insurance on his life, a trust is created in favor of the party from whom they were embezzled, are not applicable to the factual situation now before this court. We conclude that there is no merit in appellant's contentions.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

150 Cal.App.2d 807

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond A. RUSSELL and Abe Shear, Defendants,

Raymond A. Russell, Defendant and Appellant.

Cr. 1119.

District Court of Appeal, Fourth District, California.

May 13, 1957.

Defendant and another were convicted of forgery. The Superior Court, Riverside County, John G. Gabbert, J., entered judgment of conviction and order denying new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to establish that defendant knew that check was forged before he passed it and to sustain the conviction.

Judgment and order affirmed.

Forgery 🔑44(3)

Evidence was sufficient to establish that defendant knew that check was forged before he passed it and to sustain conviction for forgery. West's Ann.Pen.Code, § 470.

William W. Shaw, Riverside, for appellant.

No appearance for respondent.

BARNARD, Presiding Justice.

The defendants Russell and Shear were jointly charged with a violation of section 470 of the Penal Code (forgery). A jury found them both guilty and Russell's motion for a new trial was denied. Judgment was pronounced sentencing Russell to state prison, the sentence being suspended and probation granted to him. In addition to the usual and ordinary terms of probation he was ordered to pay a fine of $1,000 at the rate of $25 per month. He has appealed from the judgment and from the order denying his motion for a new trial.

There is no dispute as to the general facts involved. One Curtis Hight was an engineer working in various oil fields throughout the world, including Saudi-Arabia. He maintained a bank account in Riverside and returned there from Saudi-Arabia in February, 1954. Shortly thereafter, he bought a used car from the defendant Abe Shear, a used car dealer in Riverside, paying for it with a check. Thereafter, he frequently dropped in at Shear's place and chatted with him. He told Shear about his business trips and, later in May, told Shear that he was leaving soon for a protracted visit to Ethiopia. About that time, Shear cashed a check for $2.50 for Hight.

The defendant Russell was a private investigator in Riverside. As a part of his business he also operated a patrol service. He had a contract with Shear to patrol Shear's place of business, and one of his employees, Andrew Cocas, did the actual patrolling. Russell did not know Hight.

Around the 8th or 10th of June, 1954, Russell and Cocas went into the Riverside post office and accidently met Shear. Shear called Russell aside and showed him a check for $884.59 purportedly signed by Hight, and payable to cash. Shear told Russell that he could not run this check through his own bank account because the tax officials would think it was a car deal and charge him sales tax on it; and he offered Russell half the proceeds of the check if Russell would run it through his own bank account. Cocas saw Shear hand Russell the check but did not hear the conversation. Russell then discussed the transaction with Cocas and offered to let Cocas handle the matter, but Cocas refused saying that the deal "smelled".

Shear told Russell that Hight would be out of town, and told him to hold the check for a few days. Some ten days later Shear told Russell over the telephone that the check was good, and told him to call the bank and confirm it. Russell called the bank and was told that such a check would be good. Russell then placed his business endorsement stamp on the back of the check, deposited the check to his own account in another bank, and his account was credited with that amount. The next day Shear phoned Russell and told him not to deposit the check, explaining that Hight had come back to town. When Russell told him he had already deposited the check Shear told him he had better leave the money there for two months "just in the event there is some trouble."

Hight had returned from Ethiopia sooner than he had indicated to Shear, and the cancelled check in question was returned to him by his bank. He referred the matter to the authorities and the matter was investigated. It was found that the forged check was made out on a typewriter belonging to Shear, and the check had been torn out of a book of checks found in Shear's office. It was established that the signature on this check had been traced from the signature on the $2.50 check given to Shear by Hight.

While no question exists as to the proof of forgery and Shear's connection with it, the appellant's sole contention is that the evidence was insufficient to show any criminal act, knowledge or intent on his part in connection with issuing or passing this forged check. It is argued that Shear had told him that the check was good, and he had no basis for disbelieving him; that at Shear's insistence he called the bank and found out the check was good; that the fact that Cocas thought the deal "smelled" is not enough to charge the appellant with knowing that the check was forged; that if he had wanted to pass a "phoney" check he would have engaged in some manipulation to cover his true identity; and that while he "may have smelled a rat" this is not sufficient to show the knowledge which is necessary to support a conviction.

An officer of the bank on which the check was drawn called on Russell as soon as it was discovered that something was wrong. Russell told him that he had received the check in payment of a bill from a client, and refused to tell who the client was. Shortly thereafter, in a conversation with several officers, he told them that he had received the check on a bill from a client, that he had called his client who said the check was good, and that he would tell them nothing further. He said he did want to divulge the name of his client because the work he had done for his client was not too ethical. Later that same day, in a conversation in the district attorney's office, he told the officers that he would now tell the truth, and that he got the check from Abe Shear in payment for a job he had done for one Morrow; that when he met Shear at the postoffice Shear told him he had a check from a "guy" who had lots of money; that this man was then in Arabia or Ethiopia and would never miss the money; that Shear told him to deposit the check in his bank and wait two months "and if there is no protest" they would use the money and split the profit; that when he asked Shear why he did not put it in his own bank account "he said he knew Hight too well to do that; besides Hight was gone anyway"; that he had put a case number (No. 936) on the check just to protect Shear; and that he had never given Shear any of the money. About that time Russell signed a statement which was taken down in shorthand and transcribed. In this statement he said he met Shear while the investigation was in progress and said to him, "Abe, I'm in a hell of a spot along with you. I came from the attorney's. He said it didn't look too good for me"; that Shear replied, "You fathead why did you implicate me?"; that he then told Shear that "I have an out for both of us. * * * I know of a Mex that would state he wrote it if I'd pay him $2500. Would you loan me some money?"; that Shear told him "Tell me the name of the fella, and you give me a description of him and I'll back you up"; that he later gave Shear the name of a Mexican and Shear told him to give the man only $800 or $1,000; that Shear said that this man's signature would not match with the endorsement on the check; that he (the appellant) replied "He can always say his girl-friend wrote it for him"; that Shear said "I'll back you up. I'll identify him, I'll say he was hanging around my place"; and that "I'm trying to get him to admit the check was a forgery when he gave it to me. I know it was forged—but the thing to do is to get him to admit it."

On the witness stand the appellant was asked if he was not suspicious when he was offered half of the check, and he replied that he knew he wasn't to get $400 for nothing. He testified that since he was to get 50% of the check and had done nothing for it "I didn't want to run it through my deposits and made it a separate deposit and never entered it in my bank deposit book." When asked why he had put "#936" on the check he explained that this was to indicate a case in his office, that there was no such case, and that "I figured—that if I was ever questioned by Mr. Curtis Hight, I could say 'Well, Mr. Hight, I did an investigation'." and there was nothing on the check that would tie Mr. Shear into this check at all.

Aside from the testimony of the appellant on the stand there was a mass of evidence which, with the reasonable inferences therefrom, was amply sufficient to show that the appellant knew this check was forged before he passed it. The appellant's testimony on the stand would remove any doubt about his knowledge and criminal intent if any such doubt had otherwise existed. He testified at great length, making many contradictory and inconsistent statements, and his own testimony indicated both that he was not telling the truth and that he knew that this check was forged when he deposited it in the bank; that he believed that he could make this profit without any responsibility being fastened on him; and that he took many steps to that end. The evidence supports the verdict and judgment.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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150 Cal.App.2d Supp. 826

ABC ACCEPTANCE, etc., Plaintiff and Appellant,

v.

James G. DELBY, Defendant and Respondent.

C. A. 9116.

Appellate Department, Superior Court,
Los Angeles County, California.
April 23, 1957.

Action for money claimed to be due on an account stated, and for the same amount claimed to be due on a promissory note. The Municipal Court of the Los Angeles Judicial District, Lucius P. Green, J., vacated a judgment entered for plaintiff in accordance with a stipulation, and dismissed the action, and plaintiff appealed. The Superior Court, Appellate Department, held that where plaintiff's assignor was an employment agency, and note in question was executed by defendant for unpaid fee claimed by said agency for rendition of service, and account stated was for an alleged oral promise by defendant to agency to pay promissory note, controversy was one between an employment agency and its client, and the Municipal Court had no jurisdiction over the subject matter involved, and such lack of jurisdiction was not waived by stipulation and appearance signed by assignor of agency and defendant.

Order the judgment appealed from affirmed.

1. Bills and Notes ⚷106, 111

Giving of a note by a defendant to an employment agency in an attempt to circumvent requirement that a controversy between employment agency and its client must be submitted to the Labor Commissioner is contrary to public policy, and therefore a court is without jurisdiction to enforce such a note. West's Ann.Labor Code, § 1647.

2. Evidence ⚷48

Court would take judicial notice of a memorandum of the Labor Commissioner disapproving use of promissory notes to circumvent the employment agency law, requiring submission to the Labor Commissioner of a controversy between an employment agency and its client. West's Ann.Labor Code, § 1647; West's Ann.Code Civ.Proc. § 1875, subd. 3.

3. Courts ⚷189(5)

Labor Relations ⚷19

Where plaintiff's assignor was an employment agency, and note which it sought to collect was executed by defendant for unpaid fee claimed by said agency for rendition of service, its action for account stated was for an alleged oral promise by defendant to agency to pay the promissory note, controversy was one between an employment agency and its client, and the municipal court had no jurisdiction over the subject matter involved, and such lack of jurisdiction was not waived by stipulation and appearance signed by assignor of agency and defendant. West's Ann.Labor Code, § 1647.

4. Courts ⚷24, 37(1)

Lack of jurisdiction over subject matter in action may not be waived by a party or conferred upon a court by consent.

◆

Saul C. Nadel, Beverly Hills, for appellant.

Pauline Nightingale, Leon H. Berger, Los Angeles, for respondent.

Before BISHOP, P. J., and SWAIN and KAUFMAN, JJ.

BY THE COURT.

Plaintiff sued for money claimed to be due on an account stated and for the same amount claimed to be due on a promissory note. On April 18, 1956, the attorneys for the respective parties stipulated that judgment be entered as prayed. On June 12, 1956, judgment was entered in accordance with the stipulation. On July 11, 1956, pursuant to a motion duly noticed, an order was entered which set aside the stipulation for judgment, vacated said judgment, quashed an order for appearance of judgment debtor, and at the same time judgment was entered dismissing the action. From this order and judgment the plaintiff appeals.

To clarify the facts, the parties stipulated in this court as follows: "That plaintiff's assignor, Aetna Personnel Agency, rendered service to the defendant as an employment agency, for which the said agency claimed a fee; that the promissory note set forth in the second cause of action of the complaint herein was executed by the defendant for the unpaid fee claimed by the said agency for the rendition of the said service, and the account stated in the first cause of action of the complaint is for an alleged oral promise by the defendant to the plaintiff's assignor to pay the said promissory note."

[1] Appellant's position is set out in the affidavit of Saul C. Nadel, in opposition to the motion to set aside the first judgment: "That any obligation that may have existed regarding an employment agency fee was completely paid and discharged by the execution and delivery of the note upon which this action was based." The giving of such a note, in an attempt to circumvent the requirement that a controversy between an employment agency and its client must be submitted to the Labor Commissioner (Labor Code sec. 1647), is contrary to public policy. In Lewis & Queen v. N. M. Ball Sons, 1957, 48 Cal.2d 141, at page 148, 308 P.2d 713, at page 718, the court said: "The policy in favor of narrowing the issues in dispute, which normally confines the court to those made by the pleadings, and the policy of the parol evidence rule favoring the conclusiveness of integrated written agreements, both give way before the importance of discouraging illegal conduct. To this end, the trial court must be free to search out illegality lying behind the forms in which the parties have cast the transaction to conceal such illegality."

[2] Furthermore, the February 1, 1956 memorandum of the Labor Commissioner disapproving the use of promissory notes to circumvent the employment agency law, of which memorandum we take judicial notice (C.C.P. § 1875, subsec. 3), and a copy of which is attached to respondent's supplementary brief, clearly shows that the note in question which was executed after the memorandum was issued is contrary to public policy.

[3] It appears from the foregoing that the lower court was justified in finding that a controversy arose under the Labor Code between plaintiff's assignor and defendant, and that the Municipal Court had no jurisdiction of the subject matter involved. Labor Code sec. 1647; Garson v. Division of Labor Enforcement, 1949, 33 Cal.2d 861, 863, 206 P.2d 368; Bess v. Park, 1956, 144 Cal.App.2d 798, 301 P.2d 978.

[4] The stipulation and appearance signed by plaintiff and defendant and filed herein by plaintiff, did not confer jurisdiction on the Municipal Court over the subject matter of the action, for lack of such jurisdiction may not be waived by a party or conferred on the court by consent. Sampsell v. Superior Court, 1948, 32 Cal.2d 763, 197 P.2d 739, and cases cited.

The order and judgment appealed from are affirmed.

48 Cal.2d 551

The PEOPLE of the State of California, Respondent,
v.
Frank CORRIGAN, Appellant.
Cr. 6001.

Supreme Court of California,
In Bank.
May 10, 1957.

Defendant was convicted in the Superior Court, Sacramento County, Raymond T. Coughlin, J., of first degree robbery, and he appealed. The Supreme Court, Gibson, C. J., held that evidence sustained conviction and that trial judge's questioning of defense witnesses was not improper as constituting an expression of judge's opinion as to their credibility.

Affirmed.

Schauer and Carter, JJ., dissented.

Opinion, 302 P.2d 371, vacated.

1. Robbery ⚷24(1)

Evidence was sufficient to sustain conviction for first degree robbery.

2. Criminal Law ⚷1035(3), 1044

In criminal prosecution where defendant made no objection to questioning of his witness by judge and did not move to strike the questions or answers, any alleged impropriety in questions or answers could not be assigned as error on appeal.

3. Criminal Law ⚷656(2)

In criminal prosecution, trial judge's questioning of defense witnesses was not erroneous as an attempt to express to the jury the judge's opinion as to their credibility.

4. Criminal Law ⚷656(2)

It is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence, and mere fact that judge has examined defense witness at some length does not establish misconduct.

5. Criminal Law ⚷655(1)

In criminal prosecution, judge's offer in open court to have alleged participant in robbery brought from jail in order to testify in behalf of defendant did not constitute error.

◆

Frank Corrigan, in pro. per., Robert W. Cole, Public Defender William D. Heekin, Asst. Public Defender, and Ralph D. Drayton, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., and G. A. Strader, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of first degree robbery, and he has appealed from the judgment of conviction and the order denying a new trial.

The robbery occurred about 1:25 a. m. on May 1, 1955, in a Sacramento bar called the King of Clubs. It was committed by two men whose faces were masked by women's stockings, and the shorter of the men held a gun and wore gloves, an overcoat and a hat. One of the robbers was Frederick Ash, who was arrested on May 2 and pleaded guilty when he was made a codefendant in this case. Defendant, whose first name is Frank, knew Ash, and, on May 6, a man who identified himself as "Frank" sought to reach Ash by telephone at the house where Ash rented an apartment. The landlady told the caller that Ash was out of town. Again on May 8, a man identifying himself as "Frank" telephoned and asked for Ash. The landlady's son answered the call and immediately telephoned his mother, who was visiting friends. When she came home about 15 minutes later, there was another telephone call, which she answered, and the voice of the caller sounded like that of the man who had asked for Ash on May 6. Immediately after and "pursuant to" the telephone call, the landlady and a friend went to Ash's apartment and "got" a locked green box. It contained, among other items, two purses, a wallet, a pair of women's stockings, an overcoat, a hat and a gun.

The green box and its contents were turned over to the police and were introduced in evidence at the trial. The purses and the wallet were identified as property taken in the robbery, and the stockings were similar to those worn by the masked men. The overcoat and hat resembled the garments of the shorter robber, and the gun looked like the one which he used. Defendant's fingerprints were found on the gun, and an eyewitness to the robbery testified that defendant was approximately the size of the man with the gun.

James Duran, an ex-convict who was arrested with defendant in defendant's apartment on May 8, testified that, twice during that day, Edward Dillon, another ex-convict who was present in the apartment, left to make telephone calls and that, when Dillon returned from making the second call, he told defendant that Ash was in jail. According to Duran, defendant then said that the "heat was on" and that "I hope you guys got sense enough to get rid of that box because in the box was the stockings and the gun and these fingerprints were all over it."

[1] Defendant took the stand and denied participating in the robbery. He claimed that, on the night in question, he did not see Ash and that he was in a night club called the Sapphire Club from shortly before 1 a. m. until about 2 a. m., except that, at 1:10 or 1:20, he went across the street to another night club for five or ten minutes. By way of explaining the fact that his fingerprints were on the gun used in the robbery, defendant stated that he handled the weapon while being questioned by the police. However, two officers who conducted the interrogation testified that defendant did not touch the gun when it was shown to him. The evidence is sufficient to support the verdict.

Defendant seeks to reverse the judgment, claiming that he was prejudiced by questions which the judge asked three defense witnesses and by a statement of the judge that he would order Ash, who was then in jail, to be brought into court if defendant wished to call him as a witness.

Rheba Boyd, a waitress at the Sapphire Club, testified that she had breakfast with defendant about 2 a. m. on the night of the robbery and that defendant had been in the club during the preceding hour and a half. In cross-examining the witness, the prosecutor asked why she had not previously given this information to the authorities, and she answered, "Well, why should I? * * * A lot of people had seen him there that night, and should they all come up to the Police Department and tell them?" In reply to further questions on the subject, she said that, although she knew that her information, if believed, would "clear" defendant, she did not "think of it that way," and that she knew that defendant could not have committed the crime but that she did not "do anything about it." The judge interrupted and questioned the witness as follows:

"The Court: Let me ask you this. You became quite concerned there when you were asked why you didn't go to the authorities and tell them. Why didn't you go to the authorities and tell them that you knew where Corrigan was that night? I don't want anything that a lot of other people saw him. They haven't come up and testified to it, but you have. Tell us why you didn't go. If you knew this man was innocent, why did you wait until today to tell this Court where he was charged or to tell the District Attorney or the Chief of Police? Why did you wait until today? A. Well, actually this Jack Travis, this bartender I, was going with, he didn't want me to get involved anyway or anything.

"The Court: You mean that the bartender was the one? Who is Jack Travis? A. The fellow I was going with.

"The Court: Where is he? Does he know anything about this?

"Witness: No.

"The Court: Well, all right. Now tell me, why, if you knew that this man was innocent, if you knew he was innocent, why did you wait until today? Give me your answer? You say it was your friend?

"Witness: Well, I thought if he needed me he would certainly get in touch with me.

"The Court: Did anybody ever get in touch with you?

"Witness: Mr. Cayocca [defendant's attorney] is the only one.

"The Court: All right, then what happened? Why didn't you go after you talked to Mr. Cayocca?

"Witness: He didn't suggest it.

"The Court: Did he suggest that you don't go?

"Witness: No, he did not.

"The Court: Well, then what stopped you from going?

"Witness: Actually, I don't—I don't know why I didn't go. Just never occurred to me.

"The Court: You are here today. Aren't you?

"Witness: Yes.

"The Court: And you are here under a subpoena; isn't that right?

"Witness: Yes.

"The Court: When did you get that subpoena?

"Witness: About a week and a half ago.

"The Court: All right. At that time you knew that you were going to be brought into Court, didn't you?

"Witness: Yes.

"The Court: Why didn't you then go to the District Attorney and tell him that you knew this man was innocent?

"Witness: Well, I don't know why, I just figured that I would have to be here today and that's all there was to it; I mean I just didn't think any more about it.

"The Court: You never thought any more about it?

"Witness: No.

"The Court: Is that it?

"Witness: Yes.

"The Court: Is that what you want to tell me?

"Witness: Yes.

"The Court: All right. Now then, who was this you said told you not to become involved in it?

"Witness: This Jack Travis I was going with him, and he was just a little jealous of Frank [defendant], that's all.

"The Court: All right. And for that reason Jack Travis told you not to go and tell about it; is that it?

"Witness: Well, he didn't say not to, but he said if you are not careful, he said, you may get a subpoena; that's all.

"The Court: You told me he was jealous of Frank?

"Witness: He was.

"The Court: And is that the reason you mean to tell me that because he was jealous of Frank, that you would let a man be convicted of a crime of robbery because this bartender told you not to go to the police?

"Witness: He didn't tell me not to go.

"The Court: Well, why didn't you go?

"Witness: Judge, I don't know why I didn't go.

"The Court: All right. All right."

[2] The right of a trial judge to examine witnesses is not disputed. People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193; People v. Mendez, 193 Cal. 39, 46, 223 P. 65; Bell v. Moloney, 175 Cal. 366, 370–371, 165 P. 917; People v. Candiotto, 128 Cal.App.2d 347, 359–360, 275 P.2d 500; People v. Deacon, 117 Cal.App.2d 206, 209, 255 P.2d 98; People v. Flores, 113 Cal.App.2d 813, 818, 249 P.2d 66; People v. Montgomery, 47 Cal.App.2d 1, 18, 117 P.2d 437; People v. Golsh, 63 Cal.App. 609, 615, 219 P. 456. Defendant argues, however, that, in questioning the witness, the judge improperly led the jury to infer that her testimony was not to be believed because she did not volunteer to give to the authorities the information which she claimed to have with respect to defendant's whereabouts on the night the crime was committed. No objection was made to the questions asked of the witness by the judge, nor did defendant make a motion to strike the questions or answers. It is settled that a judge's examination of a witness may not be assigned as error on appeal where no objection was made when the questioning oc-

curred. People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193; People v. Bishop, 134 Cal. 682, 686, 66 P. 976; People v. Deacon, 117 Cal.App.2d 206, 208, 255 P.2d 98; People v. Flores, 113 Cal.App.2d 813, 817, 249 P.2d 66; cf. People v. Amaya, 40 Cal.2d 70, 78, 251 P.2d 324; People v. Avery, 35 Cal.2d 487, 493, 218 P.2d 527. If the rule were otherwise, a party could speculate on the verdict by deliberately failing to call the court's attention to a matter which could be remedied during the trial. We must assume that, had an objection been made, the judge would then have informed the jury that his purpose in so questioning the witness was to establish facts which might affect her credibility, but that it was the exclusive province of the jury to determine the credibility of the witness and the weight to be given her testimony. Such an instruction, given at the time the questions were asked, would have removed any danger that the jury might misunderstand the purpose of the examination. In this connection, it may be noted that the jury was instructed at the close of the case that it was the exclusive judge of the weight, value and effect of the evidence and of the credibility of the witnesses.

Another of the witnesses whom the judge questioned was Nick Bakotich, who testified that he was with defendant between 10 p. m. and 2 a. m. on the night of the robbery. The prosecutor asked him a number of questions concerning what they did on that night and about other occasions when he had been with defendant. The judge interrupted the cross-examination and continued the same general line of questioning at considerable length. The following portions of the record illustrate the matters complained of with respect to the judge's examination of this witness:

"The Court: What other nights did you spend with him?

"The Witness: Oh, a couple of other occasions I met him uptown.

"The Court: Tell me the last night before the 30th.

"The witness: I guess it might have been around three, four days before.

"The Court: Might have been three or four days. Tell me the last time you were with him before the 30th. You ought to know. You say you were there. Where were you with him the last time before the 30th? And tell me how long you were with him that time and what you talked about?

"The witness: I don't recall.

"The Court: You don't know. You don't know, is that it? Do you know or don't you know?

"The Witness: No.

"The Court: You don't know, is that right?

"The Witness: (Nodded affirmatively.)"

The judge later questioned Bakotich about his claim that a third man had been with him and defendant on the night of the crime:

"The Court: Let's talk about this third person. What was his name?

"The Witness: I don't know his name.

"The Court: Don't you know his first name?

"The Witness: Might have been Freddy, I think. I am not too sure.

"The Court: Might have been Freddy. Freddy Ash?

"The Witness: No.

"The Court: It might have been Freddy. But you don't know whether it was Freddy Ash or not; is that right?

"The Witness: No, I don't know the guy.

"The Court: Why do you say it might have been Freddy?

"The Witness: Well, I think it might have been his name. I don't know.

"The Court: You were with him from 9:30 until 2:00 o'clock in the morning?

"The Witness: That's right.

"The Court: Is that right? And you don't—didn't even know his name? Were you ever with him before?

"The Witness: No sir."

At another point, in response to a question by the judge as to the source of the money which Bakotich spent on the night of the robbery, the witness testified that his brother had given the money to him earlier that day. The judge said that the brother would be called to testify and that Bakotich should wait in the corridor until recalled to the stand. The brother did not testify, but Bakotich was recalled, and the prosecution resumed the cross-examination. The witness then testified that he wanted to change his testimony, that he had been trying to help defendant, that there was a chance that he was with defendant on the night of the robbery but that he was not sure, and that it was possible that it was some other night. On redirect examination it was established that, while Bakotich was waiting to be recalled to the stand, he was taken into the district attorney's office, where several men, apparently detectives, talked to him about perjury. The judge examined Bakotich and inquired whether anyone had told him to change his "story." The witness gave a negative answer and testified that he had been told that giving false testimony would constitute perjury, a fact which he had not known previously. The judge then asked, "as I understand your testimony * * * up to that time you thought you could help Frank out; is that it?" The witness replied, "That's right."

The third witness, of whose examination defendant complains, was Michael Azzinaro, the bartender who was on duty at the Sapphire Club on the night in question. He testified that defendant left the club at 1:15 a. m., returned about 1:35, and stayed until closing time. When cross-examined about his testimony that defendant first left the club at 1:15, he said, "The reason I say that is because he said, 'I'll see you later,' and I just happened to notice the time." He was asked if he could recall other persons who were in the club that night, and he testified that one was named Harry but that he could not remember at what time that customer left. At this point, the judge interrupted and questioned the witness as follows:

"The Court: Let me ask you this, whenever anybody goes out, says, "I will see you later," do you always look at the time to see what time they leave?

"Witness: Well, not exactly, but thirty-four years as a bartender is a little experience, your Honor. * * *

"The Court: All right. Now let me ask you this. How many other people left that night that you could tell us left at 1:00 o'clock, that you looked at the clock when they left?

"Witness: I didn't look at the clock but I could tell you a few.

"The Court: All right. But you did look at the clock when Corrigan left; is that it?

"Witness: No, I didn't look at the clock.

"The Court: Didn't you tell us you looked at the clock?

"Witness: But at 1:00 o'clock I did look at the clock and I spaced the time as fifteen minutes.

"The Court: I see. As the time that he left?

"Witness: Yes, I would say that at the time he left I spaced it at fifteen minutes.

"The Court: How did you happen to do that? Why did you do that with him any different than anyone else?

"Witness: Well, I don't do it any different with anyone else, your Honor, it's just that I know the time some come in and some go out is all.

"The Court: Now isn't it a fact, let me ask you this and let's you and I be on the square with each other.

"Witness: Yes.

"The Court: Do you definitely know what time Corrigan left there that night? Don't forget I want you to tell me the truth.

"Witness: Well, I am telling you the truth to the best of my knowledge.

"The Court: All right, and you say at 1:15.

"Witness: Yes, I would say."

[3, 4] There is no claim that the questions asked of Bakotich and Azzinaro con-

stituted improper cross-examination as far as the subject matter was concerned. The position of defendant is that the length of the examination by the judge and some of the language which he used conveyed to the jury the impression that he did not believe the witnesses. No objection was made to any of the questions, and, as we have seen, defendant cannot complain on appeal where, as here, any error could have been corrected, if a timely objection had been made. Moreover, we find no error in the questioning of these two witnesses. The judge was obviously seeking to elicit or clarify testimony on material points, and it is the right and the duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence. People v. Martinez, 38 Cal.2d 556, 564, 241 P.2d 224; People v. Mendez, 193 Cal. 39, 46, 223 P. 65. The mere fact that the judge examined Bakotich at some length does not establish misconduct. People v. Montgomery, 47 Cal.App.2d 1, 18, 117 P.2d 437. Nor is there any merit in defendant's contention that the judge acted improperly in remarking to Azzinaro, "Let's you and I be on the square with each other. * * * Don't forget I want you to tell me the truth." This remark was made while Azzinaro was being questioned regarding the time defendant left the Sapphire Club, and it seems clear that, in view of the witness' vague and inconsistent testimony on that point, the judge merely wished to emphasize that Azzinaro should weigh his answer carefully and be certain of its truth.

[5] Finally, it is argued that the defendant was prejudiced by the judge's offer to have Ash, who was then in jail, brought into court if defendant wished to call him as a witness. On direct examination, defendant testified, in effect, that he was not afraid of having Ash called as a witness because Ash's testimony, if truthful, would not harm defendant. During cross-examination, the prosecutor asked, "And isn't it a fact, Mr. Corrigan, that the reason you are not afraid is that you know that Mr. Ash will get up there and say that you were not the man with him?" Defendant answered, "Why if he tells the truth, he will, sir." The following then occurred:

"The Court: Do you want him [Ash] called as a witness?

"The Witness: That's up to my attorney, sir.

"The Court: Well it's up to you, too, I am asking you now, do you want him? I will order him here.

"The Witness: I don't care, sir, either way.

"The Court: If you want him, he is available. I will bring him here from prison if you want.

"Mr. Cayocca [defense counsel]: Well, your Honor—

"The Court: If you want him, he is available for you.

"Mr. Cayocca: Your Honor, from what has gone on before with some of these other fellows that testified, I have already advised Mr. Corrigan that I would not call Ash.

"The Court: I don't understand what you mean by that. If you want him, I will order him here so he is available for you."

There is no reason for supposing that the judge intervened for any purpose other than to assure defendant that Ash would be produced at the trial if defendant desired his testimony, and it was not error for the court to give defendant this assurance.

The judgment and the order denying a new trial are affirmed.

SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice (dissenting).

I do not agree that (310 P.2d 958, italics added) "it is the right and the duty of a judge *to conduct a trial*" in the manner stated in the opinion or otherwise. People v. Martinez (1952), 38 Cal.2d 556, 564, 241 P.2d 224, quoting People v. Mendez (1924), 193 Cal. 39, 46, 223 P. 65, cited in the opinion, is not authority for the above quoted statement. The right or duty the Martinez case speaks of is "to so *supervise and regulate* the course of a trial that the truth shall be revealed in so far as it may be, within the established rules of evidence." (Italics added.) To "supervise and regulate the course of a trial" is quite a different thing from assuming to himself "conduct a trial." The latter practice should be disapproved and discouraged rather than approved and encouraged.

A vice of the practice depicted by the record is that, however proper may have been the motive of the trial judge, the effect of his intervention must almost certainly have tended to deprive the defendant of a fair trial. It tended to deprive the defendant of a fair trial not merely because of the content and improper implications of some of the judge's questions and statements but because it must have appeared to the jury that the judge was throwing the prestige of his position to the support of the prosecution. Trial by jury means that issues of fact shall be resolved by the jury on the evidence under the law. On the record here, the influence of the judicial mien can well have been the deciding factor; such influence is not lawful evidence.

For the reasons indicated above, and on the grounds more completely related in the opinion of Mr. Justice Peek, dissenting in the District Court of Appeal (reported in 302 P.2d 371, 385), I would reverse the judgment.

CARTER, Justice.

I dissent.

I concur in the views expressed by Mr. Justice SCHAUER in his dissenting opinion and, in addition, adopt the pertinent portions of the dissenting opinion of Mr. Justice Peek of the District Court of Appeal, 302 P.2d 371, 385.

"* * * 'A trial judge is rigorously prohibited from actions or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. This rule should be strictly adhered to.' People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939, 942. * * *

"From my reading of the transcript I cannot escape the conclusion that from the outset of the trial, by the persistent, aggressive and lengthy cross examination of the witnesses, the context of the questions asked, the innuendoes contained therein, as well as the inferences to be drawn therefrom, and what amounted to voluntary comments contained in such questions, the trial judge definitely stepped out of his character as a judge and took over the role of the prosecutor. And, by such actions and words, he very forcefully conveyed to the jury his personal opinion as to the truth or falsity of the evidence and the credibility of the witnesses. Although the majority opinion has quoted much of the extensive and repetitious examination of the witnesses by the court, it seems to me that only by a reading of the entire transcript can the true effect on the jury of such questioning be evaluated. * * * [T]he interrogation by the court, in addition to the portions quoted in the majority opinion, is replete with such comments and questions as:

"'* * * You ought to know. You say you were there * * * You don't know. You don't know, is that it? Do you or don't you know? What joint were you in * * * you say * * * You guess * * *. Now you are telling us. Is that right? And you don't—didn't even know his name * * *? Might have been Freddy but you don't know whether it was Freddy or not, is that right? You just guess it was during April; is that right? You are not sure are you? Are you sure it was in April or you just say it must have been, you guess? * * * All right, now let me ask you this. * * * You don't remember that very well? You don't know the date. Was it Saturday night, Sunday night, or do you know? Have you any idea? * * Who said? They said? Who are they?' * * *

"I cannot agree that the case was strong. The evidence concerning the identification of the two persons who participated in the robbery was entirely circumstantial. The testimony of the bartender and the four bar patrons, some of whom had been at the bar for quite some time, was in complete confusion. Their only agreement was as to what clothing was worn by the two men; that is, the nylon stockings worn as masks, the overcoat, hat and gloves, and the similarity of the gun used with the one introduced at the trial. The defendant herein was never directly identified. His only connection with the robbery was established by reason of the fingerprints being found on the gun and certain conflicting statements made by two of the State's witnesses concerning comments said to have been made by defendant following two telephone calls to Ash's landlady. The landlady testified to one version and one of the paroled ex-convicts testified to another, and one which was different from his testimony at the preliminary hearing. Durand, the other ex-convict parolee who was called by the prosecution gave still another version. Again there was conflict as to whether it was Dillon or Corrigan who made statements such as: that the 'heat was on' when he was informed that Ash was in jail; that he hoped that Ash had enough sense to do something with the box the police were said to have found; that there were stockings, gloves and other stuff in the box and fingerprints all over it. Corrigan denied that it was he who made such statements. But even assuming that he did, I do not consider such comment can be interpreted either as an admission on his part of participation in the robbery or as an identification of the gun. No incriminating evidence was found in the possession of Corrigan. The box was found in the attic of Ash's apartment. The fingerprints found on the gun were not so placed as they would have been had the gun been held in a normal position. It was Corrigan's testimony that his fingerprints were left on the gun when he was asked to examine it at the police station. All of the witnesses testified that the robber who held the gun wore gloves at the time of the robbery. Thus the fingerprints must have been placed on the gun either before or after the robbery. The most that was said concerning the gun, by any of the witnesses, was merely that it was similar to the gun used at the time of the robbery.

"* * * a trial is not a game in which the judge can only act as an umpire, and 'sit quietly by and see one wrongfully acquitted or unjustly punished'. People v. Golsh, 63 Cal.App. 609, 614–615, 219 P. 456, 458. But it is equally true that he must not become a partisan advocate. Therefore when, during the examination of the witnesses, a court by words or actions departs from the role of an impartial judge and conveys to the jury 'his personal opinion as to the truth or falsity of any evidence', People v. O'Donnell, 11 Cal.2d 666, 671, 81 P.2d 939, 942, and it could well be added, of the credibility of any witness, he has by so doing placed himself without the bounds of Article VI, section 19.

"No one will deny that jurors are most sensitive to and rely with great confidence on the fairness of judges and the correctness of their views expressed during the the course of a trial. 'For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant.' People v. Mahoney, 201 Cal. 618, 627, 258 P. 607, 610; People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939.

"Conviction or acquittal may equally be the result of a miscarriage of justice. In either event a fundamental right of the People or of the defendant has been disregarded or denied. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging both to the People and the defendant shall be respected. People v. Long, 63 Cal.App.2d 679, 147 P.2d 659.

"The situation as presented by the record before this court * * * convinces me that to approve the * * * error in this case is to deny a fair, impartial trial to the defendant and to extend the saving grace of section 4½ just a bit too far."

I would reverse the judgment and grant defendant a new trial.

48 Cal.2d 528

Irving ARENSON, Plaintiff and Appellant,

v.

NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO., a California corporation, Defendant and Respondent.

L. A. 24193.

Supreme Court of California,
In Bank.
May 10, 1957.

Action by insured against insurer to recover attorney's fees incurred in defending an action. The Superior Court of Los Angeles County, Philip H. Richards, J., entered judgment awarding attorney a fee of $175 and the insured appealed. The Supreme Court, Schauer, J., held, inter alia, that where school district had sued to recover $274.18 damages allegedly resulting from tort committed by insured's minor son under statute rendering parent liable for minor's wilful tort, and insurer wrongfully refused to defend district's action under policy, and insured engaged competent counsel who, among other things, sought to defend on ground that statute was unconstitutional, which defense entailed a great deal of research, and trial proceeded through several courts including appellate courts, value of attorney's services rendered could not be excluded from amount which insurer owed to insured merely because value of services to be rendered would greatly exceed the amount for which district sued.

Reversed and remanded for new trial.

Spence, J., dissented.

Opinion, 302 P.2d 877, vacated.

1. Insurance ⚷514½

An insurer's unwarranted refusal to defend suit against insured relieves the latter from his contract obligation to leave management of such suits to insurer, and justifies him in defending action on his own account, and where insured is thus compelled to conduct his own defense, he may recover expenses of litigation, including costs and attorney's fees from insurer.

2. Insurance ⚷514½

Reimbursement for expenses of litigation is allowed insured against insurer which refuses to defend suit against insured, even though insured's defense is unsuccessful, and insured can also recover expenses of an appeal, at least where grounds for appeal are reasonable, even where appeal was unsuccessful.

3. Insurance ⚷514½

An insurer may not wrongfully refuse to defend its insured and thus force insured into position of having to engage outside counsel, and then, because defense was not handled in a manner to liking of insurer, refuse to hold insured harmless against payment of fees for all services reasonably performed in such defense.

4. Insurance ⚷514½

That insured might not have been financially able to employ counsel and make a defense in action against insured, which insurer should have defended, was not a ground for denying or limiting recovery against insurer of amount of attorney's fees incurred in defending action against insured.

5. Insurance ⚷146(3)

If semantically permissible, insurance contract will be given such construction as will fairly achieve its object of securing indemnity to insured for losses to which the insurance relates, and if insurer uses language which is uncertain any reasonable doubt will be resolved against it, and if doubt relates to extent or fact of coverage, whether as to peril insured against, amount of liability or person or persons protected, language will be understood in its most inclusive sense, for benefit of insured.

6. Insurance ⚷514½

Where insurer wrongfully refused to defend action against insured and insured employed counsel for such purpose, if there be uncertainty as to nature or extent of services reasonably to be rendered by counsel engaged by insured, that uncertainty must be resolved against insurer.

7. Insurance ⚿514½

Where school district had sued to recover $274.18 damages allegedly resulting from tort committed by insured's minor son under statute rendering parent liable for minor's wilful tort, and insurer wrongfully refused to defend district's action under policy, and insured engaged competent counsel who, among other things sought to defend on ground that statute was unconstitutional, which defense entailed a great deal of research, and trial proceeded through several courts, including appellate courts, value of attorney's services rendered could not be excluded from amount which insurer owed to insured merely because value of services to be rendered would greatly exceed the amount for which district sued.

8. Appeal and Error ⚿1178(6)

Where trial court in awarding fee of $175 for services rendered by attorney to insured who was compelled to defend tort action because of insurer's wrongful refusal to defend such action was so grossly inadequate as to indicate that trial court must have been under misapprehension as to nature of insurer's obligation to insured or as to extent of services which were properly rendered to insured, on which attorney placed a value of some $2,000, matter of amount of fee would be remanded to trial court notwithstanding Supreme Court may appraise and adjudicate value of attorney's services.

9. Witnesses ⚿16

Where insured sought to recover from insurer attorney's fees incurred by insured in defending tort action which insurer had wrongfully refused to defend on behalf of insured, a subpoena duces tecum served on insurer was, under circumstances, too broad in some of its demands, and should have been restricted to data which would be relevant as having some substantial similarity to case at bar, so that quashing of subpoena did not require reversal of judgment.

◆

William Katz, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee and Charles Agor Harrison, Los Angeles, for respondent.

SCHAUER, Justice.

This is plaintiff's second appeal in an action based upon a policy of "comprehensive" personal liability insurance issued to plaintiff by defendant insurance company. This litigation, as well as an earlier related action in the municipal court, which included an appeal to the appellate department of the superior court, has been occasioned by defendant company's wrongful refusal to either defend plaintiff in the prior (municipal court) action or to discharge the judgment entered against him in such prior action and reimburse him for his costs and attorney's fees incurred in defending that action. Plaintiff prevailed in his first appeal herein and we conclude, for reasons hereinafter stated, that he should again prevail.

The briefs and arguments indicate that there has been substantial confusion as to the nature of the current issue. It concerns the amount of plaintiff's obligation for an attorney's fee incurred in defending the municipal court litigation. Defendant has argued largely as though the action here were by an attorney to collect a fee. But the action is not one by an attorney against a client to collect a fee; neither does it involve a discretionary fee allowance by a judge as incident to a cause the proceedings in which have been heard by that judge who is, hence, presumed to be familiar enough with the attorney's services to know their extent and their propriety or impropriety, and to fix their value. This is quite another case; it is a suit by an insured against the insurer on a policy, liability under which has already been conclusively determined (Arenson v. National Automobile & Cas. Ins. Co. (1955), 45 Cal.2d 81, 84, 286 P.2d 816), and the services for which the insured incurred his obligation were rendered in courts other than the instant trial court.

On the first appeal in the current action this court (in reversing a judgment for defendant) held that plaintiff is entitled to recover from the company the principal amount of the judgment theretofore rendered against plaintiff in the municipal court action, together with interest, court costs, and attorney's fees properly incurred by plaintiff in defense of that action. (Arenson v. National Automobile & Cas. Ins. Co. (1955), supra.) Plaintiff's right to recover and the identity of the items for which he is entitled to reimbursement have been finally adjudicated; the only open question relates to the amount of recovery.

On the new trial which followed the reversal, although there was uncontradicted evidence prima facie establishing the proper rendition to plaintiff of services of a reasonable value of $2,000, judgment was rendered awarding plaintiff the total sum of $488.36, including an allowance of only $175 as indemnification of his debt for attorney's fees. Plaintiff again appeals, urging that the item of $175 is, in the circumstances, inadequate and unsupported by the evidence.

The municipal court action was filed against the present plaintiff after his minor son "acting jointly with another pupil" started a fire in a waste basket which subsequently they were unable to extinguish, and which damaged property belonging to the Los Angeles City School District, of which the boy was a pupil. The school district, alleging that the boy's tort was wilful, instituted the action under section 16074 of the Education Code[1] to recover the amount of its loss, claimed to be $274.18. Plaintiff, in accordance with the terms of the personal liability insurance policy hereinabove mentioned, promptly forwarded the summons and complaint to defendant insurer and demanded that it defend the school district action against him. Defendant first responded, "We thank you for your report * * * [W]e can not see any legal liability on your part * * * We also wish to advise you that should claimant file suit * * * we will make defense on your behalf. In the event the court should erroneously award a judgment in favor of the school, we would then make payment on your behalf." Some three months later, however, defendant advised plaintiff that "the insurance policy which you had in effect * * * does not cover a loss of this type" and "we will be unable to make any payment on this claim." Defendant also refused to interpose any defense on plaintiff's behalf. Thereupon plaintiff engaged an attorney to defend the case for him on a quantum meruit basis. The attorney decided that the best defense to the action should include an attack on the constitutionality of section 16074;[2] he further determined that such a defense would be quite costly to present. Accordingly, in fairness to the company as well as to his client, he put up to defendant insurance company by letter the question as to whether in its own interest, if not in fidelity to its policyholder, it should (1) assume the defense of the action for plaintiff (defendant there) or (2) settle the claim against him or (3) gamble on letting its insured shift for himself and defeating his claim on its policy.[3] It chose the latter

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[1] Section 16074 provides, in material part: "Any pupil who wilfully cuts, defaces, or otherwise injures in any way any property, real or personal, belonging to a school district is liable to suspension or expulsion, and the parent or guardian shall be liable for all damages so caused by the pupil. * * *"

[2] The attorney testified that:

"A search of the law determined that the section was on the statute books of this state since 1874. And there was no judicial interpretation or construction of that section in this state.

"Further research was then made into the law of other states of the United States. And after abundance of research of the law of the states, of other states, it was discovered that this section of the Education Code had no counterpart in any other state of the United States * * *"

The attorney concluded from this research that the statute was subject to attack on the ground that it established an unreasonable and improper classification.

[3] Such letter reads as follows:

"This is to advise you that the trial of the action you refused to defend is set alternative. This it had a right to do, and its good faith in so doing is not questioned. But it must have known that plaintiff had an equal right to press his claim under the policy it had written and that if he ultimately prevailed it should, in justice, have to make full reimbursement to him.

Following the company's refusal to defend, plaintiff's attorney prepared and presented the defense on certain questions of fact and on the above mentioned constitutional grounds. The municipal court rendered judgment for the school district in the amount of $255.16, plus costs, whereupon plaintiff appealed to the appellate department of the superior court and was initially successful. That court entered its order reversing the municipal court judgment. In a memorandum opinion it stated that "We regard the statute here involved, Education Code section 16074, as valid," but "the evidence is not sufficient to show that the damage complained of was caused by any act of defendants' child," and that hearsay evidence had been erroneously admitted. However, such reversal was based on an erroneous assumption of facts. To clarify the matter and to avoid the expense of a new trial on an issue of fact which did not in truth justify a new trial, counsel then stipulated to an amendment of the settled statement on appeal.[4] On the basis of the amended statement the school district obtained a rehearing and reargument of the case. Upon the rehearing the appellate department again ruled against plaintiff's (defendant there) contention that the statute was unconstitutional, but this time held that the evidence, in light of the amended settled statement, was sufficient to support the judgment and that the admission of the hearsay testimony was nonprejudicial, and

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for May 9, 1952, at 9:30 A.M. in Division I of the Municipal Court.

"As you know, the total amount sought to be recovered by plaintiff in that action is $274.18. The action involves a number of complex and intricate questions of constitutional law and the interpretation and construction of a statute of this state, no counterpart of which appears to exist in any of our sister states, and which has never been the subject of judicial decision.

"The amount of time, effort and energy which must be expended to properly prepare for the defense of this action will, of necessity, substantially exceed the total amount involved in the litigation. Your refusal to defend such action on behalf of your assured has placed your assured in the position in which he was compelled to employ counsel to defend him and his wife in such action. However, he and Mrs. Arenson both have looked, and will continue to look to you for the defense thereof, or to reimburse them for all of their costs, fees and expenses, including counsel fees, for the defense of such action, as well as, of course, the payment of any judgment which may be recovered against either of them therein.

"This letter is intended to put you on notice of the fact that the reasonable amount of attorney's fees incurred and to be incurred by the Arenson's in the defense of the action against them will be much greater than the total amount of the claim, in order that *you may prefer to settle or satisfy the claim of the Los Angeles School District rather than to expose yourself to the additional claim which will be made against you for the services yet to be rendered* to Mr. and Mrs. Arenson in said action, and the costs, fees and expenses, including attorneys fees, which will necessarily be incurred by them." (Italics added.)

[4] Arenson's attorney testified that the settled statement had incorrectly set forth the stipulation of the parties as to the facts, and because on retrial the school district would have been able to prove the actual facts, the attorney agreed to amend the settled statement to conform to the truth in order that a rehearing could be obtained "so that we could get a decision that would be determinative of the problem from the standpoint of actual legal liability, because either the section was not constitutional or because under the facts they could not recover and not merely have procedural errors that could be corrected. Those procedural errors were eliminated." Since a retrial would normally be more costly than a reargument on appeal, this action by the attorney would appear to constitute a good faith attempt to keep the cost of litigation down. Likewise it evidences a high standard of duty to the court and unwillingness to have the court misled as to a material matter of fact by an inaccuracy or inadequacy in a stipulation of facts.

affirmed the judgment. This terminated the litigation adversely to plaintiff insofar as his liability to the school district is concerned. Likewise it determined the issues involved in that litigation adversely to defendant insurance company if the policy it had sold to plaintiff covered his liability. The latter issue remained to be determined.

Plaintiff then instituted the present action in the superior court for a declaration of his rights and to recover from the insurance company the amount of the municipal court judgment, costs incurred in the school district's action, and his obligation to pay an attorney's fee for the defense of that action. Defendant answered admitting issuance of the "certain personal Comprehensive insurance policy" relied on by plaintiff but denying any liability in the premises; it contended that plaintiff was not covered by the policy for the tort sued on by the school district. This raised directly the important issue of law determined by this court in the prior appeal. The trial court accepted defendant's theory but this court reversed. We held that the policy covered the tort sued on and that "Plaintiff is entitled to recover the principal amount of the judgment against him with interest together with court costs and attorneys' fees properly incurred by him in defense of the school district's claim." (Arenson v. National Automobile & Cas. Ins. Co. (1955), supra, 45 Cal.2d 81, 84 [7], 286 P.2d 816.)

Upon retrial, the only issue in dispute was the amount properly chargeable to the insurer to indemnify plaintiff for his obligation to pay an attorney's fee "properly incurred" in the defense of the action by the school district. The trial court had before it certain correspondence between plaintiff, the latter's attorney, and the insurance company, including the letter to the company hereinabove quoted in material part in footnote 3, and the records of the municipal court and the appellate department of the superior court in the school district's action. The only witness was the attorney, Mr. William Katz, who detailed his services and the charges therefor, which totaled $2,027.50,[5] for which he had billed plaintiff.

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[5] The services and charges therefor itemized by the attorney in his testimony were substantially as follows:

1.	Letter to county counsel re filing amended answer:	$10.00	
2.	Preparing and filing stipulation to file amended answer:	15.00	
3.	Preparing and filing substitution of attorneys, substituting Mr. Katz for Mr. and Mrs. Arenson in propria persona:	15.00	
4.	Letter to Mr. and Mrs. Arenson advising them of date of trial:	10.00	
5.	Trial of action on merits in the municipal court, consuming better part of one day:	100.00	
6.	Consultations with Mr. Arenson in preparation for trial, 5 hours at $12.50 an hour:	62.50	
7.	Conferences with Mr. Arenson's minor son, two hours at $12.50 an hour:	25.00	
8.	Telephone conferences with county counsel:	5.00	
9.	Letter to county counsel about the case:	10.00	
10.	Three letters to Mr. Arenson about the case:	30.00	
11.	Further conferences with county counsel:	5.00	
12.	Research into the laws of sister states and foreign jurisdictions pertaining to the constitutional issues, 64 hours at $12.50 an hour:	800.00	
	Total of itemized charges for services rendered in the municipal court action to and including entry of judgment therein:		$1,087.50
13.	Preparing and filing notice of appeal and request for transcript:	$25.00	

On cross-examination Mr. Katz testified that "I had an agreement with them [Mr. and Mrs. Arenson] that my fee was the amount for which I billed them" but "I want to clarify that a little further. Up to this point, I have received nothing. I have not received the return of my costs which I have advanced. My clients have been paying off the judgment rendered against them in the Municipal Court at the rate of $15.00 or $20.00 a month. * * * And if they * * * pay me * * * it would be in the same way. And, then, I doubt very much that I would get it. * * As a matter of fact, this case was one that at the outset when I went into it I made no arrangement with respect to the fee because I did not know how much time and effort would go into it; that was to be based upon the working involved and the complexity of the matter and the time spent on it, and the like; after I got into the case I was in the position of having a bear by the tail, I couldn't hang on and was afraid to let go. I didn't want to put myself in the position of leaving these clients in the lurch. I knew what their financial position was. And so I went right on through with the defense of the action. I felt that the action should have been defended by the carrier * * * I want to make the explanation * * * I not only intended to charge them, I actually did charge them by billing them for it. And I have billed them continuously since the services have been performed. I did not expect to get it, counsel. I doubt that these people are in a position to pay that kind of money."

The trial court found that "the attorney's fees reasonably and properly incurred by the plaintiff in defense of the claim of the Los Angeles City School District of Los Angeles County is the sum of $175.00," and, as above stated, awarded that sum as part of the total judgment of $488.36.

In determining the adequacy of the amount awarded the insured plaintiff as indemnification for his obligation for attorney's fees three questions are presented. First, is the fact that plaintiff-insured may not have been financially able to employ counsel and make a defense in an action, which defendant-insurer should have defended, a ground for denying or limiting recovery against the insurer? Second, were *all* of the services which the attorney performed properly rendered to plaintiff in defending the municipal court action? Or, to phrase it differently, in determining the attorney's fees properly incurred by plaintiff (and hence chargeable to defend-

14.	Preparing and filing settled statement on appeal:	$100.00	
15.	Preparing and filing opening brief:	150.00	
16.	Preparing and filing reply brief:	100.00	
17.	Appearance and argument on appeal:	150.00	
18.	Conference with county counsel respecting stipulation to amend the settled statement:	15.00	
19.	Appearance and argument on rehearing of appeal:	150.00	
20.	Research on questions involved in the appeal, 20 hours at $12.50 an hour:	250.00	
	Total itemized charges for services rendered on appeal:		$ 940.00
	Total itemized charges for case:		$2,027.50

Plaintiff's exhibit 8, received by the trial court as a summary of the attorney's testimony and not as evidence of charges actually made, indicates rendition of certain additional services in the municipal court which would bring the total charges for the case to the sum of $2,142.50, rather than $2,027.50 as itemized in the testimony, but the discrepancy appears to be immaterial in view of the fact that plaintiff in his complaint has alleged, and has sought to recover, the sum of only $2,000.

Plaintiff's attorney further testified that although he had computed the charges for conferences with the Arensons and for legal research at only $12.50 an hour, this sum was actually only "one-half of an amount which is fair and reasonable, a fair and reasonable charge being $25.00 an hour, rather than $12.50 an hour."

ant insurance company) may the value of any of such services be excluded or were they all reasonably pertinent to plaintiff's defense? Third, what, under all the circumstances shown, is the reasonable value of the rendered services which were reasonably pertinent to plaintiff's defense? In considering these questions it is to be emphasized, as has been above indicated, that this is not an action by an attorney against his client to recover his fees, but is, rather, an action by an insured seeking reimbursement from defendant insurance company, under the terms of the insurance contract, for an obligation properly incurred by the insured in defending an action against which the insurance company wrongfully refused to provide the defense.

[1, 2] The principles applicable to liability of an insurance company for attorney's fees thus incurred by an insured, insofar as they are relevant here, are stated in 8 Appleman, Insurance Law and Practice 36–41, § 4691, as follows:

"An insurer's unwarranted refusal to defend a suit against the insured has been held to relieve the latter from his contract obligation to leave the management of such suits to the insurer, and to justify him in defending the action on his own account. And where the insured is thus compelled to conduct his own defense, it is uniformly held that he may recover the expenses of litigation, including costs and attorneys' fees, from the insurer. * * *

"Reimbursement for the expenses of litigation has been allowed to the insured, even though his defense was unsuccessful. * * * The insured can also recover the expenses of an appeal * * * [at least where the grounds for appeal are reasonable. (Grand Union Co. v. General Accident, etc., Assur. Corp. (1938), 254 App.Div. 274, 4 N.Y.S.2d 704, 711 [8], affirmed 279 N.Y. 638, 18 N.E.2d 38.) This has been held true even where the appeal was unsuccessful. (John B. Stevens & Co. v. Frankfort M., A. & P. G. Ins. Co. (9 Cir., 1913), 207 F. 757, 762 [3].)]" (For a more complete discussion of the foregoing rules and collection of cases in support thereof see the annotation in 49 A.L.R.2d 694, 711–760; see also 45 C.J.S. Insurance, p. 1062, § 934; Aetna Life Ins. Co. v. Heiden (1931, 184 Ark. 291), 42 S.W.2d 392, 394; Southern Ry. News Co. v. Fidelity & Casualty Co. (Ky. 1904), 83 S.W. 620, 622; Carthage Stone Co. v. Travelers' Ins. Co. (1915, 186 Mo. App. 318), 172 S.W. 458, 460.)

In the present case defendant insurance company by respecting its contract with plaintiff could have prevented (or itself have handled) the extensive litigation in which plaintiff engaged in defending the action by the school district. Plaintiff did not voluntarily employ an attorney. He was, in the exercise of ordinary prudence, compelled to do so when he and his wife were sued on a claim covered by defendant's policy and defendant refused to either defend or settle. Plaintiff employed a well-known, able and skilled [6] attorney and was entitled to expect the attorney to defend him to the best of his ability and in all courts in which his claims could properly be presented. Neither plaintiff nor the attorney could be sure, in defending the school district action, that defendant insurance company could ever be compelled to pay a judgment adverse to Arenson in that action and also to respond for attorney's fees and costs. Furthermore, although plaintiff did not prevail on the constitutional issues in either the municipal court or the appellate department of the superior court, there is no showing that such issues were not debatable or were not advanced in good faith in the belief that they presented the best defense to the action against Arenson. The record is devoid of any evidence that the attorney did not actually perform the services exactly as enumerated in his testimony.

[3, 4] An insurance company may not wrongfully refuse to defend its insured

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[6] If it be material here, the fact that plaintiff and the attorney were eventually successful as against defendant would appear to be cogent evidence of the attorney's skill.

and thus force the insured into the position of having to engage outside counsel, and then, because the defense was not handled in a manner to the liking of the company, refuse to hold the insured harmless against payment of fees for all services reasonably performed in such defense. Surely the insurance company will not favorably be heard to urge that plaintiff's counsel acted improperly when he, knowing his clients' financial position, nevertheless refused to put himself "in the position of leaving these clients in the lurch" and "went right on through with the defense of the action." It would appear, on this record, that Mr. Katz is to be commended rather than criticized for his conduct.

[5–7] As we have recently reiterated, "If semantically permissible, the [insurance] contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. [Citation.] If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against [citations], the amount of liability [citations], or the person or persons protected [citations], the language will be understood in its most inclusive sense, for the benefit of the insured." (Continental Cas. Co. v. Phoenix Construction Co. (1956), 46 Cal. 2d 423, 437–438, [11, 12], 296 P.2d 801; Ensign v. Pacific Mut. Life Ins. Co. (1957), 47 Cal.2d 884, 306 P.2d 448.) Here, the company agreed to defend any suit brought against Arenson in which damages for injury to property was alleged (see Arenson v. Nat. Automobile & Cas. Ins. Co. (1955), supra, 45 Cal.2d 81, 82, 286 P.2d 816). Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him. It will not be allowed to defeat or whittle down its obligation on the theory that plaintiff himself was of such limited financial ability that he could not afford to employ able counsel, or to present every reasonable defense, or to carry his cause to the highest court having jurisdiction, and that therefore he should not have had, and will not be allowed compensation for, an attorney who filled the breach. Sustaining such a theory would not only tend to discourage busy attorneys from rendering adequate services for needy clients but would tend also to encourage insurance companies to similar disavowals of responsibility with everything to gain and nothing to lose. If there be uncertainty as to the nature or extent of the services reasonably to be rendered by counsel engaged by the insured, that uncertainty must be resolved against defendant insurer. As declared in Speegle v. Board of Fire Underwriters (1946), 29 Cal.2d 34, 46 [14], 172 P.2d 867, "[T]he wrongdoer shall bear the risk of the uncertainty which his own wrong has created." There is in the record before us no basis whatsoever for concluding that plaintiff is asking indemnification for services not rendered to him in good faith or for which he has not in good faith been billed, or that he seeks more than he reasonably expects to pay his attorney upon recoupment of that obligation from defendant. We hold that on the record before us plaintiff (insured) was warranted, so far as relates to the liability of defendant (insurer), in proceeding as he did in defense of the municipal court action, and that attorney's fees were properly incurred for all of the services which the evidence (see footnote 5, supra) shows were performed by the attorney engaged by plaintiff.

The next question is as to the reasonable value of such services. Without here again detailing the extent of the services rendered by plaintiff's attorney, it is at once apparent that a fee of $175 is so grossly inadequate that we are impelled to the conclusion that the trial court must have been under a misapprehension either as to the nature of defendant's obligation to the insured or as to the extent of the services which were properly rendered to plaintiff.[7] (See Berry v. Chaplin (1946), 74 Cal.App.2d 669, 680–681, 169 P.2d 453.) This conclusion is further compelled by the testimony of the attorney himself, which was in no way controverted by defendant insurance company and which placed a value of some $2,000 on the services rendered —a value which on the record would appear entirely reasonable.

[8] Although it has been said that this court possesses the power and ability to appraise and adjudicate the value of attorney's services (Kirk v. Culley (1927), 202 Cal. 501, 510, 261 P. 994), we deem it better practice, particularly where it appears as it does here that there was some misapprehension in the trial court as to the nature of the issue to be resolved, that the new determination be made in the trial court. The matter will therefore be remanded for that purpose.

[9] Plaintiff also complains of the quashing of a subpoena duces tecum which he had caused to be served on defendant requiring defendant to produce its files of actions pending in the municipal court in the years 1951 to 1955, inclusive, in which the company had employed counsel for or on behalf of the defendants in the actions or had itself defendant, together with its records of the services rendered by counsel, the bills and statements submitted by such counsel, the ledger, cash disbursement book, or other record showing the amounts paid by defendant for the services so rendered, as well as similar records for appeals taken from the municipal court to the appellate department of the superior court during that period. It is apparent that the subpoena as served was too broad in some of its demands and that compliance would have put an unnecessary burden on defendant. It should have been restricted to data which would be relevant as having some substantial similarity to the case at bar. The ruling of the trial court quashing this subpoena does not, therefore, furnish a ground for reversal of the judgment, and the question in its present application need not occur on the new trial.

For the reasons above stated, the judgment is reversed and the cause remanded for a new trial on the issue which remains open.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and McCOMB, JJ., concur.

SPENCE, Justice.

I dissent.

My views are in accord with those expressed in the opinion of the District Court of Appeal written by Mr. Justice Ashburn. Arenson v. National Auto. and Cas. Co., 302 P.2d 877. I would therefore modify and affirm the judgment.

48 Cal.2d 541

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Gerald MOORE, Jr., Defendant and Appellant.

Cr. 5992.

Supreme Court of California.
In Bank.
May 10, 1957.
Rehearing Denied June 4, 1957.

Prosecution for murder in the first degree. The Superior Court, San Bernardino County, Carl B. Hilliard, J., entered judgment of conviction and defendant appealed. The Supreme Court, Spence, J., held that evidence sustained conviction for first degree murder under felony murder doctrine, for killing in the course of a rape or attempted rape.

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[7] In announcing its decision from the bench, the trial court stated that the judgment for the plaintiff would include "the sum of $175.00 attorney's fees, being the reasonable value of services *properly rendered* in the defense of the Municipal Court action and appeal therefrom * * ". (Italics added.)

Judgment and order denying new trial affirmed.

Carter, Traynor and Schauer, JJ., dissented.

1. Criminal Law ⚿1169(1)

In prosecution for murder, trial court did not prejudicially err in admitting in evidence three colored slides picturing victim's body, in view of testimony that objects pictured were accurately reproduced and that the color of the body and wounds was not distorted, and in view of fact slides were relevant since victim died of internal injuries caused by external blows, the nature of which appeared from the slides.

2. Homicide ⚿338(1)

In prosecution for murder, trial court did not prejudicially err in admitting evidence concerning defendant's afternoon taxicab ride with woman other than victim, in view of fact that such evidence was relevant on question of his intent and purpose in picking up strange women, including victim, who allegedly was killed by defendant in the course of a rape or attempted rape.

3. Criminal Law ⚿552(1)

Circumstantial evidence is as adequate to convict as direct evidence.

4. Homicide ⚿18(4)

A killing in the course of a rape or an attempted rape constitutes first degree murder. West's Ann.Pen.Code, § 189.

5. Homicide ⚿253(6)

Evidence sustained conviction for first degree murder, under felony murder doctrine, arising out of a killing in the course of a rape or an attempted rape. West's Ann.Pen.Code, § 189.

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John C. McCarthy, Ontario, and Theo. G. Krumm, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Lowell E. Lathrop, Dist. Atty. and J. Steve Williams, Deputy Dist. Atty., San Bernardino, for respondent.

SPENCE, Justice.

Defendant pleaded not guilty and not guilty by reason of insanity to the charge of murdering one Hulda Hoag. The jury found him guilty of murder in the first degree and fixed the penalty at death. Defendant withdrew his insanity plea and, after his motion for new trial had been denied, the death penalty was imposed. The appeal is automatic under section 1239(b) of the Penal Code.

Mrs. Hoag was killed at some time between 8 and 11 o'clock on the evening of March 16, 1956. In the afternoon of that day defendant, a 33-year-old carnival worker, left a bar in San Bernardino with a woman (not Mrs. Hoag), and the couple entered a taxicab. They discussed whether they should go to a motel or the woman's house, and she gave the driver her address. Defendant argued with the woman when she said he could not enter her home, and he refused to pay the fare since there was "nothing in it" for him. He left the taxicab and was finally given a ride back to the downtown area by policemen who had investigated the incident.

Defendant entered another tavern about 5 o'clock that afternoon, had several beers, and struck up a conversation with Mrs. Hoag, who was 62 years old. Their friendship apparently ripened quickly, and he invited her to come and live with him. By 7:30, hugging and kissing had led to more intimate advances. Because of this and because Mrs. Hoag had become ill, the bartender asked the couple to leave and called a taxicab for them.

The driver of this vehicle testified that defendant instructed him to drive to the location of the carnival trailers at the National Orange Show. During the trip, which lasted about half an hour, defendant continued "making love to" Mrs. Hoag. At about 8 o'clock the driver left the couple near a field where the trailers were parked and saw them cross a cable and enter the field. Both had obviously been drinking and Mrs. Hoag, who was staggering, was assisted by defendant.

Defendant testified that he and Mrs. Hoag then sat on the running board of a truck and drank from a bottle which he had with him; that they "started playing around a little like we did in that bar"; and that they "got into a little argument." He told her that they "had to sleep in the van," as he "didn't make the kind of money to sleep in a hotel." Mrs. Hoag refused to sleep in the van, and he told her "You are just as bad as the other woman that was in the taxicab after me previous to that."

A carnival worker who was sleeping in one of the vans heard a woman's voice say "Don't do this," or "Oh, don't do this to me." He also heard a sound of scraping which seemed to come from the vicinity of an adjoining van. He did not believe that the voice he heard showed distress, and he did not disturb himself.

Shortly before 11 that evening another carnival worker discovered Mrs. Hoag's nude body in a field near the trailers and summoned officers. The body was cold, with only slight warmth between the head and shoulders where they were pressed together. There was no pulse. Her clothing and personal effects were scattered over and near the trailers. A pass to a roller derby was also discovered in the vicinity.

Mrs. Hoag had been severely beaten. Her breastbone and eight ribs had been fractured. The body was scratched and bruised but she had died, according to the autopsy surgeon, from shock and hemorrhages from internal injuries. These injuries were caused by blows which could have been administered by a fist, knee, or shod foot. There was no testimony showing that Mrs. Hoag had been actually raped, but the surgeon did testify that there were contusions on the outer section of the sex organs and bruises and scratches on the front surface of the thighs.

Black and white photographs and colored slides, showing the body as it was found and also showing the general area, were admitted in evidence. They were used by the surgeon and other witnesses while explaining the victim's injuries and the scene of the crime.

Footprints were found near the trailers. A footprint expert testified that defendant was wearing shoes that could have made the prints. Defendant was questioned and thereafter arrested. Pictures of footprints made by defendant after his arrest were compared with footprints found at the scene. The prints were similar.

A criminologist testified that while there were several spots of human blood on the trousers which defendant wore on March 16, their areas were too small to identify the type of the blood. No seminal spots were found on defendant's clothing nor were any identifiable fingerprints discovered on the items found at the scene of the killing. There were two small tears on defendant's trousers, near the hip pockets. These could have been made if defendant had backed into a barbed wire fence near the trailers while dragging the body to the place where it was found.

Defendant sought to quit his job the morning after the killing but was told that he could not leave until the carnival closed. His employer testified that defendant did not tell him why he wanted to quit. The employer admitted that he had previously spoken to defendant's former employers who may have stated that they would have liked to have defendant work for them again.

Defendant told a deputy sheriff, and again stated on cross-examination, that he had served a sentence in Iowa for rape.

The sheriff testified that he asked defendant after his arrest why he had killed Mrs. Hoag and defendant replied, "I don't know why I did it," that he did not want to hurt any one and that "I don't remember. I blacked out. I can't remember anything." The sheriff also testified that defendant later sought to plead guilty to second degree murder and stated that he remembered more than he had told the officers but if he told them more he "would burn for sure."

Defendant testified that he had been drinking beer and whiskey all afternoon on March 16, that he met Mrs. Hoag at the bar and gave her a roller derby pass, and that he brought her to the carnival trailers near the fairgrounds. He decided, he said, that they had drunk too much to visit the fair itself or to have intercourse; and when she objected to sleeping in one of the carnival vans, they argued and he left her. He stated that he then went to a tavern in Colton with a fellow employee for more drinks, returned to the carnival, went to sleep in the cab of a truck at the carnival, and awoke the next morning on a carrousel.

Defendant also testified that his employer knew he wished to quit because his former employers had offered him a better job. He stated that he told the sheriff, "I didn't do it. If I did, I didn't know I did." He also testified that the sheriff had tried to convince him that he should plead guilty to second degree murder but he refused.

On cross-examination defendant admitted that he had lied during preliminary questioning by sheriff's deputies when he told them that he had returned to the fairgrounds during the afternoon of March 16.

Defendant's only other witness was a woman who also worked at the carnival. She corroborated one phase of his testimony by stating that she was with defendant when he tore his trousers while repairing the carnival equipment.

[1] Defendant contends that the trial court committed prejudicial error in admitting in evidence the three colored slides picturing the victim's body. While the photographer testified that one transparency had a red or orange effect from the light and the type of film used, he also stated that the objects pictured were accurately reproduced and that the color of the body and wounds was not distorted. While such evidence should be faithful and accurate (People v. Goodwin, 9 Cal.2d 711, 714, 72 P.2d 551), it was within the discretion of the trial court to admit the pictures, particularly when the jury had heard the testimony as to the color and its causes. See People v. Burwell, 44 Cal.2d 16, 34, 279 P.2d 744.

Defendant also argues that the transparencies were irrelevant since the surgeon testified that Mrs. Hoag died of internal injuries. These were caused, however, by the external blows, the nature of which appeared from the transparencies. The introduction of photographs showing the body of the victim has been disapproved "where no useful purpose is served thereby" (People v. Sisson, 1 Cal.2d 510, 511, 36 P.2d 116), but the pictures here were such as would aid the jury in determining the circumstances surrounding Mrs. Hoag's death. See People v. Osborn, 37 Cal.2d 380, 383, 231 P.2d 850; People v. Dunn, 29 Cal.2d 654, 659, 177 P.2d 553.

[2] Defendant next contends that it was prejudicial error to admit the evidence concerning his afternoon taxicab ride with another woman. However, this evidence of defendant's earlier activities was relevant on the question of his intent and purpose in picking up strange women, including Mrs. Hoag. Thus the evidence showed that, within a relatively short time before Mrs. Hoag was killed, defendant had been twice frustrated in his obvious desire and purpose to engage in sexual intercourse. It could therefore be reasonably inferred from all the evidence that defendant had been aroused to the point of using force and that he did use force in attempting to accomplish his purpose with Mrs. Hoag.

"The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not." People v. Sanders, 114 Cal. 216, 230, 46 P. 153, 157; see also People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924, and cases cited.

[3] Defendant's final contention is that the evidence is insufficient to support his

conviction. It is true that the evidence is largely circumstantial, but such evidence "is as adequate to convict as direct evidence." People v. Reed, 38 Cal.2d 423, 431, 240 P.2d 590, 595.

[4] Defendant argues that even if there is sufficient evidence to sustain his conviction of murder, the circumstances surrounding the murder are undisclosed, and therefore the verdict should be murder of the second degree. People v. Howard, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385. Here, however, the testimony, including that showing defendant's obvious desire and purpose to have sexual intercourse with Mrs. Hoag, her refusal to go to the van for that purpose, the nature of the injuries to her body when found near the van, and the fact that her clothing had been torn off, was sufficient evidence to sustain the implied finding that defendant had killed her in the course of an attempted rape. People v. Lewis, 220 Cal. 510, 31 P.2d 357; People v. Wheelock, 6 Cal. Unrep. 914, 68 P. 579. Such a killing, under the felony murder doctrine (Pen. Code, § 189), constitutes first degree murder.

[5] Defendant makes no complaint concerning the instructions. The jury was properly instructed on the elements of rape, attempted rape, and the felony murder doctrine. There was ample evidence to sustain the verdict of first degree murder under that doctrine.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I do not agree that the evidence is sufficient to support the judgment of conviction of first degree murder; I also am of the opinion that the evidence concerning defendant's conduct earlier in the day of the crime could have had no other object, or effect, than to prejudice the defendant in the eyes of the jury.

Even the People do "not stress the argument" that defendant was guilty of premeditated, deliberate and wilful murder, but argue that this was a killing committed in the attempt to commit, or the actual perpetration of, rape. There is absolutely no evidence whatsoever in the record to support this latter theory: The victim willingly engaged in making love, and permitting the defendant to make love to her; she went with him voluntarily with the expressed purpose of having sexual intercourse with him—not only that night, but in the future since she intended to live with him and tentative arrangements were made for another patron of the bar to take her and the defendant to her home and pick up her belongings the following Sunday morning.

The testimony concerning the defendant's and victim's supposed presence at the trailer when the victim was overheard to say "Don't do this" or "Oh, don't do this to me" was expressly stated by the witness to be that the woman did not seem to be in any distress and "wasn't screaming, anything like that." The witness testified that he didn't hear a man's voice; that for a few seconds he heard something like scraping against tin. Defendant testified that when the victim refused to sleep in the trailer with him that he got up and left her, fully clothed, and walked alone toward the show grounds where he met a coworker who went with him to another bar; that he later returned to the show and woke up the next morning on a merry-go-round without knowing how he got there.

The evidence directly linking defendant with the crime is almost non-existent: He was identified as the man who was last seen walking to the trailers with the victim. There was no evidence on his clothing except two tears on his pants' pockets, which were proved to have occurred at an earlier time; and two unidentifiable minute blood spots on the back of one pants' leg. There were no blood stains on his shoes, no scrapings from under his nails connecting him with the victim; the only prints from his shoes were in the spot where he had been last seen with the woman when she was alive. There was nothing on defendant's clothing suggesting he had either raped, or killed, the woman. Circumstantial evidence and each link in the chain of circumstantial evidence must prove beyond a reasonable doubt that the defendant committed the crime with which he was charged, and, furthermore, each link of that chain of circumstantial evidence must be irreconcilable with any other rational conclusion (People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469; People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812; People v. Koenig, 29 Cal.2d 87, 173 P.2d 1).

In considering the applicable law, it should be noted that a woman's voice was heard, but that the one hearing the words did not consider that she was in distress; no man's voice was heard; no violent sounds were heard; no signs were found on defendant's clothing or hands which would even suggest he had committed the crime. The only evidence linking defendant with the victim is that they had set out together with the avowed purpose of engaging, voluntarily, in sexual intercourse; that they had been engaged in drinking, and making love, publicly for some time; that they were seen walking together toward the trailers. There was ample evidence in the record that other men and women slept in the trailers, and outside of them.

With respect to the evidence as to defendant's conduct on the afternoon of the day of the crime, its only purpose could have been to inflame the passion and prejudice of the jury. The general rule is that such evidence is inadmissible. There is an exception to the rule that such evidence is admissible when it is relevant to the issues in the case (People v. Evans, 113 Cal.App.2d 124, 126, 247 P.2d 915). The primary theory on which this case was tried was that defendant killed his victim in the attempt to commit rape, or in the actual commission of rape. The evidence complained of concerned the woman with whom defendant had left the bar earlier in the day. After she and the defendant arrived at her home, where he had expected to have intercourse with her, she refused to let him in the house. He then refused to pay the cab driver and was taken back into town by the police. From this the majority infers that defendant was aroused to the point of rape by force and violence due to the frustration of his sexual desires. Even though I am of the opinion that the evidence was inadmissible for any purpose since it showed only defendant's desire for sexual intercourse and had nothing whatsoever to do with either rape, or murder, since both women were apparently quite willing to go with defendant, its prejudicial effect upon the jury cannot be discounted. With the first woman's refusal to comply with defendant's wishes, he merely left her and refused to pay the taxi fare. There is nothing in this evidence which has any bearing on the issues of intent to commit rape with force and violence, or intent to kill, or a killing committed in the attempt to perpetrate, or the commission of rape. In other words, to support murder of the first degree under the theory that it was committed in the attempt to commit, or the commission of, rape, the evidence must show either lack of consent, or the use of force and violence in the commission of the act. When the conduct of the parties here is considered, it is apparent that there was no lack of consent on the part of the victim because she was with the defendant for the purpose of having intercourse with him. This is also true of the other woman who, apparently, later changed her mind. There was, however, no intimation that her change of mind caused any violence, or threat of violence, on defendant's part. Inasmuch as he was charged with murder of the first degree on the theory that he committed said killing in the attempt to commit rape, or the commission thereof, it is difficult for me to see how the evidence could have been considered admissible on any theory. It is clear, however, that the effect of it was to prove to the jury that the defendant was a "bad" and "immoral" man capable of any crime and since he was the last one to be seen with her, even though she was with him voluntarily and willingly, and even though there was no further evidence linking him with the killing that he must have been the guilty one.

I would reverse the judgment because I do not believe the evidence is sufficient and because I believe that the admission of the evidence of defendant's conduct earlier that afternoon was prejudicially erroneous.

TRAYNOR, J., concurs.

SCHAUER, Justice (dissenting).

The evidence is obviously sufficient to establish a criminal homicide. It is also suggestive that defendant is the guilty perpetrator. But it convincingly negates, rather than proves, murder in an attempt to commit rape. It is not sufficient to establish premeditated murder. In the state of the record, and in the light of the errors pointed out by Mr. Justice CARTER, the conviction, in my view, should be reduced to murder of the second degree. Failing such action, the judgment should be reversed. Imposition of the death penalty in a case such as this is manifestly a miscarriage of justice and an abuse of the penalty.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

150 Cal.App.2d 778

Carl H. ANDERSON and Rosa E. Anderson, Plaintiffs and Appellants,

v.

John V. McNALLY, Administrator of the Estate of Thomas Lee McNally, Sr., deceased, and W. A. Robertson, Administratrix of the Estate of Blanche Agnes McNally, deceased, Defendants,

John V. McNally, Administrator of the Estate of Thomas Lee McNally, Sr., deceased, Respondent.

Civ. 9058.

District Court of Appeal, Third District, California.

May 10, 1957.

Action by parents for death of son, fatally injured in collision of automobile in which he was riding with automobile of administrator's intestate. The Superior Court, Plumas County, Bertram D. Janes, J., sustained demurrer to amended complaint and parents appealed. The District Court of Appeal, Schottky, J., held that although it did not appear on the face of complaint that wrongful death action was barred by provisions of Probate Code requiring that holder of claim, which had been rejected by administrator or judge, bring suit in proper court within three months after rejection and proper procedure would have been for trial court to have overruled demurrer, where fact of untimely filing appeared in appellants' opening brief, error did not require reversal of judgment.

Judgment affirmed.

1. Executors and Administrators 🔑225(1)

Where complaint based on theory of wrongful death as result of collision which had occurred between automobile in which complainants' son was passenger and automobile of deceased driver was not filed within period specified by Probate Code in which to bring rejected claims against estate, complainants could not waive claim against estate property and limit recovery to alleged proceeds of deceased's automobile liability policy. West's Ann.Insurance Code, § 11580; West's Ann.Prob.Code, § 714.

2. Insurance 🔑591½

An injured party's action on automobile liability policy can be maintained only after the establishment of liability on part of alleged tortfeasor.

3. Executors and Administrators 🔑224

Where, in action for wrongful death resulting from an automobile accident, there was no allegation that defendant's decedent had died before plaintiff's decedent, claim for wrongful death was not one falling within rule exempting presentation of claims when liability arises after death of decedent. West's Ann.Prob.Code, § 700 et seq.

4. Executors and Administrators ⚿225(1)

A provision as to time for filing a claim against estate of a deceased person constitutes a statute of limitations. West's Ann.Prob.Code, § 714.

5. Limitation of Actions ⚿180(2)

A demurrer, which raises defense that the statute of limitation bars action, cannot be sustained unless facts alleged in complaint show that the action is barred and if all that appears from facts alleged is that action might be barred, defense cannot be raised by demurrer.

6. Appeal and Error ⚿1170(3)

Although it did not appear on face of complaint based on wrongful death as result of automobile collision that action was barred by provision of Probate Code requiring that holder of claim, which had been rejected by administrator or judge, bring suit in proper court within three months after notice of rejection, and proper procedure would have been for trial court to have overruled demurrer, where fact of untimely filing appeared in appellants' opening brief, error did not require reversal of judgment sustaining demurrer to complaint. West's Ann.Const. art. 6, § 4½; West's Ann.Prob.Code, § 714.

◆

J. Adrian Palmquist, Oakland, and Francis T. Cornish, Berkeley, for appellants.

Winslow Christian, Loyalton, for respondent.

SCHOTTKY, Justice.

Plaintiffs, Carl H. Anderson and Rosa E. Anderson, in this wrongful death action have appealed from a judgment of dismissal entered in favor of John V. McNally, Administrator of the Estate of Thomas Lee McNally, Sr., deceased, following the refusal of plaintiffs to plead further upon the sustaining of a demurrer to their amended complaint.

The amended complaint alleges two causes of action: The first against respondent, and the second against W. A. Robertson, Administratrix of the Estate of Blanche Agnes McNally, deceased. W. A. Robertson did not demur, and is not a party to this appeal.

The first cause of action, after alleging appellants' capacity to sue as the parents of Carl H. Anderson, Jr., deceased, and respondent's appointment and qualification as administrator, alleges that on February 7, 1955, plaintiffs filed and served a claim against the Estate of Thomas Lee McNally, Sr., deceased, in the amount of $75,000 for the wrongful death of Carl H. Anderson, Jr. The complaint alleges further that a head-on collision occurred on June 5, 1954, near Reno, Nevada, between the car in which Carl H. Anderson, Jr., deceased, was riding, and the car of Thomas Lee McNally, Sr., deceased; that the accident was the result of negligence on the part of McNally; that Anderson was killed; and that plaintiffs have thereby been damaged in the amount of $75,000.

Defendant McNally demurred "on the ground that the amended complaint fails to state facts sufficient to constitute a cause of action in that it does not allege the commencement of this action within three months after the date of service upon plaintiffs of a notice of rejection by defendant John V. McNally of the creditors' claim referred to * * *" (Probate Code, sec. 714.) The demurrer was sustained, with leave to amend. Following plaintiffs' refusal to plead further, judgment was rendered in favor of defendant McNally.

Section 714 of the Probate Code, so far as applicable here, reads as follows:

> "When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due;

otherwise the claim shall be forever barred."

In their summary of material facts in their opening brief, appellants state:

> "In the instant case, a verified claim against the estate of Thomas Lee McNally, Sr., deceased, was filed and served on February 7, 1955. It was rejected by defendant and notice of rejection was filed and served on February 21, 1955, though notice of service of the rejection was not received by plaintiffs' attorneys until February 23, 1955. Plaintiffs' complaint was filed May 31, 1955, three months and ten days after service of notice of the rejection, and five days before the limitation of time on a wrongful death cause of action under Section 340.3, Code of Civil Procedure."

It is thus apparent that appellants concede that their complaint was not filed within the three months period specified in section 714 of the Probate Code, which no doubt is the reason that they did not seek to amend their complaint further.

Appellants first contend that the demurrer should have been overruled because their claim is not a claim against the assets of the estate and they quote the following from Kagee v. Bencich, 27 Cal.App.2d 469, 471, 81 P.2d 265, 267;

> "A claim is required to be presented against the estate only when the person presenting it is making some * * * claim against the funds or property of the estate."

Appellants then state that they waive claim against the property of the estate and offer to limit appellants' recovery to the proceeds of whatever liability insurance policy respondent's decedent may have had.

[1, 2] There are several answers to this somewhat novel argument. No insurance company is a party to the action, nor do the pleadings contain any indication that respondent's decedent carried any liability insurance. Furthermore, it is difficult to understand how appellants could assert a claim against any insurance company when they have in effect waived their claim against the property and estate of the alleged insured wrongdoer. Liability insurance, as the term indicates, insures against liability upon the part of the policy holder. When there is no claim against the policy holder, or a claim has been waived, as it has been in this case, there is no liability upon which an action against an insurance company could be founded. Section 11580 of the Insurance Code provides that every liability policy shall include "* * * A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." By statute then, an injured party's action on the liability policy of the tort-feasor can be maintained only following the establishment of liability on the part of the alleged tort-feasor. Such liability cannot be established where the injured parties have waived their claims against the alleged wrongdoer.

[3] Appellants' next contention is that "Since liability in this matter arose after the death of decedent Thomas Lee McNally, Sr., it was not a claim against the estate which was required to be presented within the purview of section 700 et seq. of the California Probate Code." In support of this contention appellants quote from Sperry v. Tammany, 106 Cal.App.2d 694, 698, 235 P.2d 847, 849, as follows:

> "When a liability arises after the death of the decedent it does not constitute a claim against the estate which is required to be presented for allowance (except funeral expenses and other matters expressly provided in the Probate Code.)"

There is no allegation in the complaint that McNally died before Anderson, nor is there any allegation as to the ages of the parties or of Anderson. The complaint does allege that a claim was filed against the estate, from which it may be inferred that appellants believed that Anderson died first.

A more serious contention is the one raised by appellants for the first time in their closing brief. This contention is stated by appellants as follows:

> "Since the complaint states a cause of action and it does not affirmatively appear on the face of the complaint, nor, for that matter does it appear in the record at all, that the action was not filed within three months after written notice of rejection of the claim, nor, for that matter, that written notice of rejection was ever given, to sustain a general demurrer was error. If the defense exists at all, it should have been set up by answer, and appellants should have had the opportunity to show that the defense, if properly pleaded, was not in fact good."

Appellants argue that the allegation in the amended complaint that "On * * * the 7th day of February, 1955, plaintiffs * * * filed * * * in * * * the Estate * * * a claim for wrongful death * * *" was, as against a general demurrer, a sufficient allegation that a claim had been presented. Appellants cited section 712 of the Probate Code which provides that if the personal representative fails to allow or reject the claim within ten days, "such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day." Appellants then argue that the election may be made at any time after the ten-day period and hence a complaint need only allege that a claim was presented and show that more than ten days elapsed thereafter in order to state a cause of action. Appellants point out that the instant action was commenced on May 31, 1955, which was more than ten days after February 7, 1955. They then state that the complaint does not allege that the claim was allowed for payment in the ordinary course of administration nor that the claim was rejected and written notice given more than three months before suit was filed.

Appellants then argue that Probate Code, section 714, which requires that suit be commenced within three months after written notice of rejection of the claim, constitutes a statute of limitations. They quote from In re Estate of Wilcox, 68 Cal.App.2d 780, at page 785, 158 P.2d 32, at page 34, where the court said, with reference to said section 714:

> "* * * It is there provided that if the holder of a rejected claim does not file suit thereon within the time therein specified 'the claim shall be forever barred.' This provision constitutes a statute of limitations."

Appellants also cite Lobrovich v. Georgison, 144 Cal.App.2d 567, 301 P.2d 460, 464, in which the court said with reference to section 714:

> " 'The statute of limitation is a positive rule of law, and the courts must, when it is pleaded, be governed by it where it applies * * *.' Adams v. Hopkins, 144 Cal. 19, 28, 77 P. 712, 715. As a statute of repose it prevents the bringing of action after the period provided for, independent of the existence of prejudice to the defendant."

[4, 5] It appears to be the law that the provision as to the time for filing a claim against the estate of a deceased person constitutes a statute of limitations. It also appears, as contended by appellants, that the California courts have consistently held that a demurrer which raises the defense that a statute of limitation bars the action cannot be sustained unless the facts alleged in the complaint show that the action is barred. If all that appears from the facts alleged is that the action *might* be barred, the defense cannot be raised by demurrer. The general rule is as stated in King v. Mortimer, 83 Cal.App.2d 153, at page 163, 188 P.2d 502, at page 508:

> "In order that a complaint be vulnerable to attack by demurrer raising a specific statute of limitations, it must affirmatively appear on the face of the complaint that the whole of the cause

of action is necessarily barred by the pleaded statute. [Citing cases.]"

And in Vassere v. Joerger, 10 Cal.2d 689, 693, 76 P.2d 656, 658, the court said:

> "* * * it is well settled that 'a demurrer on the ground of the bar of the statute of limitations does not lie, where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred.' Pike v. Zadig, 171 Cal. 273, 277, 152 P. 923, 925; Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 250, 27 P. 211."

[6] The demurrer to the amended complaint in the instant case was upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action in that it did not allege the commencement of the action within three months after the date of service of rejection of the claim. This must be considered a general demurrer, for as stated in California Procedure, by Witkin, at page 1477:

> "Since the statute of limitations is not a ground of special demurrer under C.C.P. 430, it necessarily falls within the general demurrer provision (C.C.P. 430(6)). * * * The rule developed that, although a general demurrer is an appropriate method of raising the defense, it must do so by specific mention."

Therefore, in view of the fact that it did not appear upon the face of the complaint that the action was barred by the provisions of Probate Code, section 714, we believe that the proper procedure would have been for the court to have overruled the demurrer, and the defense that the action was barred by the statute could have been raised by answer.

However, we do not believe that this error requires a reversal of the judgment in the instant case. Rather do we believe that to do so would be contrary to the intent and purpose of section 4½ of Article VI of our state Constitution which reads:

> "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

For the record shows that the same ground of demurrer was raised as to the original complaint, and when the amended complaint was filed there was no allegation that the action had been commenced within the three months period. Furthermore, as hereinbefore set forth, in appellants' opening brief appellants state frankly that their action "was filed May 31, 1955, 3 months and 10 days after service of notice of rejection," thus conceding that their complaint was not filed within the three months period specified in said section 714. It is apparent that appellants did not avail themselves of the permission granted to amend their complaint because they could not allege truthfully or prove that their action was filed within the statutory period. Under such circumstances we believe that the error of the court in sustaining the demurrer with leave to amend did not result in a miscarriage of justice. To hold otherwise would in our opinion be to fly in the face of the plain and meaningful language of section 4½ of Article VI of our Constitution, and would unreasonably and unnecessarily substitute form for substance.

The administration of justice is not improved by slavish adherence to technical rules of pleading, and where, as here, the fact of the failure to file the action within the statutory period is admitted, we believe that the judgment should be affirmed.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

150 Cal.App.2d 740

Elizabeth B. JOHNSON, Plaintiff,
v.
Don RICH, etc., et al., Defendant, Cross-Complainant and Respondent.
International Airports, Inc., Cross-Defendant and Appellant.
Civ. 22029.

District Court of Appeal, Second District, Division 3, California.
May 9, 1957.
Rehearing Denied May 22, 1957.
Hearing Denied July 8, 1957.

Action for value of services rendered and for other relief, wherein defendant cross-complained and cross-defendant counterclaimed to the cross-complaint. The Superior Court of Los Angeles County, Burnett Wolfson, J., rendered judgment for plaintiff and for cross-complainant, and cross-defendant appealed. The District Court of Appeal, Shinn, P. J., held that from the fact that plaintiff's attorney prepared findings adopted by trial court, reviewing court inferred that he requested no findings upon issues as to which he contended on appeal that findings were deficient, and hence plaintiff must be held to have waived findings on those issues.

Affirmed.

1. Appeal and Error ⚷882(17)

Under invited error rule, where findings are prepared by counsel designated by court, who was at liberty to use his own judgment as to text of findings, no claim of insufficiency of the findings will be entertained on appeal, though such rule will not be strictly applied if to do so would penalize party unjustly.

2. Appeal and Error ⚷931(9)
Trial ⚷392(1)

From the fact that plaintiff's attorney prepared findings adopted by trial court, reviewing court inferred that he requested no findings upon issues as to which he contended on appeal that findings were deficient, and hence plaintiff must be held to have waived findings on those issues.

3. Appeal and Error ⚷931(9)

Generally, where findings are waived it will be presumed that every fact essential to support the judgment was proved and found by court.

4. Appeal and Error ⚷931(3)

Where there appeared to have been only a waiver of findings as to some of the material issues, and it was contended that evidence was insufficient as to some findings, reviewing court would proceed as if trial court had made findings on all issues that would be consistent with the evidence and the judgment.

5. Principal and Agent ⚷78(6)

In view of failure to prove that principal did not get benefit of commissions earned by agent on contract with third party, evidence was insufficient to give principal the benefit of rule that agent may not make profit through use of his position without principal's consent, and finding that agent disclosed terms of the commission agreement to principal was not lacking in evidentiary support.

6. Principal and Agent ⚷89(8)

Evidence was sufficient to show that third party knew of agent's authority to place principal's airplanes for maintenance service, so that third party's agreement to pay commission to agent would not be invalid under rules pertaining to dual agency.

7. Novation ⚷1

Where written agreement for servicing of airplanes for a year did not provide for placing of specific airplanes and was subject to termination by either party on ten days' notice, subsequent superseding agreement, which changed amount of commission and person to whom commission was to be paid, and prevented cancellation of the original agreement, was based on substantial consideration.

8. Aviation ⚷238

Evidence supported finding that agreement for servicing of airplanes related to work on only three planes, and hence there was no breach of contract to deliver planes for service in delivery of only three planes, though original agreement provided for delivery of five planes.

9. Evidence ⚷69

Under statutory presumption that ordinary course of business has been followed, it was a reasonable inference, from payment of invoices when due, that bills for maintenance services for prior months had also been paid. West's Ann.Code Civ. Proc., § 1963, subd. 20.

10. Evidence ⚷87

That statutory presumption that ordinary course of business has been followed will support a finding based thereon, in absence of indisputable evidence to the contrary. West's Ann.Code Civ.Proc., § 1963, subd. 20.

11. Appeal and Error ⚷171(1)

Appellant could not change the theory upon which it elected to stand in trial court, by asserting that proof of payment of particular charges was part of adversary's case though it tried the issue in trial court upon the assumption that nonpayment was part of its own defense.

12. Corporations ⚷432(12)

Sufficiency of specific evidence of corporation's knowledge that particular person was collecting commissions was unimportant where such person was corporation's sole stockholder.

13. Appeal and Error ⚷1133

Finding that account was stated in favor of cross-complainant against plaintiff would preclude reversal of judgment for cross-complainant, in absence of any attack upon such finding, though evidence did not show why such finding was requested or made.

A. J. Blackman, Los Angeles, for appellant.

Goodstein, Moffitt & Rosen, Los Angeles, for respondent.

SHINN, Presiding Justice.

Elizabeth B. Johnson, assignee of George Batchelor, Batchelor Enterprises and International Airports, Inc., recovered judgment against Don Reichgott, who calls himself Don Rich, and Ann Rich in the sum of $7,320.28 and attorney's fees, the balance unpaid on a promissory note, and a judgment against Don Rich and Fred A. Miller for $1,500 for services rendered. By the judgment Rich was awarded $7,700 upon his cross-complaint against appellant International Airports, Inc. The contentions on appeal all relate to claims of error in the trial of the issues raised by the cross-complaint of Rich and International's counterclaim to the cross-complaint.

The court determined that $7,700 was owing by International to Rich as compensation under an agreement by which International agreed to pay Rich $2 out of each $32 earned by International for the servicing of airplanes which Airline Ground Service brought to International for maintenance. (Rich and Airline were one and the same. Rich was the sole owner of Airline.) The court found that the agreement related to three transport airplanes, namely, Nos. N59483, N62528 and N1651M, the first two of which were operated by Air America, Inc., and the third by Paul Mantz Air Services. International charged for maintenance $32 for each hour a plane had been flown since the last servicing. The court found that the airplanes had been flown for a total of 3850 hours and this finding is not questioned.

The answer to the cross-complaint alleged affirmative defenses. The first alleged that Rich "and his instrumentality, Airline Ground Service, Inc." were the agents of Air America, Inc.; America operated four aircraft; International maintained three of them for a charge of $32 per hour; Airline paid on behalf of America maintenance charges and was reimbursed by America. It was alleged that a fiduciary relationship existed between America and Airline. No question is presented on the appeal with respect to the second affirmative defense. By the third affirmative defense it was alleged that the agreement to pay Rich $2 for each hour of maintenance service on said planes was without consideration for the reason that International already had a written contract with America for maintenance of said aircraft. The fourth affirmative defense alleged that International had entered into a contract with one Fred A. Miller and Rich on the one hand, and International on the other, under which Rich and Miller agreed to furnish airplanes for maintenance service and that they had failed to perform the terms and conditions of said agreement for the reason that payment of $2 per hour of maintenance service was conditioned upon payment in full to International of all maintenance charges against the several aircraft. It was alleged that "said maintenance charges have never been paid."

International filed a counterclaim to the cross-complaint alleging that on May 8, 1952 one Fred A. Miller and Rich were partners, that Miller, an agent of Rich, agreed to deliver certain planes to International for service, and claiming damages for failure of Rich and Miller to deliver planes as agreed. It was alleged that four aircraft were not delivered on the agreed dates and that a fifth (N53472) was not delivered at all. Damages were alleged in the sum of $13,644.

The points on appeal are the following: (1) Airline was the alter ego of Rich and the agent of America, with a duty to arrange for the maintenance of America's planes; Airline and Rich could not profit at the expense of America by accepting compensation from International for maintenance of America's planes; (2) any agreement of International to pay Rich for directing America's planes to International for service was without consideration for the reason that International already had a contract with America for maintaining the planes; (3) the agreement to furnish the planes for service was never fully performed; (4) the court committed error in admitting testimony as to the knowledge of Airline's directors of the Rich agreement with International; (5) the court failed to make findings upon material issues.

Before entering upon a discussion of these several contentions we are impelled to say that we have seldom been confronted with a more confusing, inadequate and unsatisfactory record in what should have been a simple case. We have found it difficult to choose between reversal of the judgment because of the manifest inadequacy of the trial proceedings, including the decision of material issues, and the onerous burden of determining whether under appropriate rules of appellate procedure the judgment can and should be affirmed.

It was admitted that Airline was the agent of America. The following were factual issues the court was called upon to decide: (1) whether America had knowledge of Rich's agreement with International for payment of so-called commissions at the rate of $2 per hour, and gave its consent to the arrangement (the court found that America had knowledge of the agreement); (2) whether International knew that Airline was the agent of America, had authority to place planes for maintenance and was compensated by America for the services (the court made no finding); (3) whether a certain agreement of May 8, 1952 for delivery of planes to International signed by Miller was executed on behalf of Rich as well as on his own behalf. This would depend upon the existence of a partnership between Rich and Miller with respect to that transaction, as alleged by International (the court made no finding); (4) whether the agreement to pay Rich commissions was without consideration for the reason that he was a party to the agreement of May 8th under which the planes in question had, prior to the agreement with Rich, been delivered to International for service. If Rich was a party to the May 8th agreement there would be involved the question whether that agreement was superseded by one entered into November 25, 1952 to pay Rich commissions (the court made no finding); (5) if Rich was a party to the May 8th agreement, whether that agreement obligated him and Miller to deliver to International five planes, or was only an agreement to use their efforts to deliver five planes, and if the former, whether there was a breach of the agreement and whether International was damaged thereby. The latter were material facts for the reason that International was claiming damages of $13,644 for failure to deliver the planes as agreed (there was no express finding); (6) whether there was an agreement that commissions would be paid to Rich only in the event all charges for service of the planes in question had been paid, and whether such charges had been paid prior to the institution of the action (the court found there was such an agreement but made no finding whether the charges had been fully paid).

It was found that on or about May 31, 1953, an account was stated between Rich and International and there was found due to Rich, by reason of the commission agreement, $7,700. It was also found that International became indebted to Rich for money had and received in the sum of $7,700, no part of which had been paid.

Rich sought recovery of $1,079 for overpayment on the note, but, although the decision was against him upon this claim, he has not appealed and the point is not to be considered. As previously mentioned, International was given judgment for $1,500 against Rich and Miller for personal services of plaintiff's assignor, Batchelor, as an aviation consultant. The correctness of this feature of the judgment is not in question on the appeal.

Plaintiff contends that the failure of the court to make findings on all material issues requires a reversal of the judgment. At the outset of our inquiry into this contention we note that at the direction of the court the attorney for plaintiff prepared the findings. It appears from the record that the court signed the findings, conclusions and judgment as prepared by plaintiff's attorney. The spectacle of an attack made upon the sufficiency of the findings by counsel who prepared them is a novel one in our experience although, as we shall see, it has been viewed by other courts.

It is trite to say that it is the duty of the trial judge to see that the findings dispose of the essential factual issues to his satisfaction. But it is well known that frequently, if not usually, if findings are prepared by the party directed to prepare them and, as proposed, are not objected to, the judge signs them in the form in which they are presented. It is equally well known that for a trial judge to rely implicitly upon counsel in the preparation of findings is to invite reversal of his judgments.

[1] An attorney who prepares inadequate or erroneous findings invites error on the part of the court, and if error is unwittingly committed by the court the responsibility rests upon the attorney and his client. It is settled that where findings are prepared by counsel designated by the court and it appears that the attorney was at liberty to use his own judgment as to the text of findings, no claim of insufficiency of the findings will be entertained on appeal from the judgment. Snow Mountain W. & P. Co. v. Kramer, 191 Cal. 312, 325, 216 P. 589; Anderson v. Derrick, 220 Cal. 770, 775–776, 32 P.2d 1078; Tucker v. Cave Springs Mining Corp., 139 Cal. App. 213, 218, 33 P.2d 871. This is merely a phase of the rule that a party may not complain of error which he has invited. (4 Cal.Jur.2d 420–421.) Although the rule would not be strictly applied if to do so would penalize the party unjustly, we have no doubt that in the present case it should be applied in the manner and to the extent hereinafter set forth.

[2–4] From the fact that plaintiff's attorney prepared the findings it follows that he requested no findings upon the issues as to which he contends the findings were deficient. Therefore, plaintiff must be held to have waived findings on those issues. It is the general rule that where findings are waived it will be presumed that every fact essential to support the judgment was proved and found by the court. (24 Cal. Jur. 956.) There is an intention to admit the sufficiency of the findings and the evidence. Here we have only a waiver of findings as to some of the material issues, and it is contended that as to some of the findings the evidence was insufficient. In this somewhat peculiar situation we think we should proceed as if the court had made findings on all issues that would be consistent with the evidence and the judgment. It is reasonable to suppose that if plaintiff's attorney had believed that findings which he claims were omitted would have been in plaintiff's favor he would have asked the court to make them. Certainly findings favorable to International upon some of the issues respecting which no findings were requested would have been inconsistent with the judgment that was rendered on the cross-complaint and the counterclaim, and would have resulted in a judgment in favor of International. We shall therefore discuss the omitted findings, and the evidence pertaining to the subject matter of each, as if findings had been made in favor of Rich on all issues with respect to which the evidence was sufficient to justify the same.

[5] We shall discuss first the contention that there was insufficient evidence to support the finding that the terms of the commission agreement were disclosed by Rich to America. Appellant relies upon the rule that an agent may not, without the consent of his principal, make a profit through use of his position. Therefore, it is contended Rich could not recover the commissions without proof that America consented to his receiving them. Without considering whether International could have developed facts that would have given International the benefit of the rule it is clear that it did not develop sufficient facts. The basis of the rule is that the agent has kept something for himself to which he has no right. It was therefore incumbent upon International to prove that America did not get the benefit of the commissions earned by Rich. There was a presumption against fraud to be overcome, and no evidence to overcome it. There were many ways in which America could have derived a benefit through Rich's arrangement with International. Mere suspicion that none of them existed is not sufficient. But aside from this, there was testimony by Rich that he informed Miller of the arrangement while Miller was president of America and that he also informed a General Randall of the commission arrangement shortly before Randall became president. From the fact that America did not complain of the arrangement it was inferrable that the commission agreement was satisfactory to the company. There was also circumstantial evidence from which it could have been inferred that the receipt of commissions by Rich was not kept secret from America. Rich testified, and there was no evidence to the contrary, that all Airline's employers, namely, America, Mantz, Caribbean America (operated by Rich and Miller) and one Illitch had knowledge of the payment of commissions. It appears to have been a general practice of Airline and International.

[6] Appellant says there was no evidence that International knew that Rich had authority to place America's planes for maintenance service and then argues that in the absence of knowledge of that fact the commission agreement would have been invalid under the rules pertaining to dual agency. Batchelor, who represented International throughout, testified that at the time the agreement was made Rich and Miller had authority to place the planes in question for maintenance service. This was sufficient.

[7] The court made no finding upon the defense to the cross-complaint of want of consideration. This defense was advanced on the theory that on November 25th International already had an agreement for the servicing of America's planes. It is true that by agreement entered into in June 1952, the servicing of America's planes by International was the subject of a formal written agreement. However, by that agreement America did not promise to place with International any specific planes and although the agreement was to run for a year it was subject to termination by either party on 10 days' notice; moreover, regardless of this agreement, there was a

consideration for the November 25th agreement. On May 8, 1952, an agreement was entered into between International and Miller (then president of America) reading as follows: "Maint Price to be $32—3 Comm. $8000 per aircraft to be paid to Inter prior to each ship receiving 8000 hr inspection. Thirty day cancellation. (Signed) Fred Miller, G. Batchelor. Schedule: 1st ship in 5 days, 2nd ship in 10 days, 3rd ship in 20 days, 4th ship in 30 to 45 days, 5th ship in 45 to 60 days." Under this agreement International had been paying Miller commissions at the rate of $3 per hour for maintenance. The November 25th agreement read as follows: "Miller, Rich and Batchelor. No commission on 487 of $3.00 per hr. unless ship allowed 1000 hour on engines. From December 1, only $2.00 commission until a difference of $4,000. minimum to International Airports or until Slick does 8000 hour overhaul 472 and 73M. Then maintenance on these ships goes to International Airport. This supersedes all other agreements." One copy of this agreement contained the notation "$29." It is clear from the evidence that by November 25th Miller had resigned as president of America, that Rich was taking over the matter of placing not only America's planes but also other planes for service, that the May 8th agreement was superseded by the November 25th agreement and that instead of paying $3 per hour to Miller as in the past a commission of $2 was to be paid to Rich. Also by the later agreement International accomplished the purpose of preventing a cancellation by America of the June agreement which was subject to cancellation. This was substantial consideration.

[8] Appellant contends that the May 8th agreement was made on behalf of Rich as well as by Miller, that it bound them to deliver five planes on certain dates, that they were not delivered on the agreed dates, one of them was never delivered to International and that International suffered damage. Rich was claiming commissions for work on only three planes, the court found that the November 25th agreement, which superseded all former agreements, related to work on only three planes and this finding had support in the testimony of Rich. There is no merit in the contention that there was a breach of contract on the part of Rich to deliver planes for service.

[9, 10] Appellant contends that the evidence was insufficient to show that the maintenance charges on the airplanes delivered to International were paid. The court made no finding as to this issue although it was found that payment of commissions was conditioned upon payment of the charges. It was alleged in the answer to the cross-complaint that the agreement between Rich and International provided that the $2 commission would be payable only against full payment to International of the maintenance charges against the aircraft. By this pleading and at the trial appellant assumed the burden of proving that the maintenance charges had not been fully paid. Batchelor testified that there were maintenance charges with respect to Air America's three planes which were unpaid at the time of trial. However, there was evidence that invoices of International for maintenance services on America's planes were paid as late as August 1953 upon bills dated in July. The period for which Rich sought commissions was from December 1, 1952 to May 31, 1953. It was a reasonable inference that if invoices presented in July 1953 were paid when due, bills for maintenance services for prior months had also been paid; it is presumed that in business transactions the ordinary course of business has been followed (Code Civ.Proc. § 1963, subd. 20), and in the absence of indisputable evidence to the contrary the presumption will support a finding based thereon. Furthermore, Batchelor's testimony did not compel an inference that the unpaid maintenance charges related to the period for which Rich is seeking a commission.

[11] Although the court made no finding as to the issue of nonpayment, had counsel for appellant believed the court would have found that the condition of the oral agree-

ment had not been performed, he would have requested such a finding. Finally, since International tried the issue in the court below upon the assumption that nonpayment of the maintenance charges was a part of International's defense, it may not now assert that proof that the charges had been paid was a part of Rich's case. It cannot change the theory upon which it elected to stand in the trial court. (3 Cal. Jur.2d 607.)

[12] The briefs discuss the evidence as to Airline's knowledge that Rich was collecting commissions. This is wasted effort. Rich, admittedly, was the sole stockholder of Airline.

[13] We have considered at length the contentions of International but there is yet a finding that is not mentioned in the briefs, namely, that an account was stated between Rich and International by which it was found that $7,700 was due Rich as commissions. This finding, alone, would be sufficient to support the judgment. However, for several reasons, we have refrained from adopting this finding as a basis for affirmance of the judgment; counsel have entirely overlooked the significance of the finding; the cross-complaint alleged that an account was stated May 31, 1953, by which it was found there was due to Rich $6,000, and this figure was changed by amendment during the trial to $7,700; we are in doubt whether plaintiff's counsel intentionally incorporated the finding in the findings he prepared, and whether the court intended to find an account had been stated. That finding is merely another of the oddities that have perplexed us. In view of the evidence we do not understand why counsel for plaintiff requested the court to make the finding nor why the court made it. Neither do we understand why it is ignored in the briefs. Nevertheless the finding, in the absence of any attack upon it, would preclude a reversal.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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151 Cal.App.2d 1

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Charles Hilmer NEEL, Defendant and Appellant.
Cr. 5698.

District Court of Appeal, Second District, Division 3, California.
May 14, 1957.

Prosecution for grand theft. From judgment of conviction entered in Superior Court, Los Angeles County, Thomas L. Ambrose, J., and from order denying motion for new trial, defendant appealed. The District Court of Appeal, Parker Wood, J., held that where evidence as to whether defendant who took automobile from used-car lot with salesman's permission intended to steal the automobile or pay for it later was circumstantial, failure of trial court to give, upon its own motion, an instruction that facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion to justify a conviction on circumstantial evidence was prejudicial error.

Judgment and order denying motion for new trial reversed.

Larceny ⚿57

Facts and circumstances must not only be entirely consistent with the theory that defendant intended to steal automobile, taken from used-car lot with permission of salesman, but must be inconsistent with any other rational conclusion to justify a conviction for grand theft based on circumstantial evidence.

◆

Gladys Towles Root, Eugene V. McPherson and Joseph A. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged in Count I with grand theft of an automobile, and in Count II with violation of section 503 of the Vehicle Code (unlawfully driving an automobile without consent of the owner). In an amended information it was alleged that defendant had committed three felonies and had served terms of imprisonment therefor in federal prison. He denied the allegations as to prior convictions. At the beginning of the trial, Count II was dismissed on motion of the People. In a jury trial defendant was convicted on Count I; and the jury found that the allegations as to the three prior convictions were true. At the time of pronouncing sentence, the judge stated that he would disregard the second prior conviction and strike it, since there was a question whether defendant had served time in prison on that conviction (escape from federal penitentiary farm). Defendant appeals from the judgment and the order denying his motion for a new trial.

Appellant contends that the evidence was insufficient to establish grand theft; and that the court erred in instructing the jury.

Mr. Curtis, a salesman for the Maywood-Bell Ford Company, testified that on May 21, 1955, about 11:30 a.m., while he was on the used-car lot of that company, he saw the defendant get out of a 1941 Ford which was parked on the street near that lot; defendant approached him and asked the price of a 1954 Mercury automobile which was on the lot; at that time defendant was accompanied by a woman with a child in her arms; Curtis said that the price was $2,995; defendant asked how much money was required for the down payment; Curtis said the minimum down payment required of a responsible person with good credit was $400; Curtis asked him what he did for a living; he replied that he was a railroad man; he showed identification documents to substantiate it; Curtis asked how long he had been on his job and whether he had the $400 with him and how he intended to handle the down payment; he replied that he had the money in a bank near the Maywood-Bell Ford Company, he liked the car, and he wanted to get the money to effect the transaction; he also said he felt he could handle the down payment of $400, and he would get it from the bank and bring it back; then defendant got into the Mercury car, said he would be right back, and he drove off the premises; the woman and child were in the car with him when he left; at that time the 1941 Ford was at the place on the street where defendant parked it when he came to the lot; Curtis did not give defendant permission to do anything with the Mercury car other than to go to the bank and return with the car. On cross-examination, Curtis testified that May 21 was the first and only day he was employed by that company.

Mr. Plum, the assistant manager of the used-car department of the Maywood-Bell Ford Company, testified that the Mercury car was missing from the place of business of the company at the end of the working day of said May 21.

Officer Carter testified that during his investigation of this case he was informed by the manager of the used-car department of the Maywood-Bell Ford Company that a 1954 Mercury car was missing from that company; on August 26, 1955, he was informed by an agent of the Federal Bureau of Investigation as to the location of the Mercury; he went to Akron, Ohio, where he saw the defendant; an extradition hearing was held in Akron; on the plane en route to Los Angeles, defendant told the officer that he went onto the lot of the Maywood-Bell Ford Company and saw a 1954 car which he liked; it appeared to be in good shape and he thought it could make the trip; he told the man that he was going to the bank three blocks away and draw the deposit of $400 out of the bank; he had no money in the bank, so he went around the block and returned to a 1941 Ford which he had parked near the used-car lot; then he transferred blankets and other articles from the Ford to the Mercury; he went to Las Vegas and then to Corning, Iowa, where he went off the road and collided with a pole and practically demolished one side of the car; he ordered a garage man to pull the car in and, being worried because he thought the police might make an investigation by reason of the accident, he went on a train to Aurora, Illinois; his wife and child went with him; from there he went to Chicago, then to Kansas City, and then to Akron where he got a job on a railroad; he intended to drop the car outside Akron, Ohio, and let the police find it; he took Oklahoma license plates off a car that was sitting along the road, and he put the California plates under the floor mat.

Defendant testified that he had been employed by the Los Angeles Junction Railroad about 2½ months prior to May 21, 1955; on said date he drove an old Ford car to the front of the Maywood-Bell Ford Company and parked it; his wife and baby were with him; while he walked up and down the sidewalk, Curtis (the salesman) approached him and asked if he was interested in a car; defendant replied that he was interested but he had practically gone broke paying the hospital bill for his new baby; Curtis said that it would be no trouble at all to finance a car, and that defendant could have as much time as he wanted; Curtis showed several cars to him, and they "centered" on a 1954 Mercury; Curtis backed the car out, pulled it up, had some whitewash taken off the window, and put gas in the car; Curtis explained how the new shift worked and handed the keys to him; defendant said that he had to get the down payment together, and he asked Curtis if had any length of time; Curtis replied, "No, keep it as long as you need it", and "Take your wife out to the beach with your baby if you want to"; defendant asked, "If I have to go to Las Vegas or Yuma, I have friends in both places, I have been railroading in both towns, is that O.K.?" Curtis said, "Yes. If you leave the state, drop me a card from Yuma?" Defendant also testified that at the time he received the car keys he had no intention of taking the car and not paying for it; Curtis did not give him any specific time within which he was to bring the car back; Curtis did not tell him to bring the car back; when defendant drove the car out, Curtis stepped into the street to stop traffic so that defendant could turn onto the street; defendant did not have a bank account in Los Angeles County; he never intended to keep the car without paying for it; defendant left Los Angeles on May 24 or 25, and went to Corning, Iowa, where he was in a wreck; he had the car taken to a garage, told "them" whose car it was, and to repair it and notify the people; after he left Corning he wrote a letter telling "them" where the car was and what had happened; his purpose in leaving the state with the car was to get the down payment; he left his Ford car on the street in front of the Maywood-Bell Ford Company's place of business; he did not turn any papers over to Curtis concerning the Ford, and he did not sign any papers concerning the Mercury.

Appellant contends that the court, upon its own motion, should have given an instruction embodying the principle that to justify a conviction on circumstantial evidence the circumstances must not only be consistent with the theory of guilt but must be inconsistent with any other rational conclusion. Appellant argues that the automobile was delivered to him by the salesman; that appellant was allowed time within which to pay for the automobile; that he took it from the lot with the consent of the salesman; there was no evidence of a specific intent to steal the automobile; that it is as reasonable to assume that appellant, after failing to get the down payment, converted the automobile as it is to assume that he had the intent to steal it when he went upon the lot or when he drove the automobile from the lot. The salesman testified to the effect that he gave the appellant permission to drive the automobile from the lot for the purpose of going to the bank. The evidence as to whether appellant intended to steal the automobile or to pay for it was, of course, circumstantial. In People v. Yrigoyen, 45 Cal.2d 46, 286 P.2d 1, wherein defendant was charged with issuing a check with intent to defraud, the prosecution relied upon circumstantial evidence to show criminal knowledge and intent. In that case the court said, 45 Cal. 2d at page 49, 286 P.2d at page 3: "The principal question is whether, in the absence of a request by defendant, the trial court erred in failing to give an instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion." In that case a judgment of conviction was reversed for failure to give such an instruction. In People v. Wales, 136 Cal.App.2d 846, 289 P.2d 305, the question was whether the defendant, a physician, intended to procure an abortion. It was said therein (136 Cal.App.2d at page 854, 289 P.2d at page 309) that, in the matter of determining defendant's belief and intent, the prosecution relied substantially upon circumstantial evidence. It was also said therein (136 Cal.App.2d at page 855, 289 P.2d at page 310) that the court erred prejudicially in refusing to give such an instruction as the one referred to in the present case. In People v. Bender, 27 Cal.2d 164, at page 175, 163 P.2d 8, at page 15, it was said: "It cannot be too strongly emphasized that such quoted statement [referring to statement to effect that circumstantial evidence must not only be consistent with theory of guilt but must be inconsistent with any other rational conclusion] enunciates a most important rule governing the use of circumstantial evidence. In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received." In the present case, the trial court erred prejudicially in failing to give, upon its own motion, an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

In view of the above conclusion, it is not necessary to discuss other contentions on appeal.

The judgment and the order denying the motion for a new trial are reversed.

SHINN, P. J., and VALLÉE, J., concur.

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150 Cal.App.2d 795

Avis D. COLLENBURG, Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES and Kenneth E. Kirkpatrick, Defendants and Respondents.

Civ. 22025.

District Court of Appeal,
Second Appellate District,
Division 3, California.

May 13, 1957.

Hearing Denied July 10, 1957.

Complaint against county and its juvenile rehabilitation camp supervisor for death of inmate as alleged result of being compelled to fight forest fire. From an adverse judgment of the Superior Court of Los Angeles, Aubrey N. Irwin, J., plaintiff appealed. The District Court of Appeal, Vallée, J., held that a cause of action was stated as against the superintendent, but not as against the county.

Affirmed in part and reversed in part.

1. Municipal Corporations 🔑847

Condition of public property may be rendered "dangerous", within meaning of government code section making local agency liable for injuries resulting from dangerous condition of public property, by the use or general plan of operation of government operated property, as well as by structural defect. West's Ann.Gov.Code, § 53051.

See publication Words and Phrases, for other judicial constructions and definitions of "Dangerous".

2. Counties ⚷222

Complaint against county, for death of juvenile rehabilitation camp inmate while engaged in fighting forest fire, would have been sufficient if it had alleged that fire took place on county property; but failing to allege that fact, or fact that property of county was dangerous or defective, either by reason of structural defect or by reason of use or general plan of operation of property itself, complaint was insufficient to state cause against county. West's Ann. Gov.Code, § 53051.

3. Counties ⚷144

In operating camp for rehabilitation of juveniles, county was acting in governmental capacity. West's Ann.Welfare & Inst. Code, §§ 740, 901, 903.

4. Counties ⚷88, 93

Immunity of county from liability for negligence does not relieve officers or employees of county from individual liability for their torts.

5. Officers ⚷116

Every person in public service is subject to duties of care imposed on him as individual.

6. Officers ⚷116

Even where public officer or employee exercises discretionary functions, a failure to exercise ordinary care will give rise to liability. West's Ann.Gov.Code, § 1950 et seq.

7. Negligence ⚷1

One may become liable in tort for doing something he has right to do if he wrongfully or negligently does it by such means, or at such time, or in such manner, that another is injured.

8. Reformatories ⚷12

Complaint against juvenile rehabilitation camp supervisor, for death of inmate as result of fighting forest fire, was sufficient. West's Ann.Labor Code, § 3351(b); West's Ann.Welfare & Inst.Code, § 903.

9. Negligence ⚷136(14)

What constitutes reasonable degree of care is question for trier of facts.

◆

Samuel Maidman, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on the sustaining of defendants' general demurrer to the third amended complaint without leave to amend in an action to recover damages for wrongful death.

The third amended complaint, referred to as the complaint, is in two counts: the first, against defendant County of Los Angeles; the second, against defendant Kirkpatrick. The first count alleges: 1. Plaintiff is the mother of Franklin C. Fay, now deceased. Franklin at the time of his death was of the age of 15 years, 11 months, and 28 days. 2. The County of Los Angeles is a political subdivision of the state. 3. At all times mentioned the County of Los Angeles owned, operated, and maintained a juvenile forestry camp known as Camp Sycamore Canyon located in the county. 4. From March 17, 1955 Franklin had been under detention and held in custody by the county through its agents, including defendant Kirkpatrick. From July 15, 1955 Franklin was assigned to and held in custody in Camp Sycamore Canyon. 5. On September 2, 1955 the county, through its agents, was engaged in fighting a fire located in the vicinity of La Habra Heights in the Puente Hills in the county. The fire "did cause and result in said deceased minor child being burned to death." Franklin was compelled to fight said fire on the "hot line," the same being part of the system and plan and the dangerous condition complained of. 6. The county maintained a system and plan of operation with respect to Camp Sycamore Canyon which was and did create a dangerous condition in that Franklin was subjected to the system and plan, the same being dangerous to his well-being and safety. The system and plan consisted of placing him, without his consent or the consent of plaintiff, in a position of danger in fighting fires without adequate or sufficient training and experience to do so. Franklin, under said system and plan, was compelled to follow such directions and orders as might be imposed on him regardless of his lack of experience and training and without due regard to his safety, well-being, and tender years. 7. The system and plan was in operation and was known to the county to be in operation for a long time prior to the death of Franklin, and was known or should have been known to it to be a dangerous condition. For a reasonable time after acquiring said knowledge of said system and plan the county failed to remedy the dangerous condition or to take action reasonably necessary to protect Franklin against the same. By reason of the knowledge on the part of the county of the dangerous condition and because of its failure to remedy the same, it was guilty of a course of conduct that was negligent, careless, and unlawful in that Franklin should not have been assigned to any duty of such extreme danger as would imperil his life or safety without providing him with adequate, necessary, and proper safeguards for his protection against the hazard to which he was exposed by reason of the system and plan. 8. The county had knowledge of Franklin's age and had knowledge of his lack of experience and adequate training in fighting fires on a "hot line" and of the hazardous condition and lack of protective means to safeguard him against the dangerous condition. The system and plan and dangerous condition was without consideration of such reasonable procedures, training, and direction as would have given adequate and proper protection to the safety and well-being of Franklin. 9. The county maintained a point or merit system as part of its system and plan; and compliance on the part of Franklin with the same was the only means available to him to obtain his release from the custody, care, and control of the county. 10. The failure of the county to change or modify the system or plan or to take action reasonably necessary to consider his safety, well-being, and protection was negligent, careless, and unlawful. 11. The negligence, carelessness, and unlawfulness of the county was a proximate cause of Franklin's death. 12. Plaintiff sustained damage. 13. A claim was filed with the county within the time allowed by law and was denied.

The second count alleges: 1. Defendant Kirkpatrick was the juvenile forestry director employed by the county and was in charge of the supervision of the activities of Franklin and Camp Sycamore Canyon and in charge of effectuating the system and plan alleged in the first count which caused Franklin's death on the "hot line" while fighting the fire. 2. Kirkpatrick directly ordered Franklin to engage in fighting the fire and to be placed on the "hot line" for that purpose. 3. As a result of said orders, Franklin was burned to death. 4. Franklin's death was the proximate result and caused by the maintenance of the dangerous condition and system which was then and for a long time prior thereto in operation at the camp. 5. Kirkpatrick had notice and knowledge of the dangerous condition. He had the authority and it was his duty to remedy such condition. He failed to take reasonable steps to do so or to give Franklin adequate warning of the danger to which he was exposed. It was the duty of Kirkpatrick to assign Franklin only to such duties as would not endanger his life. He knew or should have known that exposing Franklin to fighting a fire on a "hot line" was a great danger to his life and safety. 6. The conduct of Kirkpatrick was negligent, careless, and unlawful and was a concurring cause of Franklin's death in that he was compelled to comply with Kirkpatrick's directions and to the system and plan. 7. A claim was duly presented to the county and to Kirkpatrick and rejected.

Liability is sought to be imposed on the county under the terms of section 53051 of the Government Code which reads:

> "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:
>
> "(a) Had knowledge or notice of the defective or dangerous condition.
>
> "(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

[1, 2] The sufficiency of the first count depends on the answer to the question: Does it allege that Franklin's death resulted "from the dangerous or defective condition of public property?" We think there can be no doubt but that if it is alleged that the fire took place on county property it could not be said that the first count does not state sufficient facts to constitute a cause of action against the county. Osborn v. City of Whittier, 103 Cal.App.2d 609, 230 P.2d 132; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.2d 768; Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 267 P. 918. There is no allegation in the complaint nor is any fact alleged from which it may be inferred that the fire was in the forestry camp or on property of the county. It would appear from the allegation that the fire was "in and about the vicinity of La Habra Heights in the Puente Hills" that the fire was not in the forestry camp or on property of the county. The same would appear from what was said at the argument. Plaintiff's contention is that the system and plan in operation at the forestry camp was a dangerous condition to which Franklin was exposed.

Under the broad language of section 53051 the condition of the public property may be rendered dangerous within the meaning of the statute by "the use or general plan of operation of government operated property, as well as by a structural defect." Bauman v. City & County of San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989, 995; Harper v. Vallejo Housing Authority, 104 Cal.App.2d 621, 624–625, 232 P.2d 262; Plaza v. City of San Mateo, 123 Cal.App.2d 103, 108, 266 P.2d 523. In each of those cases it was the use or general plan of operation of the property itself which created the dangerous condition. In Bauman a small child playing in a sand box in a public playground maintained by the defendant was injured by a ball batted by older children playing hard baseball in the immediate vicinity. The practice of older children playing baseball in the area had continued for some period of time. The court stated, 42 Cal.App.2d 153, 108 P.2d 994:

> "The first and basic element is that the playground was in fact dangerous or defective. * * *
>
> "The jury was justified in finding that the playground was dangerous and defective for any of the following reasons: That the playground was rendered dangerous or defective by the negligence of appellant in permitting the playing of hard baseball in dangerous proximity to the sand box; that under the circumstances here existing it was the duty of appellant, if hard baseball was to be permitted to be played in the north end of the field, to erect some barrier for the protection of those playing in the small children's section; or the appellant negligently failed to properly supervise the playground by either failing to prevent the boys from playing hard baseball in dangerous proximity to the small children's section or in negligently failing to keep the small children away from the sand box while hard baseball was being played nearby."

In Harper the negligence alleged was permitting a recreational area owned and operated by the local agency to be so used by drivers and owners of motor vehicles as to render the area dangerous and defective for recreational use. The plaintiff was injured in the recreational area. In Plaza the negligence alleged was permitting a dangerous and defective condition to prevail on a municipally owned golf course. The plaintiff was injured on the parking lot of the course provided by the municipality when struck by a golf ball driven from the course.

Bryant v. County of Monterey, 125 Cal.App.2d 470, 270 P.2d 897, says that under the statute the agency is liable for the dangerous or defective condition of *its* property. In Perry v. City of Santa Monica, 130 Cal.App.2d 370, 279 P.2d 92, 93, this court said that the injuries must result from the dangerous or defective condition of public property and that in all the cases "the property was in existence at the time of the accident or had been in existence, and liability was incurred by the local agency because either the property was in a dangerous or defective condition or it was not maintained or replaced after it once had been in existence."

In Belcher v. City & County of San Francisco, 69 Cal.App.2d 457, 158 P.2d 996, it was held that the plaintiff had failed to state a cause of action against the city for personal injuries when she was blown over by a strong wind as she was descending steps cut by the city into the sidewalk, since she did not allege that there was anything dangerous or defective in the construction or design of the steps themselves or that there were any irregularities or defects such as holes, ridges, or upraises upon which a pedestrian might trip or by which one might be entrapped but merely alleged that the city was negligent in failing to provide a handrail and in not posting a warning sign.

Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980, was an action against the city for damage sustained as a result of a fire on the plaintiffs' property. The water lines leading to the fire hydrant adjacent to the plaintiffs' property and the fire hydrant had become clogged and were incapable of providing sufficient water for effective fire control. The court observed, 38 Cal.2d at page 489, 240 P.2d at page 982:

> "The ordinary case coming within the terms of this act involves a situation where the injured person is *using* some type of city property that is dangerous or defective, and which he had a legal right to use, such as public streets [citation]; highways [citation]; buildings [citation]; bridges [citation]; school grounds [citation]; or other similar property [citation]. Likewise the act sustains the imposition of liability in the situation where the city is *using* the dangerous or defective property and injury was proximately caused thereby * * *."

Farrell v. City of Long Beach, 132 Cal.App.2d 818, at page 819, 283 P.2d 296, at page 297, states:

> "A child injured accidentally on a public playground cannot recover for his injuries in the absence of proof that he was injured as a result of the dangerous or defective condition of the playground. Government Code, § 53051; Schmidt v. City of Vallejo, 122 Cal.App. 5, 7, 9, 10 P.2d 107. It follows that not only is no cause of action stated in the complaint, but it is not possible to allege a valid cause of action for the reason that the playground itself was not directly responsible for plaintiff's injuries. * * *
>
> "[132 Cal.App.2d at page 820, 283 P.2d at page 298.] In the instant action no property was involved but that of plaintiff's playmate. The only negligence alleged was that of the director who asked Dennis to ride along a public street on the handlebars of his friend. Neither nor both can constitute a basis for the city's liability."

There being no allegation or contention that the property of the county was dangerous or defective, either by reason of a structural defect or by reason of the use or general plan of operation of the property itself, the complaint does not state facts sufficient to constitute a cause of action against defendant county.

The second count of the complaint is directed solely against defendant Kirkpatrick. He was superintendent of the camp and in charge of Franklin.

Plaintiff urges that a public officer or employee is personally liable for negligent acts committed in the course of his employment. Defendant asserts that a public officer or employee is not personally liable for errors of judgment while exercising discretionary functions. He argues that the Legislature in the Welfare and Institutions Code has authorized the use of boys committed to forestry camps for fire suppression work; the determination as to the type of work to be performed and the manner in which it is to be performed is a matter of discretion vested in the superintendent of the camp; and there is no liability even for errors of judgment in exercising such discretionary functions.

Section 740 of the Welfare and Institutions Code provides that the juvenile court may commit a ward "(g) *To any other State or county institution* now or hereafter established for the purpose of caring for and training persons that come within the provisions of this chapter." Section 901 authorizes the board of supervisors of any county to establish juvenile forestry camps to which boys may be committed by the court. Section 902 provides that such forestry camps shall be in charge of a superintendent. Section 903 reads:

> "The boys committed to such camps may be required to labor on the buildings and grounds of the camp, on the making of forest roads for fire prevention or fire fighting, on forestation or reforestation of public lands, or on the making of fire trails and fire breaks, or in fire suppression, or to perform any other work or engage in any studies or activities prescribed or permitted by the superintendent, subject to such approval as the county board of supervisors by ordinance requires."

[3] The camp was maintained and operated for the rehabilitation of juveniles. In operating the camp the county was acting in a governmental capacity. Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107; Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.2d 846; Meyer v. City & County of San Francisco, 9 Cal.App.2d 361, 49 P.2d 893; McKinney v. City & County of San Francisco, 109 Cal.App.2d 844, 241 P.2d 1060; Williams v. City of Alhambra, 131 Cal.App.2d 262, 280 P.2d 177.

[4, 5] The immunity of a county from liability for negligence does not relieve officers or employees of the county from individual liability for their torts. Burns v. American Cas. Co., 127 Cal.App.2d 198, 205, 273 P.2d 605; Falasco v. Hulen, 6 Cal.App. 2d 224, 242, 44 P.2d 469. Every person in public service is subject to the duties of care imposed on him as an individual. A county officer or employee who commits a tortious act is liable therefor. Mock v. City of Santa Rosa, 126 Cal. 330, 343–344, 58 P. 826; Payne v. Baehr, 153 Cal. 441, 444, 95 P. 895; Stewart v. McCollister, 37 Cal.2d 203, 231 P.2d 48; Singleton v. Bonnesen, 131 Cal.App.2d 327, 329, 280 P.2d 481. There is no rule prohibiting a suit against a county officer or employee by one injured as a result of the negligence of such officer or employee arising in connection with performance of the duties of his employment. There are certain procedural requirements for enforcing the liability. Gov.Code, c. 6, div. 4, tit. 1; Veriddo v. Renaud, 35 Cal.2d 263, 264, 217 P.2d 647; Bettencourt v. State of California, 139 Cal.App.2d 255, 293 P.2d 472. Bettencourt v. State of California, supra, says, 139 Cal.App.2d at page 257, 293 P.2d at page 474:

> "Generally speaking a plaintiff can bring two types of actions for tort against public officers or employees: (1) He can sue them in their private and individual capacity. This is the normal common law tort action against an individual. (See 21 Cal.Jur. 908.) This type of action requires as additional to the pleading of negligence,

> compliance only with section 1981 (the filing of a claim) [Gov.Code]. (2) He can sue them in their official capacity as municipal officers or employees. This type of action requires not only the filing of a claim under section 1981 but the requirements of section 1953 must also be alleged and proved."

[6, 7] The powers and duties of public officers or employees are divided into two classes—discretionary and nondiscretionary. If discretion is exercised and a course of conduct begun, a failure to exercise ordinary care will give rise to liability. There is responsibility in damages where the power given a public officer or employee is exercised but with lack of ordinary care, thereby causing damage to an individual which would not have occurred had the officer or employee exercised the power with ordinary care. Where there is discretion as to the mode of performance and the method to be employed, the law is settled that in selecting the mode or method reasonable care must be exercised to foresee any injury which reasonably could have been foreseen as the cause of harm by a reasonably prudent person under the circumstances. Doeg v. Cook, 126 Cal. 213, 216, 58 P. 707; Kaufman v. Tomich, 208 Cal. 19, 21, 280 P. 130; Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35. One may become liable in an action for tort by doing something he may rightfully do; but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured. Perkins v. Blauth, 163 Cal. 782, 786, 127 P. 50; Green v. General Petroleum Corp., 205 Cal. 328, 333, 270 P. 952, 60 A.L.R. 475.

Perkins v. Blauth, supra, states the rule, 163 Cal. at page 789, 127 P. at page 53:

> "If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent."

Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35, was a suit against San Joaquin County, its supervisors, and its surveyor. The plaintiff kept a stallion on the county fair grounds in a stall rented to him by the county. Grass standing around and near the stall was set on fire and burned by persons confined in the county jail as prisoners acting under the direction of officers and employees of the highway maintenance department of the county. The prisoners and employees of the county negligently permitted the fire to become communicated with the stall, setting it on fire, thereby destroying the stallion. Reversing a judgment for the defendants, the court stated, 42 Cal.App. at page 608, 184 P. at page 38:

> "Whether or not the officers connected with the burning of this grass are individually liable presents a more difficult question. In Doeg v. Cook, 126 Cal. 213, 58 P. 707, 77 Am.St.Rep. 171, it was said that 'the very decided trend of modern decision is to hold such officers liable for acts of nonfeasance, or for the negligent performance of a duty when the duty is plain, when the means and ability to perform it are shown, and when the performance or nonperformance, or the manner of its performance, involves no question of discretion. In short, where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby.' * * *
>
> "[42 Cal.App. at page 610, 184 P. at page 39.] Relying upon the distinction made between the discharge of duties plainly and certainly devolved upon the officer, and duties which he may or may not perform at his discretion, it is contended that in the present case the duty to burn the grass as a preventive of damage which might otherwise accrue was discretionary and not compulsory, and hence, under the decision in Doeg

v. Cook, supra, and the rule as stated by Shearman and Redfield, supra, [Shearman and Redfield on Negligence, 3d ed., § 156] the defendants are not individually liable.

"The cases involving the question are generally cases arising from the neglect to do some act—cases of nonfeasance rather than misfeasance. It seems to us quite clear that where the power to do the act exists, though its performance is left to the discretion of the officer, if he acts in execution of such discretion, his liability would be the same as in the discharge of a mandatory duty, and if he performs the act or discharges the duty in a negligent manner, he would be liable in an action for damages by a person injured thereby. Whether the duty performed be discretionary or compulsory there is no reason why like consequences should not follow the negligent performance of the duty.

"The rule, as stated by Shearman and Redfield and in Doeg v. Cook, has reference more particularly to acts of nonfeasance, where it was entirely discretionary with the officer to do or not to do the act. It is perhaps a debatable question whether or not the duty 'to care for, manage, and control' this agricultural park did not impose upon the supervisors a plain and certain duty to burn this dry grass in order to prevent damage to the property itself or to individuals using it, still, having determined that it should be burned and having undertaken to do it, it was their duty to see that the work was not done in a careless and negligent manner, failing in which a liability arose for damages resulting from their negligence."

Defendant Kirkpatrick says: "From the allegations, it would appear that the plaintiff is attempting to attack the policy of requiring the boys committed to the Forestry Camps to assist in suppressing fires rather than on the theory of an individual negligent act; and, therefore, there could be no liability on the part of a public officer who was acting in an official capacity in exercising a discretion which his public office required him to exercise." Defendant is in error. The second count is predicated on the negligence of Kirkpatrick in ordering Franklin to fight the fire on the "hot line." It is specifically alleged that the conduct of Kirkpatrick was negligent and a cause of Franklin's death.

It is doubtful whether the superintendent of a forestry camp may require boys committed thereto to "labor" in fire suppression off the grounds of the camp. Section 903 of the Welfare and Institutions Code says, "The boys committed to such camps may be required to labor *on the buildings and grounds* of the camp, * * * in fire suppression." (Italics added.) We need not decide that question. If the superintendent has such power and whether it is discretionary or nondiscretionary is of no consequence since it is alleged that the power was negligently exercised. The concept of a reasonably prudent person applies.

[8] Assuming as we must that the allegations of the second count are true, Franklin was a boy just under 16 years of age, without adequate training or experience in fighting fires; Kirkpatrick was superintendent of the camp and an employee of the county (Labor Code, § 3351 (b)); he was in charge of Franklin's activities; he directed the tortious act—he ordered Franklin to fight the fire and to be placed on the "hot line"; Franklin was compelled to comply with his directions; he knew or should have known that exposing Franklin to fighting the fire on the "hot line" would endanger his life; he failed to give Franklin adequate warning of the danger to which he was exposed; the conduct of Kirkpatrick was negligent and a concurring cause of Franklin's death; a claim was filed and rejected as required by the statute. These facts are sufficient to constitute a cause of action against defendant Kirkpatrick. Bates v. Escondido U. H. School Dist., 133 Cal.App. 725, 731-732, 24 P.2d 884.

[9] What constitutes a reasonable degree of care under the facts alleged is a question for the trier of fact. Wurzburger v. Nellis, 165 Cal. 48, 52, 130 P. 1052; Black v. Southern Pac. Co., 124 Cal.App. 321, 330, 12 P.2d 981.

The judgment in favor of defendant County of Los Angeles is affirmed; the judgment in favor of defendant Kirkpatrick is reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

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151 Cal.App.2d 28

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Larry DRAKE et al., Defendants,
Sam Dere and Robert Hulsebus, Defendants and Appellants.
Cr. 1208.

District Court of Appeal, Fourth District, California.
May 15, 1957.
Rehearing Denied May 28, 1957.
Hearing Denied July 10, 1957.

Prosecution for conspiracies to induce minor to visit or be in a room or place where narcotics were being or had been recently unlawfully used and to induce minor to use narcotics. The Superior Court of Kern County, Norman F. Main, J., entered judgments of conviction and orders denying new trials and defendants appealed. The District Court of Appeal, Griffin, J., held that statute making it unlawful to visit or be in any room or place where any narcotics are being or have recently been unlawfully smoked or used is unconstitutional and that there could be no criminal conspiracy to violate statute, but evidence sustained convictions of conspiracy to encourage minor to use narcotics.

Reversed in part and affirmed in part.

1. Conspiracy 🔑48

In a mass trial for conspiracy charges, every precaution should be taken to guard the interest of each defendant so as to determine whether there is substantial evidence, standing alone, that indicates defendant's guilt of offense charged.

2. Conspiracy 🔑47

Evidence sustained conviction of conspiracy to induce minor to use narcotics. West's Ann.Health & Safety Code, § 11721.

3. Conspiracy 🔑24

Common design is the essence of conspiracy, and the conspiracy can be committed whether the parties comprehend its entire scope, whether they act in separate groups or together by the same or different means known or unknown to some of them, as long as their actions are consistently leading to the same unlawful result.

4. Conspiracy 🔑40

Liability of conspirators continues until their intent to withdraw therefrom is in some way brought home to the other conspirators before the commission of the substantive offense or before its purpose is fully accomplished or frustrated.

5. Criminal Law 🔑956(13)

In prosecution for conspiracy, no sufficient showing was made of any separation of jurors after retiring for deliberation as would indicate any prejudice to defendants.

6. Criminal Law 🔑742(2)

In prosecution for conspiracy to induce minor to use a narcotic, evidence failed to show that minor could have been guilty of encouraging herself or conspiring with others to do the acts prohibited and there was no error in charging as a matter of law she was not an accomplice. West's Ann.Health & Safety Code, § 11721.

7. Criminal Law 🔑1172(2)

In prosecution of numerous defendants for conspiracy to induce minor to use a narcotic, court instruction that certain named witnesses and no others were accomplices as a matter of law was not prejudicially erroneous because certain unnamed witnesses might also have been accomplices, where such witness testified only as to a few details respecting entire subject matter and such details were either admitted or sufficiently corroborated by other evidence.

8. Criminal Law 🔑805(1)

In prosecution of number of defendants for conspiracy in several counts, there was no error by trial judge in referring to indictment by number where it appeared that charts were before the jury containing number of various indictments, nature of charges, and defendants involved.

9. Criminal Law 🔑1166(1)

In prosecution for conspiracy to induce minor to use narcotic, there was no prejudicial error by trial court in allowing police matron in charge of prosecuting witness to remain in the courtroom during minor's testimony.

10. Criminal Law 🔑1168(2)

In prosecution for conspiracy, no prejudicial error resulted from court receiving certain testimony subject to motion to strike if no conspiracy was shown or if conversation occurred after termination of conspiracy, where court under proper instructions left it to the jury to determine scope and duration of claimed conspiracy.

11. Criminal Law 🔑673(4)

In prosecution for conspiracy, trial court did not commit error in admitting certain testimony as against a particular defendant only, where jury was fully instructed on the subject.

12. Criminal Law 🔑428

After proof of conspiracy, all of conspirators were bound by coconspirator's statement, including those who were members at the time and had not withdrawn as well as those who joined the conspiracy later.

13. Criminal Law 🔑452(1)

In prosecution for conspiracy to induce minor to use narcotic, minor who testified as to her reactions to narcotics and her prolonged familiarity with them was adequately qualified to testify as to whether certain cigarettes she saw handled by various individuals and those smoked by her contained marijuana.

14. Criminal Law 🔑1170(4)

Where a witness testifies at a later time to an excluded matter, error, if any, is cured.

15. Criminal Law 🔑1144(15)

Where trial court during conspiracy prosecution admitted a recording of one of the codefendants' statement and admonished the jury that statement could not apply to those defendants not present at the time it was made, it would be presumed that jury heeded admonition.

16. Witnesses 🔑380(5)

In prosecution for conspiracy, there was no error in allowing prosecution to play recorded statements of prosecuting witness which were inconsistent with her statements at trial.

17. Witnesses 🔑260

The prosecution may question its own witnesses with respect to prior statements in order to refresh his memory where, as found by the court, the witness has been and is damaged by the testimony given.

18. Criminal Law 🔑673(4), 1169(2)

In prosecution for conspiracy to induce minor to use narcotic, no prejudicial error was committed by allowing the playing of certain recorded statements of some of the defendants even though they did contain some hearsay matter, where jury was admonished that each statement was admissible only against the defendant making it and there was also other competent evidence establishing the facts related.

19. Criminal Law 🔑1168(2)

In prosecution for conspiracy to induce minor to use narcotic, no prejudicial error arose through testimony about and display of narcotic materials and paraphernalia subsequently excluded because obtained by an unreasonable search and seizure, where jury was admonished to disregard the testimony, and there was no bad faith on the part of the prosecuting attorney in first offering proof of character of substance found before offering it in evidence.

20. Conspiracy ⚷28
Poisons ⚷2

Statute making it unlawful to visit or be in any room or place where any narcotics are being used or have recently been unlawfully smoked or used is unconstitutional and there could be no criminal conspiracy to violate such statute. West's Ann.Health & Safety Code, §§ 11501, 11556; West's Ann.Pen.Code, §§ 182, subd. 1, 183.

◆

Henry E. Bianchi and Rex R. Mull, Bakersfield, for appellants.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Kit Nelson, Dist. Atty., Bruce F. Bunker and A. C. Paulden, Deputy Dist. Attys., Bakersfield, for respondent.

GRIFFIN, Justice.

On May 4, 1955, appellants Robert Hulsebus and Sam Dere, with certain other defendants, were indicted in indictment No. 7384, on two felony counts under section 182, subdivision 1 of the Penal Code (conspiracy) in conspiring to violate section 11501 of the Health and Safety Code. Count One charged that on December 20, 1954, defendants conspired to violate section 11501, supra, by voluntarily inducing and encouraging one Jo Ann Pool, aged 17, to visit or be in a room or place where narcotics were being or had been recently unlawfully used, in violation of section 11556 of the Health and Safety Code. Count Two charged that on December 20, 1954, defendants conspired to violate section 11501, supra, by voluntarily inducing and encouraging Jo Ann Pool to use a narcotic, in violation of section 11721 of the Health and Safety Code. Another indictment, No. 7385, charged appellant Hulsebus and defendant Larry Drake with violating section 11501, supra, by voluntarily inducing and encouraging her to use a narcotic on December 24, 1954, in violation of section 11721, supra. Another indictment, No. 7387, charged appellant Sam Dere and other defendants with the same offense charged in indictment No. 7385, committed on January 22, 1955. Other indictments for conspiracy were filed against certain named defendants other than these appellants.

On May 25, 1955, appellants moved to dismiss the indictments pertaining to them for lack of probable cause as shown by the transcript before the Grand Jury. These motions were denied. Demurrers to the indictments were overruled. Appellants' motions for separate trials were denied. Pleas of not guilty were entered. The five indictments were consolidated for trial over appellants' objections and 16 defendants were brought to trial on June 27, 1955. The trial consumed two months' time and was held in an auditorium due to the number of defendants' attorneys, defendants, the witnesses, and for the convenience of the court. The clerk's and reporter's transcripts exceed 4,000 pages in number. A jury verdict resulted in a conviction of appellant Hulsebus under indictment No. 7385, and appellant Dere under indictment No. 7387, and both on the two counts set forth in indictment No. 7384. Certain other defendants were convicted and others were found not guilty. Appellants were sentenced to State's prison, sentences to run concurrently. Only these two named defendants appealed.

From the voluminous record we will attempt to give a résumé of the salient facts. The prosecutrix, Jo Ann Pool, aged 17 at the time of the offenses charged, was living with her mother and stepfather in Bakersfield. She attended high school. There was an establishment known as "Campus Corner" near there. She and some of the named defendants, with others, patronized this place. She became acquainted with several of appellants' codefendants, particularly defendant Larry Drake, in April, 1954, when she attended meetings of the Progressive Activities Club. She attended public dances and met others, including appellant Hulsebus, a college student living in Bakersfield but attending college in San Francisco. She commenced dating an associate of his (Coke), and with others went to the home of a co-defendant of his (McGee) and played music and danced. In July, she and Coke, by prearrangement, met Drake and appellant Hulsebus in Central Park. Later that same evening she returned to the park with Hulsebus and he left her with Drake. They walked to Drake's home and later they, with others, went to the McGee home. There they drank and played music. Jo Ann had never seen marijuana cigarettes until at a later date in Central Park when defendant Drake drove her there. At that time he and one Smith smoked a marijuana cigarette in her presence and called her a "square" for not participating and told her she should "wise up". One Joyce Green appeared on the scene and Jo Ann was told by Smith that Joyce "smoked pot" (marijuana). Drake, Smith and Jo Ann then went to Drake's home. Smith asked Drake if he "would turn him on", i. e., furnish him with some kind of narcotic. They then returned to the park and the party smoked marijuana cigarettes. Jo Ann did not participate at this time. They "kidded" her about not using it. About two weeks later Jo Ann and appellant Hulsebus, the Drake brothers and others met in another park and Jo Ann, for the first time, saw appellant Hulsebus in the possession of marijuana. They all smoked except Jo Ann. A few days later Jo Ann met Joyce at her home, together with appellant Hulsebus, defendant Drake and others, but Jo Ann saw no marijuana. However, she did see an "outfit" for the injection of heroin, consisting of a spoon, wad of cotton, needle, and an eyedropper. Joyce was seen coming out of the bathroom where she had been with Drake and one other. Jo Ann secured employment at a theatre. Thereafter, she started back to school and frequented the Campus Corner where she again met and and associated with many of the named defendants and again began attending public dances, particularly with defendant Drake. In October, she was in a parked car with him and he smoked marijuana in her presence. Two nights later, while in Central Park Jo Ann, for the first time, smoked a marijuana cigarette given to her by defendant Drake. She noticed a "funny sensation in her legs and * * * felt kind of sleepy". Thereafter they joined other defendants to go to another house of "Ocho" to obtain "some more pot". They were unsuccessful. In October Jo Ann was with Drake and Ocho. Ocho went into a service station lavatory and came out and said "he had the stuff", meaning marijuana, heroin or "hard stuff". They drove out into the country and "smoked the pot". During the Thanksgiving vacation, Drake and appellant Hulsebus picked up Jo Ann at the theatre and drove to a house. Either Drake or appellant Hulsebus went in and obtained some marijuana, and the three drove around while smoking these cigarettes. In November, Drake and one other person picked up Jo Ann and drove to a service station where Drake gave her a yellow capsule and said: "You want to get high, don't you?" Jo Ann said "Yes" and the three went to the Drake house. Sometime later appellant Hulsebus came there. Others joined them and they drove away in a car. They all used marijuana. They drove around a while and then went to a motel, engaged a room and Jo Ann went to sleep.

On December 19th Jo Ann again met Drake and appellant Hulsebus at a club. Drake told her "they were going to have some parties over at Bob's (Hulsebus') house". Two nights later Drake and Jo Ann went to Hulsebus' residence. Jo Ann and Drake smoked marijuana on the way over there. Jo Ann said she did not see marijuana used at his home on that occasion although Drake and appellant Hulsebus appeared to be under its influence. Drake and Hulsebus spent much time together at appellant Hulsebus' home. Drake said he used marijuana with Hulsebus many times.

On Christmas eve, Jo Ann and other defendants went to the Hulsebus residence. She used marijuana. She said appellants Hulsebus and Drake came in later and they appeared to be "high" and talked about it, but she did not see them use it. They left and on Christmas night she returned with others about 10 p. m. and saw appellant Hulsebus in possession of marijuana. She stated he furnished her with a marijuana cigarette and they smoked it and later she smoked another with them in the bedroom. She stayed until 2 a. m. Two days later she returned and Drake, Hulsebus and others appeared to be under the influence of marijuana. On New Year's eve, about one a. m. she went to a club all alone, met Drake and others, and in a car they partook of the same narcotic furnished by Drake. After several of such occasions, Drake told her of his friends, the Virgils, and said that he went over there on occasions and "had a fix" (meaning an injection of narcotics). He also told her about Sam Dere, a Chinaman and a cafe operator (appellant herein) and that he had been going over to his apartment and getting "fixes of opium". Apparently the Virgils had been living with or were associating with appellant Dere about this time. In January, 1955, Jo Ann ate lunch at Dere's cafe. The Virgils were there. Jo Ann was asked if she would like to go to Los Angeles with them and Drake. She contacted Drake. He then arranged to take her in a car into the country and to give her her first "fix of hard narcotics". They were unsuccessful because the outfit did not work satisfactorily. Thereafter they and others who joined them used marijuana. At the Chinese cafe Jo Ann and Drake met appellant Dere. Dere told them to wait and he would be back. After some delay they went to Dere's apartment. Appellant Dere gave Jo Ann her first injection of opium. She described in full its appearance, manner of preparation and use, and its effects. Later that evening she returned to that apartment and found the Virgils, appellant Dere and Drake there and they informed her they "had just got through fixing". They appeared to her to be under the influence of a narcotic. On February 9th Mrs. Virgil took Jo Ann to appellant Dere's apartment, where Mr. and Mrs. Virgil apparently were living at the time. Dere was not there but the Virgils informed Jo Ann that Dere would soon be there and "he was supposed to bring some stuff with him". Later he returned and they all had a "fix" administered by Mrs. Virgil. Similar occurrences took place thereafter and Jo Ann returned to appellant Dere's apartment almost every day and obtained "fixes". The Drakes were also obtaining narcotics from Dere. About this time Jo Ann again saw appellant Hulsebus at the "Campus Corner" and Hulsebus asked her if she had some money "because he could get a good deal, get some pot". She gave him one dollar. After Hulsebus had been to the hospital to see Drake, Jo Ann received a marijuana cigarette from him and he informed her he had found some marijuana and had given some of it to one of his friends. Later Jo Ann visited the McGee residence with some degree of regularity, with others, to use marijuana. This residence was used as a meeting place for those persons desirous of obtaining and/or using narcotics, either marijuana or so-called "hard stuff".

About February 24, 1955, Jo Ann was at the McGee home. The next day Jo Ann failed to attend her school classes and she and another girl went to Los Angeles with several boys to the home of Forrest Prince. Someone there left the home and returned with a statement that they "had connected", meaning they had purchased narcotics. Prince administered an injection to Jo Ann and others "to get high". She said her body felt relaxed, her nose itched, and she was sick to her stomach. They returned home that night and Jo Ann continued her associations at the McGee residence. On one occasion she contributed money for the purchase of some "hard narcotics". On previous occasions it was given to her. She was administered a drug and she saw other guests "papering" (wrapping narcotics) at this residence. Jo Ann was also visiting appellant Dere's apartment and obtaining narcotics for her use. Similar conduct continued. Her school attendance dropped noticeably. About this time a Vivian Penson, one of the group, had some trouble with the police, and Mr. McGee informed everyone he did not want so many people coming to his house. Many met at defendant Jones' home thereafter, including Jo Ann, and received injections of heroin. She still visited appellant Dere at his apartment. Later, Jo Ann and one Rudy went to appellant Dere's apartment, received a "fix", and picked up two marijuana cigarettes belonging to Jo Ann. The next day several boys picked up Jo Ann at school and left for Los Angeles, rented a room and made unsuccessful attempts to obtain narcotics. They later contacted the Virgils at their Los Angeles home, were "fixed" and then returned to Bakersfield. Jo Ann was delivered to appellant Dere's apartment and she remained there until the following Sunday, March 20th. During this period she received several "fixes" by Dere. On March 19th her girl friend, Mary Price, obtained some fresh clothing for her which was furnished by appellant Dere. Later, she left with Drake, both "fixing" with Dere before departing. Dere thereafter furnished her with a mixture of opium which she drank. She and Drake "hitch hiked" to Los Angeles, going to the Virgil residence, where they received more narcotic injections. On the night of March 22nd Jo Ann, Drake and the Virgils borrowed a neighbor's car and were arrested while engaging in attempted burglary for the purpose of obtaining funds with which to obtain narcotics. At the time of the arrest Jo Ann's arms were well marked by hypodermic needles. She later went through the agony of withdrawal from the drug, which was minutely described by her and corroborated by the testimony of a physician. After appellant Dere's arrest he admitted his use of narcotics and his acquaintance with Jo Ann. He did not take the stand to testify at the trial. Appellant Hulsebus denied the charges contained in the indictment and denied knowing some of the other named coconspirators, including Dere. He admitted taking a "puff" on a marijuana cigarette occasionally, but claimed he never entered into any plan or agreement to induce Jo Ann to use narcotics. He claimed he only said "Hello" to her on occasions and that he saw her at the theatre where she worked. Several of these individuals who were with Jo Ann on some of these occasions were granted immunity and testified for the prosecution. Their testimony corroborated, to some extent, the story she related. Hulsebus produced several witnesses to corroborate his story. Others vouched for his good character.

[1] Appellants' argument, in support of their claim that the evidence is insufficient to show a conspiracy involving them, is to the effect that the evidence shows the first time Jo Ann used marijuana in appellants' presence was after she had already started using it; that neither appellant invited her to any place where narcotics were used; that the most that was shown was that she used it and other defendants furnished it; that appellants were not charged with furnishing it; that there was no evidence showing that either appellant conspired with any person or with one another, since they did not know each other, to induce or encourage her to visit or be in a room or place where narcotics were or had been unlawfully used, or to induce or encourage her to use a narcotic, particularly since she testified on cross-examination that she got no idea from the actions of defendant Drake, appellants Dere or Hulsebus, that she was being induced or encouraged to use narcotics or to go to a place where narcotics were or had been used. She testified she believed the words "induced" or "encouraged" meant trying "to talk you into doing something". It is then argued that appellants were unacquainted with Jo Ann's activities with the other co-defendants; that appellants were called upon to defend themselves in a mass public trial with others where public sentiment had been aroused as to the use of narcotics by minors, and appellants were faced with the dangers described in a concurring opinion written by Justice Jackson in Krulewitch v. United

States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790; and People v. Zammora, 66 Cal.App.2d 166, 152 P.2d 180, relating to mass trials in conspiracy charges and the danger of guilty inferences being drawn from mere association and acts of others. We concur with the expressions there given that every caution should be taken to guard the interests of each defendant in such mass trials, to determine whether there is substantial evidence, standing alone, indicating the defendant's guilt of the offense charged. This subject was discussed by this court in People v. Lyon, 135 Cal.App.2d 558, 573, 288 P.2d 57; and People v. Bennett, 132 Cal. App.2d 569, 576, 282 P.2d 590, where the same claim was made. In Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250, 254, it was held that:

> " ' "[I]t was not necessary for the state to prove that the parties actually came together, mutually discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole." ' " Citing Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859.

[2, 3] The jury, under the evidence produced here, was justified in the belief that each of the transactions here related involved a general conspiracy of inducing and encouraging Jo Ann to use a narcotic in violation of section 11721 of the Health and Safety Code, and to visit or be in a room or place where narcotics were being or had been recently unlawfully smoked or used. Although Jo Ann did testify she was not induced or encouraged to do so, under her interpretation of those terms, the jury had the right to believe that by defendants and appellants' actions and conduct, she was in fact so induced and encouraged, within the meaning of the terms used in the law involved. The word "induce" means "To lead on; to influence; to prevail on; to move by persuasion or influence". The word "encourage" means "To give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten". Webster's New International Dictionary, Second Edition Unabridged. See also State ex rel. Boynton v. Wheat Farming Co., 137 Kan. 697, 22 P.2d 1093; People v. Benenato, 77 Cal.App.2d 350, 355, 175 P.2d 296. As to appellants not knowing each other and not associating with some of the co-defendants, there need be no showing of direct association. People v. Sherman, 127 Cal.App.2d 230, 236, 273 P.2d 611. Common design is the essence of conspiracy, and the crime can be committed whether the parties comprehend its entire scope, whether they act in separate groups or together, by the same or different means known or unknown to some of them, if their actions are consistently leading to the same unlawful result. People v. Hess, 104 Cal. App.2d 642, 674, 234 P.2d 65; People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519; Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154; Anderson v. Superior Court, 78 Cal.App.2d 22, 23, 177 P.2d 315.

[4] Whether appellants were the originators of the conspiracy or later joined and participated in the common design becomes immaterial. This liability continues until the intent to withdraw therefrom is, in some way, brought home to the other conspirators before the commission of the substantive offense or before its purpose is fully accomplished or frustrated. People v. Jordan, 24 Cal.App.2d 39, 50, 74 P.2d 519; 11 Cal.Jur.2d pp. 222–223, sec. 4; pp. 227 and 228, secs. 8 and 9; and p. 235, sec. 15.

It affirmatively appears that before March 24, 1954, Jo Ann knew nothing about the use of narcotics and had no desire to use them. Drake and appellants did use them, at least to some extent. Through Drake she was invited to certain parties at Hulsebus' home at Christmas time, when his parents were away and when he returned from college. No doubt marijuana was used by certain members of his invited friends and no doubt he was in fairly close connection with them. This may well have implanted the idea in the mind of Jo Ann that it was the thing to do to be popular with that group. The way she learned to use it was by watching the defendants use it and telling her she was a "square" for not using it. The fact that the defendants were all users of marijuana and each knew the others to be users; their frequent "get-togethers" for the purpose of its use; the fact that they furnished this young girl with narcotics and they invited her along on occasions when they used it justified the jury in believing that those regularly present on those occasions were associating for that particular purpose; that they remained and continued to associate for such purpose; and by joining in the activities described they were acting in accordance with a common design and purpose to induce and encourage Jo Ann to use narcotics. People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519; People v. Jordan, 24 Cal.App.2d 39, 74 P.2d 519. As the habit grew, so did the conspiracy. She was furnished not only marijuana by these appellants and co-conspirators but she was furnished opium by injection and in a home or apartment where she could clandestinely use it. Others joined in this endeavor and it culminated in the tragic result recorded.

The fact that Hulsebus may have returned to college during a portion of that time did not necessarily relieve him of the results of his original actions and conduct. Each time he returned to Bakersfield the same conduct persisted. People v. Griffin, supra; People v. Jordan, supra.

Appellant Dere, apparently, with full knowledge of the facts, joined the conspiracy and not only furnished Jo Ann with marijuana but taught her in the use of opium. His apartment was a haven for her when the officers were seeking her. It therefore follows that if Drake, Hulsebus and the other original conspirators took in new members of the original conspiracy, Hulsebus and Dere were liable for any crimes committed by them while he was still a member of the conspiracy and so long as the crime committed was pursuant to the original conspiracy. The element of common design being present, it makes no difference whether they acted separately or together or by different means. If their acts consistently and constantly led to the same unlawful result they were conspirators. People v. Hess, 104 Cal.App.2d 642, 671, 234 P.2d 65; Anderson v. Superior Court, supra. This is true even though there be no direct association between all conspirators, since they all had knowledge of the unlawful enterprise and cooperated in it. People v. Sherman, supra. Jo Ann was being shuttled back and forth between the Dere residence and the McGee residence by the various conspirators. There can be no question but that the actions of the various conspirators created the desire in this young girl to use narcotics; that they made narcotics available to her without cost; that they taught her how to use narcotics; that they made places available to her where she knew she could obtain narcotics without cost, and where she could use them in comparative safety. They made the necessary outfit available to her and were the ones who actually injected the narcotics into her young body. They surrounded her with a way of life and a habitat directed to no use other than the use of narcotics and the perpetuation of the habit. The evidence, although conflicting in certain respects, supports the verdict on the counts on which appellants suffered convictions.

[5] Next, it is claimed the court erred in denying a motion for new trial based on the claim of separation of the jury after retiring to deliberate. On a hearing of this motion appellants' counsel orally claimed that in talking to one of the jurors after the trial, the "bulk of the jurors came in at the appropriate time" but one woman juror was "32 to 45 minutes late". It does not affirmatively appear where the jurors were or had been. It was indicated by the prosecutor that the jurors stayed in separate hotel rooms for the night and were to assemble in the jury room before entering up-

on their deliberations after being transported to the courtroom by bus. The one juror was ill and could not ride in the bus so she was brought to the jury room in an automobile. At the hearing the judge remarked that the jurors had been separated all night and that he did not believe they had assembled for deliberation of the case before the juror arrived; and that the statement of counsel was only a surmise on his part. No affidavits were presented in support of appellants' claim nor in denial of it. No sufficient showing was made of any separation of the jurors after retiring for deliberation such as would indicate any prejudice to appellants. People v. Martin, 87 Cal.App.2d 581, 197 P.2d 379; People v. Truesdell, 124 Cal.App. 360, 12 P.2d 476; People v. Knight, 63 Cal.App. 63, 68, 218 P. 79; People v. Tucker, 117 Cal. 229, 230, 49 P. 134.

[6] The court instructed the jury that Jo Ann was, as a matter of law, not an accomplice. As we view it, appellants claim that since the evidence shows that Jo Ann might have been guilty of or chargeable with a conspiracy in encouraging and inducing two of the prosecuting witnesses, Mary Price and Adele Williams, to do the acts charged and of contributing to their delinquency, she was an accomplice as a matter of law, or, at least, that question should have been left to the jury under proper instructions. Considering the nature of the charges against appellants, the definiteness of time, overt acts charged, and name of the minor victim, it does not appear from the evidence that Jo Ann, the minor and the victim, could have been guilty of encouraging herself or conspiring with others to do the acts prohibited by the Health and Safety Code section involved, or that she could have been charged with the claimed included offense of contributing to her own delinquency. Any claimed act of Jo Ann, the minor, involving these named minors, would be a separate and distinct charge against different victims. People v. Lucas, 16 Cal.2d 178, 180, 105 P.2d 102, 130 A.L.R. 1485; People v. Deibert, 117 Cal.App.2d 410, 427, 256 P.2d 355; People v. Stanley, 78 Cal.App.2d 358, 361, 177 P.2d 968; People v. Buffum, 40 Cal.2d 709, 720, 256 P.2d 317; People v. De Paula, 43 Cal.2d 643, 647, 276 P.2d 600.

[7] Appellants offered an instruction to the effect that Jo Ann, Adele Williams and other named prosecuting witnesses, were accomplices as a matter of law. The court modified the instruction by striking Jo Ann's name and adding thereafter, "and no others". Appellants claim that by inserting the words "and no others" the court erroneously excluded one of the many witnesses testifying for the prosecution, i. e., Mary Price, claiming her testimony showed she could have been a co-conspirator to the offenses charged, or the claimed included offense. As above noted, there was testimony of this witness indicating she saw Jo Ann and Drake use marijuana; that she attended parties at Hulsebus' home but saw no narcotics while there; that she drove her to appellant Dere's apartment and later took her some clothes on another occasion. This witness was not named in the proffered instruction. Considering the number of witnesses testifying, it is understandable how the exclusionary clause may have omitted her name. Under the evidence it might have been well to have submitted the question of her being an accomplice to the jury. However, this was but one of many witnesses who testified, and it was only as to a few details respecting the entire subject matter. These details were either admitted or sufficiently corroborated by other competent evidence. No prejudicial error resulted. People v. Davis, 43 Cal.2d 661, 674, 276 P.2d 801; People v. Wayne, 41 Cal.2d 814, 826, 264 P.2d 547.

[8] Appellants next complain because the judge read section 11714 of the Health and Safety Code and said this section applied to indictment No. 7386. It is argued that the jurors may not have remembered the number of this indictment and believed it applied to the charges here under consideration. There is no merit to this argument. Evidently charts were before the jury containing the number of the various

indictments, the nature of the charges, and the defendants involved. Appellants also used such references in their proffered instructions.

[9] Prejudicial misconduct of the court is claimed in allowing the police matron in charge of the prosecuting witness to remain in the court room during Jo Ann's testimony. Counsel for appellants assert the matron signalled to the witness when she was on the witness stand. It was intimated by the prosecutor that it was for the purpose of ascertaining if the witness desired a drink of water. No other facts are shown. Counsel for defendants requested the matron be removed from the room. The request was denied. Later, another matron was substituted. No prejudicial error appears. People v. Ong Git, 23 Cal.App. 148, 151, 137 P. 283.

[10] The court received certain testimony in reference to the alleged conspiracy, over objection and subject to a motion to strike if no conspiracy was shown, or if the conversation occurred after the termination of the conspiracy. Apparently the testimony involved evidence as to some of the actions of Jo Ann after she was arrested. The court, under proper instructions, left it to the jury to determine the scope and duration of the claimed conspiracy. No prejudicial error resulted. People v. Sica, 112 Cal.App.2d 574, 247 P.2d 72.

[11, 12] Complaint is made in reference to the admission of certain claimed hearsay evidence respecting conversations between Jo Ann and one Charles Smith, who was neither a defendant nor a witness at the trial, and also with May Virgil, a named defendant, but who was not on trial. As to Smith's statement, it was made in the presence of Drake and was admissible against him. Such evidence was, by stipulation, admitted against this particular defendant only, until the jury found that the conspiracy had been formed. As to Mrs. Virgil, she was alleged to be a co-conspirator, and the evidence so indicated. All defendants were bound by her statement, after proof of the conspiracy, including those who were members at the time and had not withdrawn as well as those who joined the conspiracy later. People v. Cook, 10 Cal.App.2d 54, 51 P.2d 169; People v. Jones, 25 Cal.App.2d 517, 77 P.2d 897. The jury was fully instructed on this subject. No error resulted.

[13] Another claim made is that at the trial Jo Ann was an incompetent witness to testify as to whether the cigarettes she saw handled by the various individuals and those which were smoked by her contained marijuana. At the outset of her career this probably was true, but from the reactions described and her prolonged familiarity with it thereafter she was, no doubt, adequately qualified, at the time of the trial, to so testify. Her testimony had corroboration of medical experts. People v. Candalaria, 121 Cal.App.2d 686, 690, 264 P.2d 71; People v. Winston, 46 Cal.2d 151, 156, 293 P.2d 40.

[14] Appellants argue that the direct examination of appellant Hulsebus was unduly curtailed by the court in not allowing him to testify as to the musical instruments he played at college and other activities he engaged in while a student there. He claimed these facts would explain his association with his co-conspirators, due to their mutual musical interests. He did testify to these facts in general at a later time. He was allowed every opportunity to develop the claimed basis of his association with his co-conspirators. When a witness testifies at a later time to an excluded matter, the error, if any, is cured. Pecarovich v. Becker, 113 Cal.App.2d 309, 314, 248 P.2d 123.

[15] Objection is made to the court allowing a recording of co-defendant Caife's statement, or admissions made by him of his knowledge of the co-conspirators' actions, to be played to the jury. It contained statements that defendant Caife knew Dere was "dealing", but he did not know Dere. The court admonished the jury at the time that it could not apply to those defendants not present at the time the statement was made, and it was admitted only as to those present.

Appellants were not present. It must be presumed that the jury heeded this admonition. People v. Tarantino, 45 Cal.2d 590, 597, 290 P.2d 505.

[16, 17] Apparently one Charles Drake, brother of defendant Larry Drake, was granted immunity and testified for the prosecution. As such witness, he testified he never saw Hulsebus or certain named defendants use narcotics, never obtained narcotics from Dere, and never saw Dere administer narcotics to anyone; that he was alone in the bathroom of Hulsebus' home when he, Drake, smoked marijuana; that as to certain other defendants he used narcotics with them or saw them use it; that he had used it for four years and was a "pusher" (seller) of marijuana and had used both heroin and opium for two years; that Jo Ann and others were at the park in 1954; that he furnished them marijuana; and that he used it but it was too dark to see if anyone else used it. He also involved the Virgils and appellant Dere. As to Hulsebus, he said he was his school chum; that he was with him every day during the Christmas week in 1954; that he took marijuana there and used it, but he did not remember if anyone else used it because he was only there in body and not in mind; that he had used narcotics in the presence of appellant Hulsebus and others but he had never seen them use it. He was then asked by the prosecutor if he had ever made any statement to the contrary and he denied that he had. Thereafter, the prosecutor claimed the witness had told the officers a different story, that he was surprised at his present testimony, and asked permission to lay the foundation, by tape recording, to impeach the witness and refresh his memory. Over objection the court allowed certain portions of the recording to be played, with a full admonition that the statement was not being presented to the jury to prove the truth of the matters contained therein, but because of its claimed impeaching effect on the present testimony of the witness, and it did not go beyond that. Many inconsistent statements were noted and the court inquired whether the jurors all heard the recording. Many claimed they did not understand all of it. The court ordered those portions replayed to the jury. After being confronted with the tape recording the witness changed his testimony and testified he did not know whether Hulsebus went into the bathroom at the Christmas parties to smoke with him; that he used narcotics with Hulsebus many times, and more particularly at the first Christmas party, and he involved many others who were excluded in his direct testimony, including appellant Dere. Appellants contend the witness was being impeached on collateral or immaterial matters, that it was not damaging to the prosecution and accordingly it was improper. We see no merit to this argument. The prosecution may question its own witness with respect to prior statements to refresh his memory where, as found by the court, he has been and is damaged by the testimony given. People v. Le Beau, 39 Cal.2d 146, 148, 245 P.2d 302; People v. Spinosa, 115 Cal.App.2d 659, 664, 252 P.2d 409.

Appellant also claims the court over-emphasized the importance of the statement by allowing the prosecution to re-run the record for the jury's benefit. It was the court's function to see that the jurors understood and heard all of the evidence properly admissible, and it cannot be said, for the reasons stated, that the court erred in allowing it to be re-run. In ruling on the admissibility of the statement, the court told the jury that it was allowing the admission of such evidence upon the claimed surprise of the district attorney, and that the statements were adverse and prejudicial. Appellants allege misconduct in these comments under the claim that it amounted to an instruction that the court deemed the testimony of the witness false and not worthy of belief. No objections were made to the statement at the time and no request was made to advise the jury concerning it. The court did thereafter instruct the jury it was not concerned with the reason for any ruling made by the court and they were the exclusive judges of the effect and value of evidence. No prejudicial error resulted. People v. Amaya, 40 Cal.2d 70, 78, 251 P.2d 324.

The record does show that after Charles Drake testified, counsel for defendants asked him if he knowingly entered into a conspiracy to commit the acts charged. The court sustained an objection to the question. Had this been one of the defendants testifying in his own behalf, the question would have been proper. People v. Becker, 137 Cal.App. 349, 30 P.2d 562; 10 Cal.Jur. p. 832, sec. 117. This was a prosecution witness and the cross-examination was limited to the testimony brought out on direct examination. He was, however, allowed to testify that he did not "intend" to enter into any such claimed conspiracy. Appellant Dere did not testify. Accordingly, as to him, no such question was propounded and disallowed by the court. Such a question was asked of defendant Hulsebus. It was properly allowed and he answered in the negative. No prejudicial error resulted.

[18] Objection is made to the court allowing certain recordings of statements of certain defendants, claiming they contained certain hearsay evidence which might involve these appellants, citing People v. Foote, 48 Cal.2d 20, 306 P.2d 803. While there were certain small portions of these statements which did contain some hearsay matter, the court admonished the jury that each statement was admissible only against the defendant making it. Furthermore, they were not necessarily damaging against these appellants since there was an abundance of competent evidence establishing the facts related, and no miscarriage of justice resulted. People v. Tarantino, 45 Cal.2d 590, 597, 290 P.2d 505; People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243.

A more serious question arises pertaining to certain exhibits which were discussed by the witnesses and displayed to the jury but refused admission under the search and seizure exclusionary rule set forth in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. They involved certain evidence obtained in the search of appellant Dere's apartment. The prosecution placed on the witness stand a chemist. He was asked if he had with him certain items turned over to him by the officers. They were marked Exhibit 23 for identification, in one group. They were contained in a bag full of various articles, including bottles, containers, etc., as well as a hypodermic kit and equipment. Over a general objection, the witness testified he examined them for opium or opium derivatives and found evidence of it. An inspector of the State Bureau of Narcotics furnished samples of marijuana cigarettes, opium, heroin, and a makeshift hypodermic outfit, described them in detail to the jury, their manner of use in a general case, and their particular effect on individuals. These samples were received in evidence for the limited purpose of showing the nature of the substances involved. Without objection, the witness identified Exhibit 23 (marked for identification) and, over objections testified they were the average articles found in a person's possession who used opium. Thereafter, the officers testified they had been informed by the victim, as well as others, that appellant Dere possessed narcotics in his apartment; that they had been aware of his use and activities regarding narcotics for a long time; that they suspicioned he had been harboring the victim Jo Ann in that place; that they started searching for Dere and the girl and called at his apartment; and that Dere told them no one by the name of Sam (Dere) lived there. Jo Ann had told the officers she had spent three days at Dere's apartment; that he had supplied her with narcotics; that he had a hypodermic outfit hidden in the apartment stove. They saw she had needle marks on her arms. Later that day the officers returned, knocked at the door and Dere admitted his identity, said Jo Ann had been in his apartment, and that he had given her some money for clothes and told her to get out. The officers later returned to the apartment and found the door padlocked. As they walked down the alley they met Dere. One officer searched him and asked him to get in the car. He did so.

They told him they had Jo Ann in custody and wanted to search his apartment. They had no search warrant. The officer testified Dere knew them and that he shrugged his shoulders and said it was "O.K." One officer stated he thought he advised Dere he was under arrest, but did not remember if he stated the charge. Another said he thought it was for contributing to the delinquency of a minor, although Dere was booked on that charge and also for possession of narcotics and paraphernalia for its use. The officers and Dere went to Dere's apartment where they last saw him. After seeing the door was padlocked Dere was asked if he had something in there he did not want the officers to see, such as narcotics. Appellant Dere responded he was not afraid to let them see it but he had just moved upstairs to another apartment. They questioned him as to where it was and he let the officers to it, unlocked the door and motioned them in. They then made a search of the apartment. Most of the testimony of the officers leading up to the search and as to what was found in the apartment was taken in the absence of the jury upon the offer in evidence of Exhibit 23 for identification and over general and specific objections to its reception under the rule stated in the Cahan case. The articles thus identified were found in the kitchen and around the apartment. Defendant there admitted ownership. There was no testimony contrary to what the officers related in connection with the search, and accordingly there was no conflict in the evidence. The trial court was of the belief that appellant Dere invited the search or at least authorized it, but since there had been, at the time of trial, but few decisions amplifying or further construing the effect of the Cahan case, the judge was of the belief that the federal rule applied, and consent could not be freely given when the prisoner was under arrest at the time. Accordingly, he sustained the objection to the admission in evidence of the proffered exhibit and subsequently told the jury that it was not admitted in evidence. He advised it at great length and in some detail, to disregard the exhibit and all the evidence relating thereto. The claim is that the admission of this testimony and a display of the exhibit to the jury was so highly prejudicial that no admonition to disregard it could erase the undoubted effect of it from the minds of the jurors. They rely upon People v. Brophy, 122 Cal.App.2d 638, 265 P.2d 593, 46 A.L.R.2d 1410. It is the prosecution's contention that the uncontradicted evidence shows, as a matter of law, consent or invitation of appellant Dere to the search; that it was incident to a lawful arrest; and accordingly it was authorized, citing People v. Michael, 45 Cal.2d 751, 753, 290 P.2d 852; People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855; and People v. Smith, 141 Cal.App.2d 399, 401, 296 P.2d 913.

[19] It appears to us that the uncontradicted testimony as to the actions of appellant Dere and the officers might well be considered an invitation or consent to the search, even though he may have been under arrest at the time. People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93; People v. Burke, 47 Cal.2d 45, 301 P.2d 241. Furthermore, there was, on the part of the officers, every reason to believe, from recent and reliable sources, that appellant Dere was in the possession of narcotics and paraphernalia, and that he was being arrested on this charge. Accordingly, a reasonable search was proper. Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222; People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505; People v. Dixon, 46 Cal.2d 456, 458–459, 296 P.2d 557. Since the court refused the admission of the exhibit and ordered the jury to disregard the testimony in respect thereto, at the time when the question was properly raised, no prejudicial error can be claimed, particularly when the remaining testimony fully supports the conviction. There appears to be no bad faith on the part of the prosecuting attorney in first offering proof of the character of the substance found before offering it in evidence over the objections made. No prejudicial error appears.

In appellants' closing brief, for the first time, and on argument before this court, they raise the question as to the constitutionality of the statute involving one of the charges in the information. It is predicated upon the decision in Bonwell v. Justice Court, 148 Cal.App.2d 906, 307 P.2d 716, decided since the perfection of this appeal [hearing in the Supreme Court denied May 1, 1957]. It is here claimed that a conspiracy to commit an act, based upon a statute declared to be unconstitutional, cannot stand. There is merit to the claim. Pacific Indemnity Co. v. Myers, 211 Cal. 635, 645, 296 P. 1084; Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178.

[20] The holding in the Bonwell case was that a charge based solely upon section 11556 of the Health and Safety Code, making it unlawful "to visit or to be in any room or place where any narcotics are being or have recently been unlawfully smoked or used", was unconstitutional, since it prohibits citizens from entering such a place innocently, or without knowing its character. In the instant action appellants are charged in indictment No. 7384, count one, with conspiring to violate section 11501 by encouraging Jo Ann to violate section 11556, supra, declared to be unconstitutional. That section being unconstitutional, there can be no criminal conspiracy to violate a statute which does not state a crime or public offense. Sec. 182, subd. 1, Penal Code; Sec. 183, Penal Code; 5 Cal.Jur., p. 504, sec. 8.

That partion of the judgments resulting from the conviction of appellants on Count One of Information No. 7384 is reversed. The remaining portions of the judgments are affirmed. Orders denying new trials affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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150 Cal.App.2d 763

Lillian STANTON (formerly known as Lillian S. Steinberger), et al., Plaintiffs and Respondents,

v.

WELLS FARGO BANK & UNION TRUST CO., et al., Defendants,

Wells Fargo Bank & Union Trust Co., Appellant.

Civ. 17289.

District Court of Appeal,
First Appellate District,
Division 1, California.

May 10, 1957.

Rehearing Denied June 7, 1957.

Hearing Denied July 8, 1957.

Action was brought to secure modification of provisions of trust instrument so as to permit trustees to invest and reinvest in securities permitted by the Civil Code. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment modifying the trust instrument, and one of the trustees appealed. The District Court of Appeal, Peters, P. J., held that where instrument executed in 1930 provided that investments by trustees should be made only in bonds of federal government, bonds of the states, municipalities thereof, and bonds rated at least "AA" by certain investor's service, and in 1951, when all life beneficiaries and their children and one of two trustees sought modification of trust instrument to permit trustees to invest in securities permitted by Civil Code, economic conditions had changed so that there was a marked decline in purchasing power of dollar and return on bonds as compared to return on stocks, there was no such an emergency as would justify court to permit deviation from the terms of the trust instrument.

Judgment reversed.

1. Trusts ⚷172

Normally, trust instrument constitutes measure of powers of trustee, and, except in unusual or emergency situations, court will limit trustee to powers conferred, but court will not permit main purpose of trust to fail by compelling slavish adherence to administrative limitations of trust instrument. West's Ann.Civ.Code, § 2261.

2. Trusts ⚿172

Where main purpose of trust is threatened, courts will and should grant permission to deviate from restrictive administrative provisions, but courts should not permit deviation simply because beneficiaries request it, if main purpose of trust is not threatened, and no emergency exists or is threatened. West's Ann.Civ. Code, § 2261.

3. Trusts ⚿112

A court should not presume to remake a trust instrument, even though court believes that it can do a better job.

4. Trusts ⚿217(4)

Where testamentary trust instrument executed in 1930 provided that investments by trustees should be made only in bonds of federal government, bonds of the states, municipalities thereof, and bonds rated at least "AA" by certain investor's service, and in 1951, when all life beneficiaries and their children and one of two trustees sought modification of trust instrument to permit trustees to invest in securities permitted by Civil Code, economic conditions had changed so that there was a marked decline in purchasing power of dollar and return on bonds as compared to return on stocks, there was not such an emergency as would justify court to permit deviation from the terms of the trust instrument. West's Ann.Civ.Code, § 2261.

5. Trusts ⚿217(3)

Statutory provision that where term "investments permissible by law for investment of trust funds," or other words of similar import are used in defining powers of trustee relative to investments, such language, in absence of other controlling or modifying provisions of trust instrument, shall be construed as authorizing any investment permitted by statutory provisions establishing the Prudent Man Rule of investment, is only applicable where testator limits investments to statutory approved investments, and has no application where settlor himself specifies particular investments that are prohibited. West's Ann.Civ.Code, § 2261(5).

◆

Heller, Ehrman, White & McAuliffe, Lawrence C. Baker, San Francisco, for appellant.

Philip S. Ehrlich, Albert A. Axelrod, Irving Rovens, San Francisco, Bronson, Bronson & McKinnon, San Francisco, for respondents.

Eugene H. O'Donnell, San Francisco, as guardian ad litem, of Hilda S. Newbauer, an incompetent person, in pro per.

PETERS, Presiding Justice.

A testamentary trust expressly limited the trustees in investing and reinvesting the trust property to the purchase of certain types of bonds. This action was brought to secure a modification of this provision so as to permit the trustees to invest and reinvest in those securities permitted by section 2261 of the Civil Code.

The action was initiated by three of the four life beneficiaries of a trust created by the will of Sanford Sachs, who died in 1931. The estate was distributed in July of 1936. Under the terms of the decree of final distribution, the residue of the estate was distributed to the Wells Fargo Bank & Union Trust Company, and to Hilda Newbauer, a niece of the deceased, as trustees. The trustees were directed to pay to Hilda Newbauer, for life, the income from one-half of the corpus. The other one-half of the income was to go to Hilda Newbauer's three children, Lillian Stanton, Helene Preis and J. Newbauer, for their respective lives. These three children initiated this action.

The trust provides that upon Hilda Newbauer's death her share of the estate will vest in her testamentary appointees, and, failing appointment, in her issue. The other three income beneficiaries are also given the power of appointment, and, failing appointment, the share of such income beneficiary vests in his or her issue, and failing issue, in the survivor or survivors of the three. J. Newbauer, one of the petitioners, died prior to trial without exercising his power of appointment and without issue. His share of the estate was thus vested in his two sisters, Lillian Stanton and Helene Preis. Hilda Newbauer has been declared incompetent and Helene Preis has been appointed co-trustee with the bank. By the same order substituting her as trustee Helene Preis was eliminated from this proceeding as a petitioner. Thus, by the time of trial Lillian Stanton was the sole petitioner in this proceeding.

A guardian *ad litem* was appointed to represent Hilda Newbauer, and that guardian appeared in the proceedings and requested that the prayer of the petition be granted. Helene Preis and her children, as well as those of Lillian Stanton, also appeared and also requested that the petition be granted. Thus, all persons in being, that is, all life beneficiaries and their children and one of the two trustees, appeared in the proceeding requesting that the petition be granted. The Wells Fargo Bank, one of the two trustees, objected to the granting of the petition. The only persons not represented in the proceeding are the possible unborn issue of Lillian Stanton and Helene Preis. Both of these life beneficiaries were over 40 years of age when this proceeding was instituted in December of 1951.

The trial court entered its judgment in favor of the petitioner ordering that the trust provisions relating to investments in bonds be amended to permit reinvestment as provided in section 2261 of the Civil Code. Wells Fargo has appealed. In Stanton v. Preis, 138 Cal.App.2d 104, 291 P.2d 118, this court denied a motion to dismiss this appeal, holding that one of two co-trustees may appeal from such a judgment without the cooperation or even against the will of the other trustee.

The trust involved was executed in December of 1930. The decree of distribution was entered in April of 1936. In accordance with the terms of the will the decree provided that the trustees "shall have full power and authority * * * to invest and reinvest any of the trust property * * * as to the trustee shall deem fit and proper," subject to the limitation "that investments by the trustees shall be made only in bonds of the United States Government, in bonds of the States of the United States, and municipalities thereof, and in such other bonds (the bonds of foreign governments or foreign municipalities excluded) as shall be rated at least 'AA' by Moody Investor's service, or in the event such service shall no longer be in existence, by such first class service as such trustees shall deem best."

The petition herein alleges that there has been a change in economic conditions not anticipated by the settlor since the trust was executed, and that, should the restrictive investment provision be followed, such changed circumstances may substantially impair the purposes of the trust. It is alleged that it was the intent of the settlor to assure the beneficiaries a continued income from the corpus in as large an amount as is consistent with reasonable investment safety; that such restrictive provision was inserted because the trust was executed in the middle of a financial depression when investments in stocks and real estate were in general disrepute; that the settlor was not innately opposed to investments in stocks; that since the death of the settlor the investment situation has been subjected to a "radical change"; that now there is confidence in investments in stocks because of the gradual rise in their market values and in their dividend rate; that such investments are now recognized as suitable and desirable for trusts; that the California legislature has recognized this by the adoption of the "Prudent Man Rule" of investments embodied in section 2261 of the Civil Code; that the petitioner believes that some of the securities and real estate in the trust should now be sold so as to avoid loss, but, if this is done, the proceeds from such sales would have to be invested in the specified types of bonds; that under present conditions such investment in bonds would not be desirable because of their low yield and because they would not constitute a hedge against inflation; that as a result, if the restrictive investment provisions remain, the income of the life beneficiaries will be materially decreased and the interest of the remainderman depreciated; that the investment restrictions are so disadvantageous to all the beneficiaries "as to endanger the essential trust purposes," and that the settlor, if he had anticipated the present economic conditions, would have inserted the more flexible investment provisions.

At the trial, in May of 1955, petitioner introduced Exhibit 4 to show the nature of the investments at the date of death of the settlor, the date of distribution, and on December 31, 1954. The exhibit also gives some idea of the general change in the economy between those dates. It can be summarized as follows:

Composition	Date of Death 5–7–31	Date of Distribution 7–16–36	December 31, 1954
Bonds	4.2%	.3%	17.4%
Preferred Stocks	6.8%	3.8%	2.0%
Common Stocks	49.9%	47.2%	50.0%
Real Estate	35.0%	48.2%	29.9%
Others	4.1%	.5%	.7%
	100.0%	100.0%	100.0%
Total Dollar Values	$3,460,516.04	$2,323,718.50	$2,860,687.21
Dow Jones Averages			
Bonds	95.57	103.37	101.00
Industrials	148.88	163.64	404.39
*Consumer Price Index	65.4	59.4	114.3
*Wholesale Price Index	47.6	52.3	109.5

*Basis: 1947 – 1949 = 100

Other exhibits show that two pieces of San Francisco realty increased in appraised value $60,000 between 1931 and 1954, and that an Oakland property decreased in value $225,000 between the same dates.

Five witnesses testified at the trial. Four of these were officers of the appellant bank, and the fifth, called by respondent, was an associate professor of business administration and research at the University of California. The bankers testified that the usual practice in trust administration is to buy and sell securities as conditions warrant; that if the trustee has the power only to invest in bonds, assuming a general inflationary trend, the risk to the corpus of the trust is increased, because of the reduced purchasing power of the fixed bond principal; that, when possible, it is the policy of the bank to keep about 50% of the corpus invested in common stocks; that in the trust before the court the trustees are required, except as to the exercise of subscription rights, to keep all the common stocks presently in the trust in order that the 50% ratio be maintained; that in their opinion the so-called "Prudent Man Rule" applicable to trust investments is a helpful provision; that it is the policy of the bank as trustee to try to achieve for trust beneficiaries the highest income consistent with the preservation of the principal; and that the bank invests and reinvests with the view of trying to secure added income as well as increased principal. The officer in charge of trust investments and the security analysis department of the bank testified that he would not advise a person contemplating creating a trust to place a bond restriction on investments in the trust because he believed that it was desirable to have flexibility in such matters. It is a reasonable inference from the testimony of one of the bankers that he would advise the sale of the Oakland real property were it not that the money so secured would have to be reinvested in bonds.

The professor gave an informative and lengthy discourse on the general changes in the economy between 1930 and 1954, pointing out the general inflationary trend since the depression years. He admitted, however, that the indices had leveled off somewhat since early 1954.

The trial court made findings generally in accord with the allegations of the petition. Respondent points particularly to findings to the effect that it was the intent of the settlor to secure an income for the life beneficiaries in as large amount as possible commensurate with reasonable safety; that the sole purpose of the restrictions was to protect the corpus; that because of changes in the general economy this purpose is "being defeated and thwarted; * * [a] result the testator could not have *forseen* prior to his death." It was also found that the settlor was influenced by investment conditions existing at the time he planned the trust, but "was not adverse to investing in common and/or preferred stocks, or real estate, which fact is evident by the large number of preferred and common stocks and the real estate which constituted a part of the residue of the decedent's estate distributed to the trustees, the defendants herein, under the decree of final distribution."[1]

The sole question presented is whether, under this state of facts, the trial court was justified in exercising its admitted equitable powers by authorizing deviation from the trust terms relating to investments.

Appellant concedes, of course, that since 1931 economic conditions have changed, but argues that such change alone does not warrant a court in authorizing the trustees to deviate from the terms of the trust. It is argued that to warrant deviation some emergency endangering the main trust purpose must exist, and it is contended that there is no evidence of such an emergency. Appellant considers it significant that since the inception of the trust the estate has been substantially invested in common stocks and realty, with bonds, as late as December 31, 1954, comprising only 17.4% of the estate. Appellant argues that respondent seeks the deviation solely because the bond investment provision is inflexible, and believes that flexibility would be preferable, and contends such fact alone did not warrant the court in authorizing the deviation. Appellant points out (p. 19 of its opening brief):

"* * * this lack of flexibility was inherent at the time of the creation of the trust. While flexibility may be desirable and while trustors might be better advised to provide for it, its lack does not create the emergency situation which is necessary to move the court to order deviation. * * *

"In short, there has been no showing of an emergency or exigency which menaces the trust estate and the beneficiaries, no showing of extreme hardship, of virtual necessity, of serious or any impairment of principal, or of inability to carry out the purpose of the trust which, * * * must appear in order to authorize a deviation."

The main contention of respondent in answer to these arguments is that if the trustees are compelled to adhere to the terms of the trust the settlor's intent and his main trust purpose would be frustrated. It is argued that all of the interested beneficiaries, including the living remaindermen, have consented to the deviation, and all will benefit by the proposed modification. Respondent refers specifically to the evidence showing a marked decline in the purchasing power of the dollar, and to the return on bonds as compared to the return on stocks. It is urged that since the settlor drafted this trust the following unanticipated events have occurred: The depression of the thirties; World War II and the cold war; the current defense program; the increase in income taxes; and the government controls on capital. In order to keep the record straight, it is obvious that respondent erroneously refers to the depression as an unanticipated event. The trust was drafted in the middle of the depression and undoubtedly the depression was one of the reasons that motivated the trustor to insert the provision in question.

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[1] The important date that the court should have mentioned here is 1931, the date of death of the testator, and not 1936, the date of the decree of final distribution. This is so because until distribution the executors were not bound by the bond restriction as to investments, and there is evidence that during probate and prior to distribution the executors purchased stock with the restrictive investment provision that would apply to the trustees in mind. However, this oversight in the findings is not important because the figures for the proper date are in the record.

The problem of when a court may permit a deviation from the provisions of a trust has been discussed by many commentators and text writers. (See 23 Cal.L.Rev. 86; 34 Cal.L.Rev. 453; 28 Cal.L.Rev. 785; 21 So.Cal.L.Rev. 433; 170 A.L.R. 1219; 168 A.L.R. 1018; 4 Pomeroy's, Equity Jurisprudence, §§ 1062, 1062b, 1073a; 2 Scott on Trusts, § 167, p. 836; 3 Bogert on Trusts and Trustees, §§ 561, 562; Restatement, Trusts, § 167.)

[1, 2] The power to permit deviation from the terms of private trusts is analogous to the *cy-pres* doctrine applicable to charitable trusts. In re Estate of Loring, 29 Cal.2d 423, 175 P.2d 524. A few generalizations can be made. Normally, of course, the trust instrument constitutes the measure of the trustee's powers. Bryson v. Bryson, 62 Cal.App. 170, 216 P. 391. Except in unusual or emergency situations the courts will limit the trustees to the powers conferred. But the courts will not permit the main purpose of a trust to fail by compelling slavish adherence to the administrative limitations of the trust instrument. Where the main purpose of the trust is threatened the courts will and should grant permission to deviate from restrictive administrative provisions. But the court should not permit a deviation simply because the beneficiaries request it where the main purpose of the trust is not threatened and no emergency exists or is threatened. It must be remembered that it is the theory of this rule that, by the exercise of this power, the court is not defeating the trust, but in fact is furthering it. The equity court is simply doing what the testator, presumably, would have done had he anticipated the changed conditions. In other words, the specific intent of the testator is disregarded in order to enforce his general intent.

In the instant case all persons interested in the trust except one trustee, and unlikely unborn contingent remaindermen, request that the modification be made. This is a factor to be considered. Also, the requested modification concerns only the method of administration of the trust and does not affect any rights of the beneficiaries between themselves. This, too, is important. It should also be mentioned that the objecting trustee concedes that the existing restriction is ill-advised. No doubt economic changes have occurred since 1931.

On the other hand, the considered conclusions of the settlor regarding what should constitute appropriate investments cannot be lightly disregarded. He had managed to preserve a large fortune during a terrible depression. He had seen stock investments wiped out overnight. He knew that in the past there had been recurring periods of inflation and deflation. He, the man who had accumulated this fortune, whose property it was, wanted to protect his niece and her children from such vicissitudes, and to provide them with an adequate income. He decided that this could best be done by limiting the trustee's reinvestment powers to the purchase of certain types of bonds. While the equity court has the power in an emergency to disregard these directions, the express and considered wishes and desires of the settlor should not be cavalierly disregarded. In the instant case the judgment of the settlor, to date, has not proved devastatingly erroneous. The trustees received assets in 1936 of the value of $2,323,718.50. By December 31, 1954, these assets were worth $2,860,687.21. The distributable annual income was $88,890.60 in 1938, and by 1954 this had increased to $109,942.84. There is no evidence that any beneficiary is in want or that the distributable income is not sufficient to supply the reasonable needs of all beneficiaries. No emergency exists. The existing inflationary cycle has continued for some years. The government has adopted many economic measures to try to control and stop this inflationary trend. Some economists predict an era of deflation and others warn us of a depression. These matters are mentioned to indicate that, while the settlor may not have been omniscient, neither are the beneficiaries nor the courts, omniscient. No one can forecast, with any certainty, future events. Certainly, it is true that misguided restrictions imposed by a settlor should not be permitted to defeat his fundamental trust purpose, but it is equally true that the court should not try to guess what economic conditions may be in a few years by permitting deviations when no real emergency exists or is threatened.

These general conclusions are supported by the decided cases both in California and other states. One of the leading California cases is Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484. A business trust there conveyed certain real property to trustees with instructions to sell such property at a named price, or at a lesser price if the trustees considered this in the best interest of the beneficiaries. The trustees were given power to lease the property but only "subject to the sale of the property under the conditions of the trust." 15 Cal.2d at page 354, 101 P.2d at page 486. Oil was found on nearby property and application by drillers was made for an oil lease of the premises. They would not accept a lease subject to the trust conditions of sale, and the trustee refused to execute a lease under any other circumstances. Ninety per cent of the beneficial interests sought declaratory relief, requesting permission to lease the property for drilling; one of the beneficiaries objected. The court affirmed a judgment authorizing the trustee to enter into oil leases without inserting the trust condition of sale. This was based on findings that the intent of the trustors was to secure the largest return possible on the investment; that they did not at the time of the creation of the trust know the property contained oil; that the highest purpose for which the property was adapted was the production of oil and gas; and that the drilling of other wells on contiguous properties would seriously deplete the corpus.

It was stated as well settled that "a court of equity has the power to change the method of administering a trust estate, when it is shown that such a change is necessary to prevent loss or destruction of the trust property * * *". 15 Cal.2d at page 358, 101 P.2d at page 487.

At page 360, of 15 Cal.2d, at page 488 of 101 P.2d the court made the following comments: "It seems only reasonable to assume that had the trustors, at the time the trust was created any knowledge that oil and gas could be produced from the trust property, they would have had the declaration of trust provide for a lease thereof for that purpose. In giving to the trustee this right to lease the trust property for the production of oil and gas, the court is only doing what the trustors would have done had they had the same facts before them then that were before this court at the trial of this action."

At page 361 of 15 Cal.2d, at page 489 of 101 P.2d the applicable rules were summarized as follows: "It is perfectly clear from the above authorities that the rule against courts modifying the terms of a contract, and that they should construe it precisely as the parties had made it, does not apply to declarations of trust, where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and that when it is made to appear in a court of equity, as was shown in the present case, that the benefits and advantages which the trustors desired to confer upon the beneficiaries would not accrue to them by a slavish adherence to the terms of the trust', the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors."

In Leonardini v. Wells Fargo Bank, 131 Cal.App.2d 9, 280 P.2d 81, this court affirmed a trial court's refusal to modify the terms of a spendthrift trust by permitting an invasion of the corpus so as to increase the payments to the life beneficiary and to provide for current payments to the remaindermen. In discussing the power of the court in passing on a request for permission to deviate, this court stated, 131 Cal.App.2d at page 12, 280 P.2d at page 84: "It is well settled that, in the exercise of this power of permitting what the court believes that the settlor would have permitted had he anticipated the emergency that has arisen, the court may permit a deviation from the express terms of the trust * *. But this power to modify a trust is a limited one. It is to be exercised sparingly and only in the clearest of cases."

Another interesting California case is Security-First Nat. Bank of Los Angeles v. Easter, 136 Cal.App. 691, 29 P.2d 422. There a trust consisted, in part, of a group of houses called Catalina Court. The decedent-settlor's wife was given the use for life of one of the houses rent free together with the sum of $300 per month out of the net income from the corpus. The balance of income was to go to the heirs at law of the deceased, who were also the remaindermen. The trustee was prohibited from selling or in any other manner disposing of Catalina Court. Because of the depression the value and income from the real property was so reduced that the trustee was unable to make the payments in full to the beneficiaries. The trustee brought an action to secure permission to sell the property. This was resisted by the remaindermen. The trial court made findings that the purposes of the trust would be frustrated without such sale and directed a sale for the best price obtainable. This was reversed, emphasis being placed on the absence of any showing that a reasonable price or any sum whatever could be obtained for the real property, and on the fact that there was no evidence to support a finding that, if a sale were permitted and the proceeds reinvested, there would be sufficient income to carry out the purposes of the trust. While the factual situation is diffierent from the one here presented, the case was dealing with an attempted modification claimed to be justified by changed economic conditions. In that case the income of the trust had decreased over 40 per cent because of the depression. The court had the following comments to make, 136 Cal.App. at page 697, 29 P.2d at page 425: "In view of the seriousness of interfering with the express declarations of an express trust prohibiting the alienation of property for a limited time, a court of equity should not order the property to be sold except upon clear and satisfactory proof that it is necessary to do so to preserve the estate and carry out the intention and purpose of the testator. A court has no right to speculate upon the mere probability that such a sale will ultimately inure to the benefit of the beneficiaries. In the present unsettled financial condition of affairs, it is generally conceded that all investments are highly speculative. Real estate may not ordinarily be sold only at a ruinous sacrifice. It is a perplexing problem to determine what investments may be fairly safe or reasonably profitable."

In Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838, the majority of the Supreme Court were satisfied that a complaint requesting permission to deviate was demurrable because the plaintiff "does not allege facts showing anything in the nature of an emergency or any peculiar circumstances which were not reasonably within the contemplation of the testatrix" when she created the trust. 27 Cal.2d at page 468, 165 P.2d at page 21. See also In re Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565; Whittingham v. California Trust Co., 214 Cal. 128, 4 P.2d 142; In re Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045.

Cases from other states are, perhaps, more closely in point. Appellant refers us to six out-of-state cases where modification on the basis of claimed economic changes were denied. Three of these are from New Jersey. In First Nat. Bank of Jersey City v. Stevens, 9 N.J.Super. 324, 74 A.2d 368, the trust instrument was silent as to the nature of investments permitted the trustees. The plaintiff sought court permission to invest in securities other than those a fiduciary was authorized by statute to buy without a court order. The court held that the desire to invest in common stock to increase income and to hedge against inflation was not a sufficient showing of necessity or of emergency to warrant the deviation.

In Reiner v. Fidelity Union Trust Co., 127 N.J.Eq. 377, 13 A.2d 291, 128 A.L.R. 964, a trust created in 1922 required reinvestment only in such securities as were permitted by the statute as legal investments for trust funds. The plaintiff sought authorization to invest in non-legals because of changed economic conditions. There had been no substantial shrinkage of the trust corpus and the shrinkage of income was "slight." At page 292 of 13 A.2d, the following significant comment appears: "It appears that the sole purpose to be accomplished is to increase income by investing in stocks that will produce more but will not be legals.

"* * * In this case the whole situation was put upon the basis of economics, not the necessity of the beneficiaries. The only witnesses were the trust officer of the trust company and an investment broker."

In Bliss v. Bliss, 126 N.J.Eq. 308, 8 A.2d 705, the trust instrument also limited investment to legals and permission was sought to invest in non-legals on the ground of lowered income and loss of corpus caused by inflation. At page 706 of 8 A.2d the court stated: "It is not the province of this court to allow trustees to speculate in stocks which might result in a loss to the remaindermen. * * * It does not seem to me that the objects and purposes of the trust will be defeated by a continuance of the scheme set forth in testator's will."

Of course, if these three cases were to now arise in California, they would necessarily be decided differently because of the authority conferred on trustees by section 2261 of the Civil Code. But the theory of these New Jersey cases is relevant to our discussion.

In Rogers v. English, 130 Conn. 332, 33 A.2d 540, 147 A.L.R. 812, deviation was denied in spite of changed economic conditions, the court emphasizing that the trust was prospering in spite of the inflexible investment provisions. The Minnesota court in In re Jones' Will, 221 Minn. 524, 22 N.W.2d 633, refused a deviation aimed at increasing income, while the Maine court in Porter v. Porter, 138 Me. 1, 20 A.2d 465, refused deviation in a similar case where all interested parties requested it. The Maine court emphasized that there was no evidence of an emergency or that the beneficiaries were adversely affected.

Mention should also be made of a recent (1956) decision of the Missouri court—Thomson v. Union National Bank in Kansas City, Mo., 291 S.W.2d 178. There a trust had been created in 1913. For many years the trust earned income of between $4800–$3600 annually. That income had diminished to less than $1,400 annually. The trust instrument limited reinvestment to bonds. The life beneficiary and remaindermen sought permission to deviate by investing in stocks. The court held that the power to permit deviations was limited to cases where not to deviate would seriously impair the basic trust purpose and then stated, using language quite appropriate to the instant case, 291 S.W.2d at page 183: "For the first twenty-five years or more the specified investments have accomplished all the testator's primary purposes even in the face of inflation and changing notions as to the safety and desirability of other types of investments. The testator's primary purposes have not been defeated or so substantially impaired by changed economic conditions * * * that the trustee should no longer be required to strictly conform to the directions of the trust and the settlor's explicit desires."

The cases cited by respondent involved real emergencies. Thus, in Lambertville Nat. Bank v. Bumster, 141 N.J.Eq. 396, 57 A.2d 525, a New Jersey case, the settlor, who died in 1945, prohibited the trustees from selling any of the securities in the trust estate. Seventy-seven per cent of these securities were highly speculative. The market value of the estate by 1948 had already declined 19 per cent. The chancellor held that, had the settlor envisaged the changed circumstances, he would have permitted the deviation. All the parties interested requested the deviation, including the trustee.

In Citizens' Nat. Bank v. Morgan, 94 N.H. 284, 51 A.2d 841, 170 A.L.R. 1215, the income of the trust had been halved since the creation of the trust. The court granted relief from the restrictive investment provisions of the trust.

[3, 4] These cases involved real, not imagined emergencies. It is not the function of courts to remake the provisions of trust instruments. Generally, it is the duty of courts to enforce the provisions of the trust instrument. A court should not presume to remake a trust instrument even though the court believes that it could do a better job. The court's power to permit a deviation exists so that the settlor's main trust purpose will not fail, and to take care of grave emergencies. That is not this case. The trial court should not have permitted the deviation.

Respondent also argues that section 2261 (5) of the Civil Code supports the action of the trial court. That subdivision reads as follows: "The provisions of this section shall apply to all trusts now existing or hereafter created. Where, in trusts now existing or hereafter created, the term 'investments permissible by law for investment of trust funds,' or 'authorized by law for investment of trust funds,' 'legal investments,' or 'authorized investments,' or other words of similar import are used in defining the powers of the trustee relative to investments, such language, in the absence of other controlling or modifying provisions of the trust instrument, shall be construed as authorizing any investment permitted by the terms of subdivision (1) of this section [establishing the Prudent Man Rule of investment]."

Respondent argues that the provision of the trust restricting the trustees to reinvesting in bonds is no different than if the testator had limited the trustees to such investments as were then permitted by law for the investment of trust funds. In that event, of course, the rules established by section 2261 would apply.

[5] The obvious answer to this contention is that the settlor did not state that the trustees were to be limited by what the law provided were legal investments for trustees. He specified certain types of securities regardless of what the statute then provided and without reference to the statute. The quoted provision of the statute is only applicable where the testator limits investments to statutory approved investments. It has no application where the settlor himself specifies particular investments that are prohibited.

The judgment appealed from is reversed.

BRAY, and FRED B. WOOD, JJ., concur.

Hearing denied; McCOMB, J., dissenting.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Max OSSLO, Joseph McFaden, Arthur Meyer, Chester D. Hazel, Louis J. Cacio, Paul E. Dempster, Jerry L. Dimitratos and Charles A. Tucker, Defendants and Appellants.*

Cr. 1306.

District Court of Appeal, Fourth District, California.

May 13, 1957.

Hearing Granted July 12, 1957.

Defendants were convicted of assault by means of force likely to produce great bodily injury and of conspiracy to commit assault. From judgment and from orders denying motions for new trial, rendered by the Superior Court of San Diego County, John A. Hewicker, J., defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained convictions.

Affirmed.

1. Conspiracy 🔑27

Overt acts, sufficient to sustain conviction of conspiracy, need not in themselves be criminal in nature so long as they are done in pursuance of the conspiracy.

2. Conspiracy 🔑27

To constitute conspiracy, it is not necessary that the purpose of conspiracy be fully accomplished or that each conspirator perform some overt act, but it is sufficient that one conspirator commits overt act in carrying out purpose of conspiracy, and all members thereof are bound by all acts of members done in furtherance of the agreed plot.

3. Assault and Battery 🔑92
Conspiracy 🔑47

Evidence sustained convictions for conspiracy to commit assault and assault by means of force likely to produce great bodily injury. West's Ann.Pen.Code, §§ 182, 245.

4. Criminal Law 🔑1144(13), 1160

Before verdict of jury which has been approved by trial court can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support conclusion reached in the court below, and trial court must assume, in favor of verdict, existence of every fact which jury could have reasonably deduced from evidence.

5. Criminal Law 🔑673(2), 1169(3)

In prosecution of seamen, for conspiracy to commit assault, and assault on shore, when they were employed, allegedly as bodyguards, by a labor union, court committed no reversible error in permitting testimony of captain and chief ship's clerk of coast guard as to entries in log books of steamships showing that certain of the defendants were involved in altercations on board ship, in view of facts that court limited evidence as applying to conspiracy count only and so instructed jury and that defense counsel, on direct examination of one of the defendants, introduced evidence in detail as to instances referred to in the log books.

6. Criminal Law 🔑1169(1)

Record, on appeal from convictions of seamen and others for conspiracy to commit assault and assault arising out of jurisdictional dispute between retail clerks' and butchers' unions, failed to show that error, if any, committed in admission of testimony showing involvement of members of seamen's union in labor disputes in which they were not directly concerned was sufficient to justify reversal of judgment.

7. Conspiracy 🔑45

In prosecution for assault and conspiracy to commit assault, arising out of jurisdictional labor dispute, testimony of an official of telephone company indicating telephone calls between some of the defendants and organizations to which they belonged was relevant to show connection between the defendants indicating conspiracy.

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* Opinion vacated 323 P.2d 397.

8. Criminal Law 🔑351(1)

Testimony showing that defendants attempted to show justification for their conduct and to impede investigation was relevant and admissible.

9. Criminal Law 🔑1170(1)

In prosecution for assault and conspiracy to commit assault, arising out of jurisdictional labor dispute, against a labor organizer and other defendants who had allegedly been employed as his bodyguards, record revealed no prejudice resulting from refusal to allow a defense witness to testify as to reports made to labor official which caused him to make request for men to go with his business agent on visits to stores where the disputes were.

10. Conspiracy 🔑43(6)

In statute proscribing conspiracy to commit any "crime" the quoted word embraces a misdemeanor assault so that indictment charging conspiracy to commit crime of assault sufficiently charges crime against laws of state. West's Ann.Pen.Code, § 182, and subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Crime".

11. Conspiracy 🔑23

Conspiracy may be established by showing that there was agreement between two or more persons to commit a crime and that act was done in the state to effect the object of the agreement. West's Ann.Pen. Code, § 182.

12. Criminal Law 🔑1171(1)

Record on appeal from convictions for assault and conspiracy to commit assault failed to reveal prejudicial error consisting of asserted misconduct of district attorney.

13. Criminal Law 🔑982

Granting or withholding of probation is matter that rests soundly in discretion of trial judge, and the only right which an applicant has is that his petition receive consideration. West's Ann.Pen.Code, § 1203.1.

14. Criminal Law 🔑27

Crime of assault with a deadly weapon or force likely to produce great bodily injury and crime of conspiracy to commit such offense are felonies unless trial court, in its discretion, imposes county jail sentence or fine. West's Ann.Pen.Code, §§ 182, 245.

15. Criminal Law 🔑982

Record on appeal from convictions for assault by means of force likely to produce great bodily injury and conspiracy to commit assault failed to reveal any abuse of discretion by trial court in refusing to grant probation to defendants who were sentenced to imprisonment and to fines. West's Ann. Pen.Code, §§ 182, 245.

16. Criminal Law 🔑100(1)

Record on appeal from convictions for assault by means of force likely to produce great bodily injury and conspiracy to commit assault failed to reveal any denial of fair trial resulting from alleged fact that case was intentionally channeled to particular court for trial. West's Ann.Pen.Code, §§ 1050, 1382.

Aaron Sapiro, Charles M. Arak, Los Angeles, and Charles P. Scully, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellants were charged in count one of an Indictment with conspiracy to commit the crime of Assault (Pen.Code, § 182) and in a second count with the crime of Assault by Means of Force Likely to Produce Great Bodily Injury (Pen.Code, § 245) in that on or about October 22, 1955, they did wilfully, unlawfully and feloniously commit an assault by means of force likely to produce great bodily injury upon the person of one John H. Maurer, Jr. A jury trial resulted in verdicts finding each of the defendants guilty as charged in both counts of the Indictment. Their motions for a new trial were denied. Appellants Hazel, Cacio, Dempster, Dimitratos and Tucker were denied probation and sentenced to State prison. Probation was granted to appellant Osslo. The period of probation was ten years with the provisions that he be confined for the first six months of the probationary period in the Adult Detention Facility of San Diego county; that he pay a fine in the amount of $1,500 at the rate of $50.00 per month, from his own funds; that during the period of his probation he shall not hold any position, either elective or appointive, in, or receive any remuneration from, any union; that "this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case". Probation was granted to appellants McFaden and Meyer on similar conditions, except that in Meyer's case the period of confinement was set at three months and the fine imposed was $750.00. Each appellant appeals from the judgment of conviction and the order denying his motion for a new trial. Their contentions on appeal are that the evidence was insufficient; that the court erred in its rulings on the admission of evidence; that the indictment was defective as a matter of law; that the conduct of the deputy district attorney was prejudicial; that the punishment imposed as to appellants Osslo, McFaden and Meyer was improper; and that appellants were denied a fair trial because the case was channeled into a particular court.

The record shows that a jurisdictional dispute arose in San Diego county between the local butchers' union and that of the retail clerks as to whether the butchers or the clerks would handle certain merchandise. Appellant Osslo was secretary-treasurer of the butchers' local and McFaden and Meyer were business agents for it. The other five appellants were or had been merchant seamen and all came from San Francisco to San Diego, ostensibly to accompany and protect the business agents of the San Diego butchers' local.

The five men from San Francisco arrived in San Diego a few days prior to October 22, 1955. They were in contact with appellants Osslo, McFaden and Meyer and attended a union meeting on October 21, 1955. On the following day, after being instructed by appellant Osslo, they accompanied McFaden and Meyer to various markets in San Diego, among which was Ferguson's Market in Chula Vista. They visited this market at about 11:00 a. m., where they conducted a "slow down" with the butchers there, and left. Appellants McFaden and Meyer, with appellants Tucker, Cacio, Dempster, Hazel and Dimitratos, returned to Ferguson's Market at about 1:00 p. m. The five last named men surrounded John Maurer, Jr., a retail clerk, struck and kicked him, left him lying on the floor and departed hastily from the market. They were arrested shortly thereafter and made false statements to the officers concerning the occurrence in the market and their business in San Diego.

Fifteen overt acts are alleged in the conspiracy charge and relate to conversations and meetings of the appellants and agreements for their compensation. The trial of the action consumed approximately 18 days and there are 2,369 pages in the reporter's transcript. A summary of the testimony of the many witnesses follows.

Appellant Osslo was secretary-treasurer of the Butchers' Union, Local 229, in San Diego. He was also president of the Western Federation of Butchers. Early in September, 1955, there was a strike of the butchers at the Food Basket Market in Pacific Beach. This strike lasted about a week. There were about twenty persons on strike and they reported daily to the butchers' union hall in San Diego. Appellant Osslo and the executive board gave notification for this strike. There had been a complaint of a contract violation in that some twenty-three items containing meat and including "TV" precooked dinners were being handled in the grocery department. Following this strike, the market brought an injunction action against the butchers' local and its officers, and after the injunction hearing, the disputed items were taken off sale. The contract which had been in effect at the Food Basket Market was up for renewal November 1, 1955.

About October 12, 1955, there was a strike of retail clerks at Ferguson's Market on El Cajon Boulevard. James R. Jackson, a business agent of the butchers' union in San Diego, there observed three pickets carrying signs and about twenty-five other persons, including a Mr. Marvin Brown and Mr. Herbert Langfeldt, business agents for the retail clerks, and possibly a Mr. Edgar Montgomery, Mr. Carroll Weathers and Mr. John Anderson. Jackson stayed in the area for several hours. Other members of the butchers' union, including appellant McFaden, were present, as well as two or three butchers who were employed at other markets. According to Jackson, in the late afternoon he was threatened by Brown and Langfeldt when they walked back in the alley and gave him a "good look". He also testified in this connection that before the 12th of October there was an arrangement that a certain number of butchers could be called together to the store where the strike was in progress. Jackson met appellants Dimitratos and Hazel at the butchers' hall on October 17, 1955. Prior to this date appellant Osslo had informed Jackson that Mr. Lundeberg, head of the Sailors' Union of the Pacific, with offices in San Francisco, was sending a couple of men down to San Diego to help the business agents, to go out with them and be their observers and see that they were not "jumped from behind". After appellants Hazel and Dimitratos met Jackson and others at the union headquarters on October 17, 1955, they went with Jackson and appellant Meyer to various stores and markets. They were checking contract violations at the markets as pointed out by Jackson and Meyer but their primary purpose was to protect the business agents and see that they were not "jumped".

At a union meeting on October 18, Dimitratos and Hazel were introduced to the membership and on the following day they went with Jackson and Meyer to Tang's Market at Pacific Beach. Jackson understood that there was a dispute there regarding merchandise which should be in the meat department and was in the grocery department. When they entered the market, Jackson was told that the clerks were taking all of the red meat. Jackson construed this remark as a threat and reported it to McFaden, who in turn reported it to Osslo. Jackson noted, while in the market, that Mr. Butler, a business agent for the retail clerks, was fumbling and handling a knife. While Jackson was at the market, Mr. Anderson, a business representative for the retail clerks, arrived and, according to Jackson, threatened him in "the way he carried himself".

Jackson testified that he understood that Osslo was contacted in Honolulu by McFaden, who asked for and received authorization to bring more men from San Francisco to San Diego; that these additional men were Tucker, Cacio, and Dempster; that they were hired and paid by the union $150.00 per week and necessary expenses. They arrived in San Diego by plane October 19th or 20th. Soon thereafter Osslo returned from Honolulu and on October 21 a meeting with the union membership was held in which the dispute was discussed and Osslo talked of a "slow down". At this meeting McFaden stated that Ferguson's Market, as well as others, was not cooperating with respect to frozen foods and a "slow down" would be effected the following day. Jackson was to contact either Mr. Lindville or Mr. Ferguson at this market. On Saturday, October 22, at about 10:00 a. m., Jackson and his group left for Ferguson's market in two automobiles. One was a Ford, rented by the union, and the other was owned by Meyer. Dimitratos, Hazel, Cacio and McFaden were in the Ford, and Dempster, Tucker and Jackson were in the other car. The group arrived at Ferguson's at about 11:00 a. m. They inquired for Mr. Ferguson and Mr. Lindville and found they were not present. They then carried out a "slow down" in which most of the butchers went into the meat cutting room and remained there for 35 to 40 minutes. While this was going on, Jackson, McFaden, Dimitratos and Hazel were in the market and the others remained outside in the automobiles. The group then went to two markets in Chula Vista and there conducted a "slow down" in one of them. They then returned to Ferguson's at about 1:00 p. m. Jackson noticed two clerks' representatives leaning against a post near the stairway. These men were Montgomery and Maurer and they were pointed out to Jackson by Lindville, who was a member of the butchers' union and a partner of Ferguson in the market. About a minute after Jackson and McFaden entered the market, the other members of the group came in. As Jackson and McFaden were talking to Lindville, someone in the store shouted "fight" and called for Lindville. Jackson did not see the fight but he saw Maurer on the floor, a number of people standing around, and Tucker and Cacio were walking away from Maurer. All of Jackson's group left the market within a minute or so and none of them stopped to render aid to Maurer. Hazel, Cacio, Dempster, Dimitratos and Tucker left in the Ford and the rest of the group in the other car.

There is a conflict in the testimony as to the circumstances surrounding the assault on Maurer. There was testimony to the effect that at about 1:30 p. m., Montgomery, Leland Brooks and John Maurer went to Ferguson's Market with reference to an adjudgment with some of the employees. Brooks spoke with the bookkeeper in the office while Maurer and Montgomery stood in front of the stairway for about 10 minutes, and while standing there, they saw the butchers' representatives coming in the front door. McFaden was entering the store about 30 feet away and with him were about eight men. Montgomery and Maurer had been instructed by the secretary of the San Diego local to get away if any of the representatives of the butchers' local were present and, accordingly, they walked slowly toward the last check stand and the exit. As they turned toward the bakery counter, they were surrounded by Hazel, Cacio, Dempster, Dimitratos and Tucker. There had been no exchange of words between these five men and Maurer and Montgomery when they were surrounded. Some of the five appellants stomped on Maurer's foot and then on Montgomery's foot. Montgomery struck no blows and said nothing to appellants. He was aware that Maurer was struck in the stomach but did not see the blows. He saw Maurer fall forward. Montgomery then went upstairs to call the police and upon returning to the check stand, he saw Maurer lying on the floor, writhing with pain. He was bleeding from the mouth and appeared to be having convulsions. He had a lump on the side of his face and his clothing was torn. The five appellants who had surrounded him had left the store.

Adeline Kann, a checker, testified that she observed Maurer walking away from the check stand in the direction of the exit and then a fight started; that she saw Tucker, Cacio and Dempster grab Maurer, holding his arms and beating him. They were hitting him in the back and neck and when Maurer finally went down, they kicked him hard several times.

Geraldine Walz, who was employed in the bakery section, testified that Maurer was standing, minding his own business, when he was attacked by at least three persons, Tucker, Cacio and Dempster. She did not see Hazel in the altercation directly but knew he was present when the beating was administered.

Maurer testified that he, with Brooks and Langfeldt, went to Ferguson's and went upstairs; that he and Montgomery then came down, looked at the butchers' counter and then went to the front of the store, where they were surrounded by a group of men; that appellant Cacio and Dimitratos were in the group; that someone in the group stepped on his foot and Dimitratos made a derogatory remark to him; that he was struck in the stomach, kicked about the head, stomach and back; that he tried to swing back and defend himself and that he hit Cacio in the stomach; that up to the time of the altercation he had done nothing at all except that he and Montgomery were trying to get to the check stand; that the reason he did not get out of the store was because he was surrounded by the men and that Dimitratos was in front of them; that when they tried to go through the check stand, Dimitratos said something to him.

Herbert Langfeldt, an organizer for the retail clerks' union in San Diego, testified that he became aware of a strike at the Food Basket Market in Pacific Beach in September, 1955; that as a result of this strike, the clerks began to take "a sharper look" at what was happening with respect to a "jurisdictional steal"; that he contacted Osslo following the walkout at the Food Basket Market and there was a meeting with Osslo and local union representatives of the retail clerks held some time prior to October 8, 1955. McFaden, Meyer and Jackson were at this meeting; that Osslo there said that the butchers were going to "show us" and were going to handle the disputed merchandise; that Osslo pounded on his desk and stated that he was "top man" on the west coast and "that was it"; that as a result of the strike and this meeting, he (Langfeldt) and his colleagues alerted the secretaries of the retail clerks' unions of southern California and asked if they could send representatives to assist with respect to observing the markets and in helping to prepare a petition to the National Labor Relations Board; that on October 22 he went to Ferguson's Market to inform the management that a "slow down" had been ordered and to alert them to the situation and also to inform them that if there was anything the clerks' representatives could do for them, to let them know; that he arrived at Ferguson's at about 12:30 p. m.; that he, Maurer, Montgomery and Brooks stopped at the liquor counter and spoke briefly to the clerk. The group then started up the stairway and Maurer and Montgomery went back down; that he noticed them moving toward the south exit and also observed a group of men coming into the market; that this group pursued Montgomery and Maurer and surrounded them; that he saw Montgomery jump through a group of customers and run to the back of the store and at the same time saw Cacio strike Maurer in the stomach; that Maurer was unable to get past the customers because of a railing and a number of shopping carts; that Maurer was pursued and "clobbered pretty heavily" until Dempster and Tucker got hold of him and rendered him helpless; that Dimitratos and Hazel attempted to get Montgomery but he got away; that they then started beating Maurer; that Maurer was "knocked into submission" quickly and dropped to the floor where he was kicked in the back and side; that appellants then left the market; that he saw Dimitratos strike Maurer 15 or 20 "judo chops" during the beating and also saw Hazel strike Maurer a number of times; that several days before, the retail clerks' representatives had received instructions to leave a store when members of the butchers' union arrived and that they had these instructions after they had heard through the "grapevine" that a "goon squad" had been ordered from San Francisco.

The appellants claim, in this connection, that the five men who came down from San Francisco were employed to protect the business agents of the butchers' union in San Diego from intimidation by the members of the retail clerks' union. Dimitratos testified he undertook to have additional men brought down to San Diego besides himself and contacted Hazel following a telephone conversation on October 19 between McFaden and Osslo, who was then in Honolulu; that Hazel secured Dempster, Tucker and Cacio; that he, Hazel, Cacio, Dempster and Tucker attended the meeting of the butchers' union on the night of October 21, following a meeting with Osslo in which Osslo referred to instructions previously given by McFaden; that Osslo stated that the mere fact of the presence of Dimitratos and his group would avoid trouble and trouble was not wanted; that on October 22, when they went to

Ferguson's Market the second time, he went over to the meat department; that Hazel went on back and Dempster, Cacio and Tucker were behind him; that he heard a big noise and walked on by and saw Cacio and Tucker walk out; that he did not see any altercation or fight and was no where near a fight.

Hazel testified that he belonged to the sailors' union; that he came to San Diego with Dimitratos and was to be paid $150.00 per week, plus expenses; that he went to the meetings at the butchers' hall on October 19 and 21 and went with the others to various markets; that on October 22 he went to back to Ferguson's Market at about 1:00 p. m.; that Jackson, Meyer and McFaden walked into the store first; that he and Dimitratos followed with the rest of the men, or behind them; that he walked to the back of the store and started talking to a Miss Healy and someone screamed "fight"; that he walked out of the front of the store and didn't see anything of the fight.

Appellants Osslo, McFaden, Meyer and Tucker did not testify at the trial.

Appellants Cacio, Dempster, Dimitratos and Tucker left Ferguson's Market together in the Ford automobile and were stopped by deputy sheriffs after a two mile pursuit. When questioned by the officers, Dempster stated he was down from San Francisco on a vacation and came down with a couple of friends, Tucker and Cacio. When asked if he was at Ferguson's Market the afternoon of the fight, he said that he was there but did not know anything about a fight; it was all a surprise to him. He testified that he attended a union meeting and denied that he had any connection with the butchers' union in the area. Tucker stated to the officers that he lived in San Francisco and that he came to San Diego with a friend (Cacio) to do some drinking and visit Tiajuana. When asked if he had been to Ferguson's Market on the afternoon of October 22nd, what type of automobile he had gone in and with whom, he refused to make any statements about these matters and said he wanted to see an attorney first. Dimitratos stated to some of the officers that he had come down to San Diego with a friend (Hazel) for a little visit and vacation; that he had gone with some men from the butchers' union, including McFaden, to visit stores in the area; that on one occasion when they were at Tang's Market in Pacific Beach, eleven men from the retail clerks' union showed up; that nothing happened; that they looked pretty tough and as he and the butchers' men were outnumbered, they left; that he rode to Ferguson's Market with McFaden, Dempster and Hazel; that they all went into the store together but that trouble began and they all turned around and left. Cacio told a police officer on October 22nd that he had run into Dempster and Tucker in a bar in San Francisco and that they all decided to go to Tiajuana. When questioned about the fight at Ferguson's Market, he could remember vaguely being kicked or hit but could not remember hitting anyone. He denied knowing Jackson or McFaden or knowing anyone connected with the butchers' union. Hazel told one of the officers that he was a teamster, employed in San Francisco, and that Dimitratos had asked him to come to San Diego on a vacation. He denied knowing anything about the fight at Ferguson's and stated that he went into the store and was talking to a girl and after a brief conversation with her, left the store.

The record further shows that the butchers' local in San Diego paid $4,500 bail bond premiums for Hazel, Cacio, Dempster, Dimitratos and Tucker; that they were paid a salary and expenses by the union and a defense fund was collected for them. Evidence was introduced showing that there were many telephone calls between the appellants and others involved in the labor dispute and that these calls were paid for by the butchers' union.

The first contention presented by appellants is that the verdict and the judgment are not sustained by the evidence; and that the verdict and judgment are contrary to the evidence and the law. Appellants admit that Osslo had a conversation with

Lundeberg; that Dimitratos and Hazel met in San Diego; that McFaden made reservations at the U. S. Grant Hotel in San Diego at Osslo's request; that McFaden, Dimitratos and Hazel met at the U. S. Grant Hotel on or about October 15, 1955; that Dimitratos and Hazel met at the butchers' local on October 17; that Dimitratos, Hazel, Meyer and representatives of the butchers' local No. 229 met at Tang's Market on or about October 18th; that Dempster, Cacio and Tucker met in San Diego on or about October 21st; that Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 21, 1955, met at the Ace Motel in San Diego; that Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 22nd, accompanied defendants McFaden and Meyer to Ferguson's Market; that defendants Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 22nd, were in a Ford sedan in San Diego and that the car was leased by butchers' local No. 229, all as alleged in overt acts 1 to 10, inclusive, of the Indictment. Appellants do not deny that Osslo and McFaden agreed to pay Dimitratos, Hazel, Tucker, Dempster and Cacio a weekly salary and expenses as stated in overt acts 11 to 15, inclusive, of the Indictment. While appellants admit the overt acts alleged, they claim that these acts cannot be sustained as acts "in furtherance of a conspiracy to commit an assault as alleged" and that there is no evidence to justify the inference that any assault or engagement of men was due to a plan or plot or design to do anything illegal or improper at any place or at any time. We are not in accord with this contention.

[1–3] Overt acts need not be in themselves criminal in nature so long as they are done in pursuance of the conspiracy. Nor is it necessary that the purpose of the conspiracy be fully accomplished or that each conspirator perform some overt act. It is sufficient if one conspirator commits an overt act in carrying out the purpose of the conspiracy, for all the members thereof are bound by all acts of all members done in furtherance of the agreed plot. People v. Robinson, 43 Cal.2d 132, 139, 140, 271 P.2d 865. And as is said in that case in 43 Cal. 2d at page 136, 271 P.2d at page 868: "A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design." In the instant case the evidence was sufficient to warrant the jury's inference that a plan and agreement existed between the appellants to commit an assault and that the overt acts performed by them were in accordance with and in furtherance of their unlawful plan and agreement.

The witness Langfeldt testified that at a meeting prior to October 8, 1955, attended by McFaden, Meyer and union representatives, Osslo stated that the butchers were going to "show us" and were going to handle the disputed merchandise; that Osslo pounded on his desk and said that he was "top man" on the west coast and "that was it". Apparently, the two unions involved were unable to settle their dispute amicably and the jury could reasonably infer from the acts and conduct of Osslo and McFaden that they intended to use other than peaceful means to accomplish the purpose of having the butchers handle the disputed merchandise; that Osslo, McFaden and Meyer procured the services of the five sailor appellants for the purpose of intimidating the retail clerks by their appearance and if this was not sufficient, to use force and violence. In this connection it should be noted that no effort was made to employ local union men to accompany the butchers' representatives on their visits to various markets. If the purpose of the appellants was to protect such representatives and keep them from being "jumped" and to act as observers, it is apparent that this could well have been accomplished by other means than the importation of the five members of the Sailors' Union from San Francisco. It may also be observed in this connection that when the five sailors were taken into custody by the officers they did not state that their purpose in coming to San Diego was to act as observers but claimed that they were on vacations.

There was evidence that some of the butchers' representatives thought they had been threatened by members of the retail clerks' union. In one instance the claimed threat consisted of a "good look", another by the way in which a business representative for the clerks "carried himself", and the other where a representative of the clerks was "fumbling and handling a knife". The jury could reasonably determine that these circumstances were not sufficient to justify the hiring of the five appellant sailors from San Francisco.

There is evidence in the record from which the jury could find that the five sailors, with appellant McFaden and under the direction of appellant Osslo, entered Ferguson's Market together and almost immediately surrounded Montgomery and Maurer, who were pointed out to them as representatives of the retail clerks; that the assault on Maurer was unprovoked and was unnecessary to accomplish the claimed purpose of the appellants in entering the market. The evidence further shows that the five appellants fled from the scene and left Maurer lying on the floor. It further appears that the five appellants were paid by the butchers' union, a defense fund was collected for them and their bail bond premiums were paid by the butchers' local.

[4] It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. People v. Mazza, 135 Cal.App.2d 587, 596, 287 P.2d 798. Viewing the entire record before us in accordance with these rules, we conclude that the verdict and judgment are sustained by the evidence.

[5] It is next contended that the court erred in admitting the testimony of Capt. Hodson and Robert Frediana (Chief Ship's Clerk, United States Coast Guard) as to entries in log books of steamships showing that Dimitratos and other appellants in 1951 and 1952 were involved in altercations on board ship. The attorney general contends that this evidence was admissible under the case of People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769, 771, where it is said:

> "* * * The test for admissibility is: 'does it tend logically, naturally, and by reasonable inference, to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'"

The court admitted this evidence as applying to the conspiracy count only and so instructed the jury. Furthermore, defense counsel, on direct examination of the witness Dimitratos, introduced evidence in detail as to the instances referred to in the log books. Under the circumstances shown, we conclude that there was no reversible error in this connection.

[6] Appellants complain of the admission of testimony relating to a Wall Street strike, a strike in Oakland, and a Western Union strike, which testimony tended to show the involvement of members of the Sailors' Union of the Pacific, of which Mr. Lundeberg was the head, in labor disputes with which said union was not directly concerned. The admissibility of this testimony may well be questioned. However, under the rule announced in People v. Sykes, supra, and the circumstances of this particular case, we cannot hold as a matter of law that the error, if any, was sufficient to justify a reversal of the judgments.

[7] The claim is made that the court improperly admitted the testimony of a Mr. Hewlett, an official of the telephone company, indicating telephone calls between some of the defendants and the organizations to which they belonged. This testimony was relevant to show the connection between the various appellants as a circumstance indicating that the persons involved were a part of the conspiracy and acting in concert. People v. Griffin, 98 Cal. App.2d 1, 34–38, 219 P.2d 519.

[8] It is argued that the court erred in permitting the testimony of Capt. Roland to be presented; that this testimony related to the arrest of one Carroll Weathers after the incident of October 22nd, after the alleged conspiracy had ended, and was therefore inadmissible. However, this evidence was relevant as an indication that the appellants were attempting to show a justification for their conduct and to impede an investigation. It was therefore, not prejudicially erroneous. People v. Tinnin, 136 Cal.App. 301, 306, 28 P.2d 951.

[9] Appellants claim that the court erred in refusing to permit witness Jackson to testify as to reports made to Osslo, which caused him (Osslo) to telephone to Lundeberg in San Francisco for men to go with his business agents on their visits to stores in San Diego. An offer of proof was made by the defense that the witness would testify that McFaden related his experience to Osslo and that McFaden had stated that he believed his life was in danger. No prejudicial error is indicated in this connection. People v. Monson, 102 Cal.App.2d 308, 313, 227 P.2d 521.

[10] Appellants next contend that as a matter of law the Indictment charging "conspiracy to commit the crime of assault, 182 Penal Code" did not charge a crime known to or punishable under the laws of this state. This contention is without merit. Section 182, subdivision 1, of the Penal Code provides various punishments if two or more persons conspire, among other things, "to commit any crime". Among the penal paragraphs it provides that when said persons "conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years. When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree. If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term." Appellants contend that while subdivision 1 of Penal Code section 182 refers to the commission of "any crime" and while such phrase, taken alone, is broad enough to include a misdemeanor assault, this does not mean that it is "described" as required by the final paragraph concerning punishments in said section and that, consequently, no crime was charged in count one of the Indictment.

In Doble v. Superior Court, 197 Cal. 556, 566–567, 241 P. 852, 856, the court, in discussing the meaning of "any crime", as used in the statute, said:

> "This latter penal paragraph commences, 'When they conspire to do *any of the other acts* described in this section. * * *' The quoted words are sufficiently broad to include within the purview of the paragraph *all* of the offenses created by the *five* subdivisions of the section and for which no penalty is imposed by the first penal paragraph. That is to say, the words

> 'any of the other acts described in this section,' were meant to, and do in fact, include all other conspiracies to commit crimes or acts prohibited by the section regardless of whether they are denounced by subdivision 1 or any other subdivision thereof. Therefore, in this second penal paragraph we find the penalty that is to be imposed upon those conspiring to commit any of the crimes or acts denounced by subdivisions 2, 3, and 4, and that which is to be imposed for a conspiracy to commit any and all misdemeanors, whether defined by the Penal Code or by any other statute, and for conspiracies to commit all felonies which are defined and penalized by some law *other than the Penal Code.* In other words, the second penal paragraph, in addition to prescribing the punishment for conspiracies to commit the crimes or acts specified in subdivisions 2, 3, and 4 of the section, also prescribed the punishment for all offenses denounced by subdivision 1 and for which the first penal paragraph does not prescribe a punishment; namely, conspiracies to commit any and all misdemeanors, not included in those enumerated in subdivision 5, and conspiracies to commit all felonies prescribed by some general law of the state other than the Penal Code."

[11] As is said in People v. Buffum, 40 Cal.2d 709, 715, 256 P.2d 317, 319:

> "A conspiracy may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement."

In People v. Cossey, 97 Cal.App.2d 101, 112, 217 P.2d 133, it was held that the superior court possessed jurisdiction to try the defendant for conspiracy to commit the crime of petty theft.

[12] The next contention is that the misconduct of the district attorney was highly prejudicial and resulted in a miscarriage of justice. Appellants devote many pages of the opening brief to comments made by the district attorney and questions put by him to various witnesses. In many of the instances related, objections to the questions asked and statements made were sustained by the court. The jury was instructed, both at the beginning and end of the trial, to disregard any stricken evidence; that the argument of counsel was not evidence; that if any counsel intimated by any of his questions that certain hinted facts were or were not true, that they must disregard any such intimation and must not draw any inference from it; that as to any statements made by counsel in their presence concerning the facts of the case they must not regard such statement as evidence; that they were the exclusive judges of the facts and their effect and value of the evidence. In his opening statement to the jury the deputy district attorney stated that what he was about to say was neither evidence nor an argument. He stated that if in any way the jury's version of the evidence was different from his, the jury should take its own version. We have examined the many specifications of alleged misconduct and conclude that under the circumstances there was no prejudicial error in this connection.

Appellants Osslo, McFaden and Meyer contend that the punishment imposed as to each of them is improper and constitutes a cruel and unusual punishment; that they were each convicted of a misdemeanor only, in that the court imposed no term of imprisonment in the state prison; that it was neither a suspension of imposition of a sentence nor execution of a sentence and that, consequently, the proposed term should be considered void and that the probationary terms were unduly severe. The record shows that the appellants applied for probation; that following the denial of their motions for new trial and the pronouncement of judgment as to the five sailor appellants, the court stated that he was going to grant probation to Osslo, McFaden and Meyer. Separate probationary orders were made as to each of said appellants.

In In re Hays, 120 Cal.App.2d 308, 310, 260 P.2d 1030, 1032, the nature of probationary procedure was discussed and the court there said:

> "The general nature of the entire probationary procedure is likewise well settled. As said in In re Martin, 82 Cal.App.2d 16, 22, 186 P.2d 645, 649, 'An order placing a defendant on probation, even though it include as a condition a period of detention in the county jail, is not a *judgment and sentence.*' There is no finality to an order for probation; it imposes no penalties but is 'an act of clemency.' A defendant has the undoubted right to refuse probation,—a necessary safeguard against the possibility that probationary conditions may be more onerous than sentence. People v. Frank, 94 Cal.App.2d 740, 742, 211 P.2d 350, citing People v. Billingsley, 59 Cal.App.2d Supp. 845, etc., 139 P.2d 362."

Each appellant was found guilty of assault as specified in Penal Code, section 245, for which the maximum punishment is imprisonment in the state prison not exceeding ten years. Each fine imposed is less than the $5,000 maximum specified in Penal Code, section 245, and section 182 under which the appellants were also found guilty. It therefore appears that the periods of probation and of detention were not in excess of the periods specified in section 1203.1 of the Penal Code.

[13, 14] The granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court (People v. Blankenship, 16 Cal.App.2d 606, 610, 61 P.2d 352), and the only right which an applicant for probation possesses is that his petition shall receive consideration by the court. People v. Frank, 94 Cal.App. 2d 740, 211 P.2d 350. It does not appear that the appellants were convicted merely of misdemeanors. A crime such as specified in section 245 of the Penal Code and the applicable part of section 182 thereof is a felony, unless the trial court exercises its discretion and imposes a county jail sentence or fine. People v. Williams, 27 Cal.2d 220, 228–229, 163 P.2d 692. In the instant case sentence was suspended by placing the appellants on probation.

[15] Finally, appellants contend that they were denied a fair trial because the case was "intentionally channeled" into a particular court for trial. However, they do not claim that they were denied their rights to a speedy trial in the sense that the case was not set for trial within the time limits set in sections 1050 and 1382 of the Penal Code. The record shows that there were numerous delays and continuances of the trial which were occasioned by the business of the court. No abuse of discretion appears in this connection.

[16] An examination of the entire record in this case leads us to the conclusion that there were no errors herein resulting in a "miscarriage of justice" within the meaning of that phrase as determined in People v. Watson, 46 Cal.2d 818, 835, 299 P.2d 243, 245.

The judgments and orders denying motions for new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing granted; PETERS and DOOLING, JJ., pro tem., sitting in place of TRAYNOR and SCHAUER, JJ.

150 Cal.App.2d 790

Application of Glenn Gordon DAVIS, for a Writ of Habeas Corpus.

The PEOPLE of the State of California, Plaintiff and Respondent.

v.

Glenn Gordon DAVIS, Defendant and Appellant.

Cr. 5841.

District Court of Appeal, Second District, Division 1, California.

May 13, 1957.

Hearing Denied July 10, 1957.

Proceeding for writ of habeas corpus. The District Court of Appeal, Doran, J., held that where Superior Court suspended judgment of conviction and admitted defendant to probation for five years and judgment "and proceedings" were stayed to, and including the conclusion of the appeal, contention that probationary period expired five years after the original order regardless of the appeal, and that order entered thereafter committing defendant to jail and extending the probation another two years was without jurisdiction and void, was without merit.

Writ discharged and petitioner remanded to custody.

1. Criminal Law ⚷982

Where Superior Court suspended pronouncement of judgment of conviction and admitted defendant to probation for five years, and judgment "and proceedings" were stayed to, and including the conclusion of the appeal, contention that probationary period expired five years after the original order regardless of the appeal, and that order entered thereafter committing defendant to jail and extending the probation another two years was without jurisdiction and void, was without merit, since the term "proceedings" would include the probation order.

See publication Words and Phrases, for other judicial constructions and definitions of "Proceedings".

2. Criminal Law ⚷982

Probation is not a matter of right, and where it appears that a defendant has not complied with the terms thereof in reference to making reports and proper efforts at restitution, it is proper to revoke or modify the order. West's Ann.Pen.Code, § 1203.3.

3. Criminal Law ⚷982

Where defendant was convicted of grand theft and admitted to probation for five years on condition of making restitution and defendant was required to spend the first two years of the probationary period in the county jail, revoking the probation and restoring defendant to the original terms and conditions on finding that defendant was in violation of the probation was proper. West's Ann.Pen.Code, § 1203.3.

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Morris Lavine, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

DORAN, Justice.

The petitioner was convicted of grand theft, and on February 28, 1951 the Superior Court suspended pronouncement of judgment and admitted petitioner to probation for a period of five years. Conditions imposed on probation include a provision that petitioner spend "the first two years of the probationary period" in the County Jail, and make restitution as proposed by the probation officer, the total amount of which was in excess of $16,000. Petitioner's motion for a new trial was denied, an appeal was taken, resulting in an affirmance. People v. Davis, July 18, 1952, 112 Cal.App.2d 286, 246 P.2d 160.

A certified copy of the Minutes of the Court for February 28, 1951, after stating the terms of probation, states: "* * * Notice of Appeal * * * filed. Stay of execution of jail term is granted. Bond * * * file.". However, as stated in respondent's Points and Authorities in opposition to the granting of a Writ of Habeas Corpus, a written order, bearing the heading of petitioner's attorney, and signed by Judge John J. Ford, reads in part as follows: "* * * it is ordered that the judgment *and proceedings* in the above entitled case be stayed to and including the conclusion of the appeal". (Italics added.)

Following the affirmance on appeal, the Minutes of August 21, 1952, state, "Defendant surrendered on remittitur. The Order of February 28, 1951 granting probation is ordered into full force and effect * * *". Thereafter the petitioner served the two-year jail sentence which was a condition of the probation.

On May 21, 1956, on a hearing of the defendant's motion to terminate probation, Judge Stanley Mosk granted the motion on the theory that "'the order of March 5 stayed in only as to the jail portion of the order for probation". Actually, there was no such order although, as hereinbefore, indicated, the Clerk's Minute Order did contain the words, "Stay of execution of jail sentence is granted". Judge Ford's signed order, previously quoted, specifically stayed "proceedings in the above entitled case" pending conclusion of the appeal.

Thereafter, on July 27, 1956, on the stipulation of the defendant and defendant's attorney, Judge Mosk vacated the previous order terminating probation, and modified the probation to allow the defendant to leave the state for business purposes. On December 31, 1956, the court found the defendant in violation of probation, revoked the same and restored the defendant "to probation on the original terms and condition plus the following condition: Probation is extended an additional two years; serve the next thirty days in the County Jail; make monthly report of income (including source) and expenditures * * and pay not less than 10 per cent of gross income monthly on restitution". Thereafter the defendant filed the present petition of habeas corpus, the writ was issued, the Sheriff of Los Angeles County made return showing that the petitioner was being held on the above order.

[1] The petitioner contends that the probationary period expired on February 28, 1956, five years after the original order, regardless of the appeal, and that therefore the order of December 31, 1956, committing petitioner to jail and extending the probation another two years, was without jurisdiction and void. Such theory is untenable. In contradiction of petitioner's argument that only the jail sentence and not the probation, was suspended during the appeal is the signed order by Judge Ford definitely suspending the "proceedings in the above entitled case". The term "proceedings" would obviously include the probation order. As respondents state, the words, "stay of execution of jail term is granted", appearing in the Minutes, are merely "the words of the Clerk", and do not constitute the order which included all "proceedings".

[2, 3] Nor is there any merit in any of the petitioner's contentions. Section 1203.3 gives the court full power to revoke, modify or terminate probation. Probation is not a matter of right, and where it appears that a defendant has not complied with the terms of probation in reference to the making of reports and proper efforts at restitution it is entirely proper to revoke or modify the order. Actually, in the instant case, the petitioner has little to complain about, for the record indicates that the court has been properly lenient and that the probation has been extended in an effort to make the burden as light as possible. Moreover, as respondent points out, the order suspending proceedings pending appeal was prepared by the petitioner's attorney. Likewise, both petitioner and attorney stipulated to the vacating of the order terminating probation and the modification of the original probation.

The writ is discharged and the petitioner remanded to the custody of the Sheriff.

WHITE, P. J., and FOURT, J., concur.